

**UNDERSTANDING THE TEXAS “ECONOMIC LOSS RULE”
AND ITS APPLICATION TO CONSTRUCTION DEFECT
LITIGATION**

THE 6TH ANNUAL CONSTRUCTION SYMPOSIUM

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I. INTRODUCTION:

The economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. In Texas, the economic loss rule has been applied to preclude tort claims in two related contexts: (1) where the losses sought to be recovered are the subject matter of a contract between the parties; and (2) when the claims are for economic losses against the manufacturer or seller of a defective product where the defect damaged only the product and did not cause personal injury or damage to other property. *Wolf Hollow I, L.P. v. El Paso Mktg, L.P.*, --- S.W.3d ----, 2010 WL 4262048, at *5 (Tex.App. – Houston [14th. Dist.] Jan. 11, 2011); *Coastal Conduit & Ditching*, 29 S.W.3d 282, 285 (Tex.App.-Houston [14th Dist.] 2000, no pet.). Once the other parameters are established, the rule bars recovery even if the parties are not in contractual privity. *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 152 (Tex.App.-Corpus Christi 2009, pet. filed) (op. on reh'g) (quoting *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 797 (Tex.App.-Houston [1st Dist.] 2007, pet. denied)). Plaintiffs routinely recover economic damages, such as lost wages, hospital bills, etc., in negligence and strict products liability actions when they *also* suffer personal injury or property damage.

The rule itself has created a tremendous amount of controversy as many parties believe that it is being applying far more broadly than intended. A great deal of confusion exists amongst litigants and courts about when to apply the economic loss rule and what are the limits of its preclusive reach. This paper discusses the nature of the economic loss rule as it exists in Texas and specifically discusses the challenges/opportunities that it presents in the context of construction litigation.

II. THE ECONOMIC LOSS RULE GENERALLY

Nationally, most jurisdictions follow the rule and see two distinct settings wherein the rule should be applied to preclude tort liability. The seminal case of *Indemnity Ins. Co. v. American*

Aviation, Inc., 891 So.2d 532 (Fla.2004) provides the best and most in-depth discussion of this majority view. The first application is when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract. The second is when there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property. *Id.* at 536.

A. The American Aviation Decision

The first application of the *American Aviation* interpretation of the rule regards the general prohibition against tort actions to recover solely economic damages for those in contractual privity. The case stated that this rule is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. *American Aviation, Inc.*, 891 So.2dat 536. Citing *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994) (“Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort.”). The Florida court continued by holding that underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. *Id.* Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. *Id.* at 536-37. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. *See, e.g., Electronic Sec. Sys. Corp. v. Southern Bell Tel. & Tel. Co.*, 482 So.2d 518, 519 (Fla. 3d DCA 1986) (stating that “breach of contract, alone, cannot constitute a cause of action in tort ... [and][i]t is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence”); *Weimar v. Yacht*

Club Point Estates, Inc., 223 So.2d 100, 103 (Fla. 4th DCA 1969) (“[N]o cause of action in tort can arise from a breach of a duty existing by virtue of contract.”).

American Aviation is the most discussed case in the context of the economic loss rule because it provides a great depth of analysis and discussion on the topic – far more in depth than any other case from any jurisdiction. However, the gravamen of the decision was its conclusion that absent contractual privity, the only intended application for the economic loss rule lie the context of products liability. *American Aviation* expressly reversed decades of Florida law that saw ever expanding applications of the economic loss rule beyond its products liability roots into areas such as negligent entrustment, strict liability, construction defect litigation, etc. The Court noted this trend at length and rejected previous holdings stating:

“This case does not involve a cause of action against a manufacturer or distributor for economic loss caused by a product which damages itself. Thus, the products liability economic loss rule is inapplicable. Nor does this case involve parties who enjoy privity of contract. Thus, the economic loss rule for those in privity of contract is inapplicable. Rather, this case involves plaintiffs who claim economic loss caused by the alleged negligence of a defendant with whom the plaintiffs were not in privity.” *American Aviation, Inc.*, 891 So.2d at 541.

In reaching this holding, the Florida Supreme Court began a trend of reversing the ever expanding vista of the economic loss rule from its application to virtually type of case that involved “pure economic loss” to solely the areas where contractual privity exists or in the limited application of products liability cases. *American Aviation* touched off legal debate in many jurisdictions about the potential overreach of the doctrine. Texas has not been immune. However, as demonstrated below, as the nation seems to be trending towards the limitations described in *American Aviation*, Texas courts have followed their own path.

III. DEVELOPMENT OF THE ECONOMIC LOSS RULE IN TEXAS

Texas jurisprudence has always been somewhat awkward with respect to applying the economic loss rule. This is likely because historically, three different lines of cases formed that different courts applied depending on the case. The earliest of these cases, applied a restrictive view of the doctrine, with each change seeming to expand its horizons.

A. *Montgomery Ward & Co. v. Scharrenbeck*:

The first Texas case to truly analyze the economic loss rule in Texas is the 1947 Texas Supreme Court case, *Montgomery Ward & Co. v. Scharrenbeck*, 146 Tex. 153, 204 S.W.2d 508 (1947).

In *Scharrenbeck*, the defendant agreed to repair a water heater in plaintiff's home. A short time after repair, the heater ignited the roof, destroying the house and its contents. Although the contract obligated the defendant to put the water heater back in good working order, the law also implied a duty to the defendant to act with reasonable skill and diligence in making the repairs so as not to injure a person or property by his performance. In failing to repair the water heater properly, the defendant breached its contract. In burning down plaintiff's home, the defendant breached a common-law duty as well, thereby providing a basis for plaintiff's recovery in tort. *Id.* at 510.

The Court held that accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract. The key test in *Scharrenbeck* is whether the negligent act complained of – absent the presence of a contract – would give rise to tort liability independently. See *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex.1991).

Scharrenbeck somewhat neutered the economic loss rule outside of its products liability context because in many, if not most, occasions of

claimed liability for negligence, the alleged negligent activity would generally give rise to tort liability even if the parties did not hold a contract. For instance, in the construction litigation context, construction defect claims for negligent construction by a contractor can clearly be brought in tort as the implied warranties and duties of construction in a good and workmanlike manner give rise to tort liability regardless of the contract between the parties. Consequently, *Scharrenbeck* put a chill to any potential application of the economic loss doctrine in a construction context.

B. The *Testbank* Decision:

As mentioned above, the “economic loss” rule precludes recovery only when the plaintiff suffers nothing other than economic loss. This is referred to in case law as “pure economic loss” and it historically was applied in products liability cases or in cases where the parties in interest were in contractual privity. However, the doctrine seemed to expand a great deal with the 1985 Fifth Circuit decision in *Louisiana ex. rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). In *Testbank*, the Fifth Circuit held that the “economic loss” rule precluded businesses along the Mississippi River from recovering lost profits when a spill from the defendant's ship blocked traffic on a portion of the River. The plaintiffs did not suffer property damage or personal injury. However, if the plaintiff's property had been damaged by the spill, they could have recovered lost profits caused by the damage to their property.

The most important fact of the *Testbank* decision is the fact that none of the parties were in contractual privity with one another. The Fifth Circuit had applied the “pure economic loss” rule that was born of products liability towards that case involving the secondary economic losses suffered from a chemical spill in the Mississippi River by businesses who were affected by the cessation of river traffic during cleanup. The *Testbank* decision was not a decision involving Texas law. However, this is the clear moment where Texas jurisprudence takes a dramatic turn in the application of the economic loss doctrine, which was for the most

part was confined to products liability actions to this point and was about to become a central player in construction defect litigation.

C. *Jim Walter Homes v. Reed*:

It is likely not coincidental that less than a year after the *Testbank* decision, the seminal Texas Supreme Court case on the economic loss rule was rendered. The 1986 *Reed* decision is the case where the marriage of the economic loss rule and construction litigation occurs. In *Jim Walter Homes*, Ray Reed and his wife sued Jim Walter Homes, Inc., seeking damages arising out of the sale and construction of a house. The jury found that Jim Walter Homes, Inc. breached the warranty of good workmanship in the contract and that it was grossly negligent in the supervision of the construction of the house. *Id.* at 615.

Reed analyzed the impact of *Scharrenbeck* and applied it to the *Reed*'s claims. In *Reed*, the plaintiffs were dissatisfied with the quality of a house they had contracted to buy from the builder and sued for actual and exemplary damages, alleging breach of warranty (contract theory) as well as negligent supervision of construction (tort theory). *Id.* In reversing an award of exemplary damages to the plaintiffs, the Texas Supreme Court held that if the injury is only the economic loss of the bargained-for subject of a contract, the action is in contract alone. Because the only harm shown to have befallen the plaintiffs was that the house they were promised was not the house they received, the only cause of action available was one characterized as a breach of contract, which does not support recovery of exemplary damages. The Court concluded by observing that to support the award of exemplary damages, the plaintiffs were obliged to prove a "distinct tortious injury with actual damages" *Id.* at 618.

This analysis relied on *Scharrenbeck* in stating that the nature of the injury most often determines which duty or duties are breached. *Reed* states that “when the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone.” *Id.* at 618. Citing *Mid-Continent Aircraft Corp. v. Curry County Spraying Service*, 572 S.W.2d 308, 312

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(Tex.1978); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex.1977). The Court continued by stating that “The Reeds' injury was that the house they were promised and paid for was not the house they received. This can only be characterized as a breach of contract, and breach of contract cannot support recovery of exemplary damages.” *Id.* Citing *Bellefonte Underwriters Insurance Co. v. Brown*, 704 S.W.2d 742 (1986); *Amoco Production Co. v. Alexander*, 622 S.W.2d 563 (Tex.1981).

While this language seems to work and follow *Scharrenbeck* and its line of cases, the reality is that it is different and that difference seems to open a Pandora’s Box. *Scharrenbeck* looks at the alleged negligent act and attempts to determine if that act absent a contract would give rise to tort liability. *Reed* seems to apply more of a “but for” test. Unless there was a contractual relationship, would there be any liability? This subtle distinction would seem to be the trigger to the modern day use of contractors, particularly subcontractors, invoking the economic loss doctrine in construction defect litigation. Particularly subcontractors benefit from this application because the home or structure that was bargained for is always the product of a contract.

Note how different the rule from *Reed* is than the majority rule referenced in *American Aviation*. The *Reed* rule precludes tort claims brought to recover economic losses when those losses are the subject matter of a contract. It never specifically states that all of the parties seeking to apply the doctrine must be in privity with the plaintiff such as *American Aviation*. *Reed* does not expressly go so far as removing the requirement of contractual privity and truly unleashing the rule (the problem noted in *American Aviation*).

D. The 2000s: *Reed* and *Testbank* Doctrines Merged:

The *Reed* rule attempted to apply *Scharrenbeck* while making a subtle change that drew more inference on the presence of the contract itself as the preclusive event. However, the parties in *Reed* were in privity of contract and *Reed* did not expressly rely upon *Testbank* (although the

recent interest generated by that decision in the economic loss rule in negligence cases likely played some role in the expansion of the doctrine.). However, in the early 2000s, the *Reed* and *Testbank* interpretations were morphed together by various decisions of the intermediate Texas courts of appeals.

These cases held that the economic loss doctrine does not apply only to bar claims against those in a direct contractual relationship; it also applies to preclude tort claims between parties who are not in privity, provided that the ultimate source of the loss involved a contract upon the plaintiff can seek recovery. *Trans-Gulf Corp. v. Perf. Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex.App.-Eastland 2002, no pet.) and *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 106-07 (Tex.App.-Houston [14th Dist.] 2000, no pet.). Consequently, the lack of contractual privity was no bar to someone from invoking the economic loss rule provided that the plaintiff had a contractual action against someone (and the injuries involved were only economic in nature).

During the early 2000s, subcontractors began to rely heavily on the economic loss doctrine to avoid liability. This mechanism was simple. In construction defect claims, the injuries involved are generally always economic only. Thus, the plaintiffs are restricted to their breach of contract claims. However, most subcontractors have no direct contract with the plaintiff – only the general contractor. Thus, plaintiff’s sole action under a contract theory would just be against the general contractor. Moreover, as contribution claims are derivative of tort actions, the general contractor could not merely bring the subcontractors back in under a theory of contribution. Thus, the economic loss doctrine essentially allowed subcontractors to evade liability for their defects and leave the general contractor holding the bag, absent a contractual indemnity provision in the subcontract.

IV. CURRENT STATUS OF THE ECONOMIC LOSS DOCTRINE IN TEXAS:

Not all Texas courts have drafted opinions adopting the expanded economic loss rule in non-products liability cases. Moreover, the widely discussed opinion in *American Aviation* in 2004 gave some thought that Texas courts would begin to reconsider the vast scope of the modern interpretation of the economic loss rule in the same manner that the Florida Supreme Court did in *American Aviation*.

A. *Lamar Homes v. Mid-Continent*:

In fact, there was a major indication of that from the Texas Supreme Court when in the 2007 case *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex.2007) the Court declined to apply the economic loss rule to the context a first-party insurance claim regarding alleged construction defects. While *Lamar Homes* was an insurance law decision, this was the first the Supreme Court had said in depth about the rule since 1991 and certainly after the *American Aviation* decision. It certainly appeared that the Court could be amenable to adopting a more restrictive interpretation than the Court of Appeal decision and perhaps more along the lines of *American Aviation* with respect to contractual privity. However, the Supreme Court has remained silent on this issue since 2007.

B. *City of Alton v. Sharyland Water Supply Corp*:

In *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 152 (Tex.App.-Corpus Christi 2009, pet. filed) the Fourteenth Court of Appeals refined the standard, tightening it ever so slightly. In *Sharyland*, the court held that where there is an absence of privity of contract or, as in this case, an absence of third-party beneficiary status, economic damages are not recoverable unless they are accompanied by actual physical injury or property damage. *Sharyland*, 277 S.W.3d at 152-53. Citing *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex.App.-Dallas 2001, no pet.); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 288-89

(Tex.App.-Houston [14th Dist.] 2000, no pet.); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex.App.-Houston [14th Dist.] 2000, no pet.). The key question was whether *Sharyland* suffered property damage, such that the economic loss rule will not bar its recovery.

The Court examined a great deal of case law in determining the definition of “property damage” to be used in the opinion. The court concluded:

“that property damage cannot consist merely of damage to an intangible asset or increased operational costs. Instead, some physical destruction of tangible property must occur. Based on this determination, we conclude that *Sharyland* has not suffered property damage. The sewer service lines have not corroded the waterlines. There is no evidence of physical damage to the waterlines, nor is there evidence that the water flowing through the water mains has been contaminated because of sewage leaks. Thus, *Sharyland* neither pleaded nor offered evidence of an actual injury or property damage to its waterlines or to the water that flows through the waterlines. *Sharyland* seeks compensation only for economic damages including the cost associated with protecting, maintaining, and repairing its waterlines. Because *Sharyland* has not identified any property damage that it has sustained as a result of the sewer line being laid above its waterlines, we conclude that the economic loss rule bars *Sharyland*'s negligence claim against C & B, TCB, and Cris, parties with which it is not in contractual privity.” *Id.* at 154-55.

Thus, the rule used by *Sharyland* is that to avoid the economic loss rule, some physical destruction must occur. At first glance this would seem to relax the rule as it appears that any claim of physical destruction would avoid the doctrine. However, the Court followed the decision in the *Thomson* case for defining “economic loss’ has been defined as ‘damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property....’ ” *Thomson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 421 (Tex.App.-Austin 1995, no

writ). Thus, the unanswered question from Sharyland is whether the physical destruction must be to property other than the subject of the contract. The reference to *Thomson* would seem to indicate that it does.

C. *Schambacher v. R.E.I. Elec., Inc.*:

Last fall in *Schambacher v. R.E.I. Elec., Inc.*, 2010 WL 3075703 (Tex.App. Aug.5, 2010, no pet.), the Fort Worth Court of Appeals ignored a plaintiff's attempt to apply the *Scharrenbeck* line of cases when it applied the rule to preclude claims that defendants had a common law duty to perform services under their respective contracts with care, skill, and reasonable expedience and that their negligent failure to do so gave rise to an action in tort. This seems to verify that *Reed* essentially neutered *Scharrenbeck* without overturning it and that implied duties will not give rise to tort liability if the property is the subject matter of a contract.

V. BEYOND NEGLIGENCE: OTHER APPLICATIONS OF THE DOCTRINE:

A. Negligent Misrepresentation:

Under the economic loss rule, a plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim. *D.S.A. Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 664 (Tex. 1998). The burden is on the plaintiff claiming negligent misrepresentation to provide evidence of this independent injury. *Id.* Texas courts have adopted the independent injury requirement of Section 552B of the Restatement (Second) of Torts for negligent misrepresentation claims. While benefit of the bargain damages are available for a breach of contract, under Section 552B, such damages are not recoverable for a negligent misrepresentation:

- (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which

the misrepresentation is legal cause, including:

- (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and

- (b) pecuniary loss [*11] suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

- (2) the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.

RESTATEMENT (SECOND) OF TORTS § 552B (1977); *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442--43 (Tex. 1991).

B. Loss of Profits, Loss of Business Opportunity, and Loss of Credit:

Loss profits are barred by the economic loss rule because they are "benefit of the bargain" damages rather than reliance damages, which would be recoverable under negligent misrepresentation. While the benefit of the bargain measure of damages is available for both fraudulent inducement and breach of contract claims, it is not available for a claim of negligent misrepresentation. *D.S.A. Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 663 (Tex. 1998). Reliance damages are measured as the out-of-pocket expenditures made by one party in reliance on the actions of another party, not by the amount of lost profits and sales. See *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638--39 (Tex. App.--Texarkana 1988, no writ); see also E.A. FARNSWORTH, *CONTRACTS* § 12.16, at 888-89 (1982) (noting as examples of reliance damages--in contrast to benefit of bargain damages-- a party's expenditures for labor and materials and other costs of preparation and a purchaser's spending money or making commitments for advertising, acquiring premises and equipment, hiring

employees, and the like.) Likewise, loss of business opportunity is barred because it is a contractual damage that relies upon lost profit principles. Additionally, loss of credit is barred simply because

In *Sterling Chems., Inc. v. Texaco Inc.*, the court held that Sterling's claim against Texaco sought the same measure of damages available for a breach of contract: the benefit of the bargain. 2007 Tex. App. LEXIS 8906, 11-13 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The summary judgment evidence established that Sterling was (1) asserting that the business interruptions, as a result of the syngas cooler failure, caused it to lose profits from the sale of acetic acid to its buyers and (2) seeking to recover these monies as damages in this action against Texaco. These claimed lost profits and sales represented benefit of the bargain damages--monies Sterling would have received had it been timely provided with the syngas under the Product Supply Agreement with PHS. The court held that lost profits and sales were the consequential losses as a result of the business interruptions in the timely supply of syngas by PHS and recovery for these losses was addressed by Sterling's supply agreement with PHS. Accordingly, the court held that Sterling was not entitled to any recovery of damages against Texaco under its negligent misrepresentation theory. See *D.S.A. Inc.*, 973 S.W.2d at 664.

C. Loss of Business Reputation Damages

May be Barred:

Loss of business reputation damages are not recoverable damages for breach of contract. *Lionheart Co. v. PGS Onshore, Inc.*, 2007 Tex. App. LEXIS 4628, *5 (Tex. App.--Waco 2007, no pet.); see also *UMLIC VP LLC v. T & M Sales & Environmental Sys's., Inc.*, 176 S.W.3d 595, 614 (Tex. App.-Corpus Christi 2005, pet. denied); *Sterling Projects Inc. v. Fields*, 530 S.W.2d 602 (Tex. Civ. App. -- Waco 1975, no writ); *Streetman v. Lasater*, 185 S.W. 930 (Tex. Civ. App. -- El Paso 1916, no writ). Damage for the destruction of a business by the tortious act of another are recoverable under negligent misrepresentation. See *Sterling Projects Inc. v. Fields*, 530 S.W.2d 602 (Tex. Civ. App. -- Waco

1975, no writ); *Streetman v. Lasater*, 185 S.W. 930 (Tex. Civ. App. -- El Paso 1916, no writ). However, like loss of profits and business opportunity, loss of business reputation appear to stem from the benefit of the bargain rather than reliance damages. If the claim sounds in contract rather than tort, a plaintiff may not recover under tort, what he could not recover under contract.

D. The Economic Loss Rule is applicable to Deceptive Trade and Practices Act Claims as well:

In *Crawford v. Ace Sign, Inc.*, a sales representative for the Yellow Pages made several statements to the president of Ace Sign during negotiations to renew the company's ad. 917 S.W.2d 12 (Tex. 1996)(per curiam). Specifically Crawford, the representative, stated that: (1) businesses like Ace Sign depend heavily on exposure in the Yellow Pages, and Ace Sign could expect its business to grow at least seventy to eighty percent during the next year with an advertisement; (2) Ace Sign would have to pay for the next year up front because it had fallen behind on its previous payments; and (3) if Ace Sign paid the full price up front, its advertisement would appear in the Beaumont, Port Arthur, and Mid-County directories in 1989-90. The parties entered into a written contract but, even though Ace Sign paid the full price up front, the ad did not appear in the 1989-90 directories. Ace Sign sued the representative and Southwestern Bell for breach of contract, negligence and violations of the DTPA. *Id.* at 13. The supreme court, citing *Delanney* and a long line of similar cases, held that the representative's statements "were nothing more than representations that the defendants would fulfill their contractual duty to publish, and the breach of that duty sounds only in contract." 917 S.W.2d at 13-14. The court stated:

The statements themselves did not cause any harm. The failure to run the advertisement (the breach of

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the contract)
actually caused
the lost profits,
and the injury is
governed by
contract law,
not the DTPA.

Id. at 298.

E. Fraud:

In *Formosa Plastics Corp. USA v. Presidio Engrs. & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex.1998) the Texas Supreme Court held that a claim for fraudulent inducement was not subject to the rule. Formosa concluded that the promise of future performance constitutes actionable misrepresentation if the promise was made with no intention of performing at the time the promise was made, and evidence presented must be relevant to the defendant's intent at the time the defendant made the promise. *Id.*

In *Haase v. Glazner*, the supreme court rejected the plaintiff's argument that “tort damages for fraud can be recovered even where the plaintiff suffers only economic loss related to the contract's subject matter.” 62 S.W.3d 795, 798 (Tex.2001). Thus, *Formosa* court's rejection of the independent injury rule is limited to fraudulent inducement claims and does not extend to fraud generally. See *Heil Co. v. Polar Corp.*, 191 S.W.3d 805, 816-17 (Tex.App.-Fort Worth 2006, pet. filed).

VI. CONCLUSION:

The concerns that are noted in the *American Aviation* decision are very present in Texas today. The economic loss rule continues to effect many construction defect claims and apart from some vague language contained in *Sharyland*, it appears that the *Reed/Testbank* line of cases has continued to grow and likely will continue in the near future.