

BIBLIOGRAPHY OF ECONOMIC LOSS DOCTRINE CASES

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State	Does ELD bar tort claims against DP?	Case Citation
Alabama	Unclear at this time. ELD clearly applies to products liability cases, but courts have obviated the need to analyze the applicability of the ELD in the context of commercial construction disputes by focusing instead on whether the claimant owed a duty to the party he was suing.	<p><i>Northview Christian Church, Inc. v. J & J Group, Inc.</i>, 2010 U.S. Dist. LEXIS 118454 (D. Idaho Nov. 8, 2010) (applying Alabama law and holding that owner could sue architect and engineer of church domes for design and construction flaws; ELD does not bar tort claims in commercial construction context).</p> <p><i>Public Bldg. Auth. v. St. Paul Fire & Marine Ins. Co.</i>, 2010 Ala. LEXIS 198 (Ala. Oct. 8, 2010) (answering in the negative the following certified question: "Does the economic loss doctrine, first recognized in Alabama in <i>Lloyd Wood Coal Co. v. Clark Equipment Co.</i>, 543 So. 2d 671 (Ala. 1989), a product liability case, also apply in the context of a commercial construction dispute so as to preclude the [PBA], as the owner of the subject property, from asserting tort claims against various subcontractors given that the only damage claimed to have resulted from any defective conditions allegedly caused by the subcontractors was to the property itself?").</p> <p><i>Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.</i>, 901 So.2d 84, 107 (Ala. 2004) (owner's fire insurance carrier allowed to pursue negligence claim against HVAC contractor because fire damage to building was not economic loss).</p> <p><i>Keck v. Dryvit Systems, Inc.</i>, 830 So.2d 1 (Ala. 2002) (ultimate consumer can recover in tort against manufacturer even in absence of privity of contract; where one party assumes a duty to another party in contract and it is foreseeable that injury to a third party could occur as result of breach, the promissor owes a duty to all within foreseeable area of risk).</p> <p><i>Bay Lines, Inc. v. Stoughton Trailers, Inc.</i>, 838 So.2d 1013 (Ala. 2002) (ELD bars product liability claim against manufacturer where only injury is to product itself).</p> <p><i>Berkel and Co. Contractors, Inc. v. Providence Hospital</i>, 454 So.2d 496 (Ala. 1984) (subcontractor sued hospital and its architect for negligence relating to extra costs associated with pile driving; lack of privity not a defense, and</p>

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		subcontractor could sue owner in tort to recover economic losses. Six factors should be analyzed to determine whether a party not in privity with the claimant owes the claimant a duty of care in a construction setting: (1) [T]he extent to which the transaction was intended to affect the other person; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm.).
Alaska	No clear cut ruling on issue from Alaska Supreme Court. Tort claims asserted by person not in privity with design professional will probably be barred; tort claims asserted by clients will probably not be barred.	<p><i>Pruhs Corp. v. MBA Consulting Engineers, Inc.</i>, issue briefed but not ruled on by Alaska Supreme Court. For briefing on economic loss doctrine in Alaska, see Appellant Pruh Corporation’s Brief, 2006 AK S. Ct. Briefs 12338, 2006 AK S. Ct. Briefs LEXIS 89 (2006), and Appellee MBA Consulting Engineer’s Brief, 2006 WL 4545068 (Alaska 2006) (suggesting that if client has privity, tort claim may be pursued).</p> <p><i>But see St. Denis v. Department of Housing and Urban Development</i>, 900 F. Supp. 1194 (D. Alaska 1995) (federal court engages in extensive discussion of Alaska law on ELD and predicts that Alaskan courts will bar tort claims for the recovery of economic loss in cases dealing with real estate transactions, service contracts, and products liability cases).</p> <p><i>City of Dillingham v. CH2M HILL Northwest, Inc.</i>, 873 P.2d 1271 (Alaska 1994) (city filed third party complaint against engineer and in footnote, Supreme Court suggested that third parties might be allowed to recover in tort for economic losses, despite lack of privity).</p> <p><i>State Depart. of Nat. Resources v. Transamerica Premier Insur. Co.</i>, 856 P.2d 766 (Alaska 1993) (surety sought tort damages from owner and design professional for economic losses sustained by contractor as result of defective designs; held that project owner may sue design professional in tort, but contractor may not do so).</p>

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		<i>State of Alaska v. Tyonek Timber</i> , 680 P.2d 1148 (Alaska 1984) (concrete subcontractor could not sue concrete supplier in tort to recover economic losses because of the lack of privity of contract).
Arizona	Yes.	<p><i>Flagstaff Affordable Housing Ltd.P’ship. v. Design Alliance, Inc.</i>, 223 Ariz. 320 (Ariz. 2010) (in case of first impression involving architect, Arizona Supreme Court extended ELD beyond context of products liability and construction defects to apply to claims against design professionals; building owner barred under ELD from recovering tort damages arising from faulty work by architect that caused economic loss but no physical injury to persons or other property; property owner limited to its contractual remedies against design professional).</p> <p><i>Hughes Custom Building LLC v. James Davey</i>, 212 P.3d 865 (Ariz. App. 2009) (homebuilder can sue civil engineer in tort for alleged negligence relating to soil compaction recommendations because physical damage occurred to house, which is “other property.” Cost to repair damage not “economic loss”).</p> <p><i>Valley Forge Ins. Co. v. Sam’s Plumbing, LLC, et al.</i>, 207 P.2d 765, 2009 Ariz. App. LEXIS 66 (Ariz. App. 2009) (tort claim will lie if damage occurs accidentally and suddenly and defect poses unreasonable risk of danger because contractor had general duty to exercise reasonable care) (decision subject to further appellate review).</p> <p><i>Evans v. Singer</i>, 518 F. Supp. 2d 1134 (D. Ariz. 2007) (court allowed purchaser of self-storage facility to sue realtors in tort for economic losses; ELD limited to product liability and construction defect cases).</p> <p><i>QC Constr. Products v. Cohill’s Bldg. Specialties, Inc.</i>, 423 F. Supp. 2d 1008 (D. Ariz. 2006) (supplier’s tort claims for tortious interference against builder barred by ELD).</p> <p><i>Hayden Bus. Ctr. Condos. Ass’n v. Pegasus Dev. Corp.</i>, 105 P.3d 157 (Ariz. App. 2005) (citing <i>Carstens</i> and holding that condo association’s breach of</p>

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		<p>warranty suit against developer sounded in contract and was barred due to lack of privity between the parties).</p> <p><i>Carstens v. City of Phoenix</i>, 206 Ariz. 123, 75 P.3d 1081 (Ariz. App. 2003), review denied (2004) (homeowners' tort claim against City inspectors barred by ELD).</p> <p><i>Donnelly Constr. Co. v. Oberg/Hunt/Gilleland</i>, 139 Ariz. 184, 677 P.2d 1292 (1984) (contractor who reasonably relied on architect's faulty plans to his detriment, when plans prepared specifically for contractor, could sue architect to recover economic losses; court applies special relationship exception).</p> <p><i>Woodward v. Chirco Const. Co., Inc.</i>, 141 Ariz. 514, 516, 687 P.2d 1269 (1984) (plaintiff may sue in tort for personal property damage and personal injury but must sue in contract for the cost of remedying construction defects).</p> <p><i>Nastri v. Wood Bros. Homes, Inc.</i>, 142 Ariz. 439, 444-45, 690 P.2d 158 (Ariz. App. 1984).</p>
Arkansas	Unclear at this time, but the ELD is probably not going to bar a tort claim given prior case law in products liability cases.	<p><i>Farm Bureau Ins. Co. v. Case Corp.</i>, 317 Ark. 467; 878 S.W.2d 741 (Ark. 1994) (purchaser of tractor could sue manufacturer in strict liability under state tort law because defect in tractor was "unreasonably dangerous.")</p> <p><i>Carroll-Boone Water Dist. v. M & P Equip. Co.</i>, 661 S.W.2d 345 (Ark. 1983) (in dispute between owner, contractor and engineer over damages to dam intake during blasting, court ruled that contractor entitled to judgment against engineer; court did not discuss or analyze economic loss rule).</p>
California	Perhaps. Courts are approaching the issue as a fact-specific inquiry. Conflicting case law at the intermediate	<p><i>Tachs Prop. Dev. v. Xinos</i>, 2007 Cal. App. Unpub. LEXIS 6658 (2007) (developer allowed to sue engineer for grading plan deficiencies).</p> <p><i>Rafael Town Center Investors v. Weitz Co.</i>, 2007 U.S. Dist. LEXIS 42625</p>

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	appeals court level.	<p>(N.D. Cal. 2007) (court denied architect’s motion to dismiss contractor tort claim because whether architect owed duty to contractor was factual issue). <i>O’Connor v. Hertz</i>, 2005 WL 3106407 (Cal. App. 4th 2005) (owner’s claim against architect for negligent misrepresentation barred by ELD).</p> <p><i>McCarthy Building v. Teng Li</i>, 2005 Cal. App. Unpub. LEXIS 5798, <i>rehearing denied</i>, 2005 Cal. App. LEXIS 1170 (2005) (engineer argued that contractor claim for negligence against engineer should be barred by ELD; court found claim barred by statute of limitations and did not reach ELD, but in doing so stated “it is questionable whether defendant owed a duty to plaintiff.”)</p> <p><i>Weseloh Family Ltd. Partnership v. K. L. Wessel Construction Co., Inc.</i>, 125 Cal.App.4th 152 (2004), <i>review denied</i>, (2005) (general contractor’s tort and indemnity claims against retaining wall engineer (who had contract with second tier subcontractor) dismissed under ELD because engineer owed no duty to general contractor or to property owner).</p> <p><i>Shekhter v. Seneca Structural Design, Inc.</i>, 18 Cal.Rptr.3d 83 (Cal. App.), <i>review denied and opinion ordered not published</i> (2004) (owners of apartment complex damaged in earthquake could sue design and construction firms for negligence because ELD does not apply to claims alleging negligent engineering and design services).</p> <p><i>BFGC Architects Planners, Inc. v. Forcum/Mackey Constr. Inc.</i>, 119 Cal. App. 4th 848, 14 Cal. Rptr. 2d 721, <i>review denied</i> (2004) (court rejects equitable indemnity claim brought by contractor against architect, holding that the underlying action in an equitable indemnity claim must sound in tort and that the claimant’s indemnity claim was barred because the underlying case was grounded solely upon breach of contract allegations).</p> <p><i>Aas v. Superior Court</i>, 24 Cal.4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 (2000) (homeowner barred from suing developer, contractor and subcontractor</p>

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		in tort for negligent construction when defects had caused no bodily harm or property damage).
Colorado	Yes if the parties are in privity; no if there is no privity and a tort duty of care exists independently of contract. ELD may not be extended to non-commercial transactions.	<p><i>Sterling Constr. Mgmt., LLC v. Steadfast Ins. Co.</i>, 2010 U.S. Dist. LEXIS 95096 (D. Colo. Sept. 12, 2010) (drilling subcontractor that breached a canal was barred from suing engineering firm; because the duties imposed on the engineering firm by its contract with the project's owner created a duty that is identical to the duty imposed by tort law, the economic loss rule precludes any claims sounding in tort).</p> <p><i>Hamon Contractors, Inc. v. Carter & Burgess, Inc.</i>, 2009 Colo. App. LEXIS 715 (Colo. App. 2009) (contractor's claim for fraud against construction manager barred by economic loss rule because there was no tort duty of care owed to contractor independent of contract).</p> <p><i>Williams Field Services Group LLC v. General Electric International</i>, 2008 U.S. Dist. LEXIS 11692 (N.D. Okla. 2008) (applying Colorado law, court dismisses negligence action based on BRW but refused to dismiss negligent misrepresentation claim).</p> <p><i>A.C. Excavating, et al. v. Yacht Club II Homeowners Ass'n, Inc.</i>, 114 P.3d 862 (Colo. 2005) (subcontractors owe homeowners a duty of care, independent of any contractual obligations, to act without negligence in the construction of a home- the economic loss rule has no application where a plaintiff's tort claim is based on an independent duty of care).</p> <p><i>BRW, Inc., v. Dufficy & Sons, Inc.</i>, 99 P.3d 66 (Colo. 2004) (Colorado Supreme Court holds that ELD bars tort actions, when the claimant is seeking only economic damages. Noting that the controversy involved duties arising from contractual relationships between commercially sophisticated parties, the court overrules an appellate court decision finding that the ELD did not serve as a bar).</p>

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		<p><i>See also Derkevorkian v. Lionbridge Tech., Inc.</i>, 2006 U.S. Dist. LEXIS 4191 (D. Co. 2006) (employee's tort claim against employer not barred by ELD because employer owed fiduciary duty to employee, citing <i>A. C. Excavating</i>).</p> <p><i>Town of Alma v. AZCO Constr., Inc.</i>, 10 P.3d 1256 (Colo. 2000) (Colorado Supreme Court adopts the ELD and holds that it bars tort actions brought by an owner against a contractor, when the owner only sought to recover economic damages. Opinion contains extensive discussion regarding the history of the doctrine and its underlying rationale).</p>
Connecticut	<p>Conflicting reported decisions from different superior courts as to whether or not the economic loss doctrine is limited to disputes between the buyer and seller of goods under Article 2 of the Uniform Commercial Code, or if it applies generally to other types of disputes between parties who are in a contractual relationship. Connecticut Supreme Court has not yet addressed issue, although one federal court predicts that Supreme Court will apply ELD to bar tort claims against DP. Majority of state superior courts, however, seem inclined to limit application of doctrine to product liability cases.</p>	<p><i>Loureiro Contrs., Inc. v. City of Danbury</i>, 2010 Conn. Super. LEXIS 2938 (Conn. Super. Ct. Nov. 18, 2010) (in the absence of privity of contract, a contractor may bring a tort claim against a design professional for purely economic losses "as long as the latter [has] failed to perform its duties with care and diligence and the damages claimed by the general contractor were a reasonably foreseeable consequence of its failure.").</p> <p><i>Hovdic v. B&E Juices, Inc.</i>, 2008 Conn. Super. LEXIS 592 (2008) (court limited ELD to product liability cases: allowed purchaser of Snapple distribution route to sue seller in tort to recover economic losses).</p> <p><i>Town of New Canaan v. Brooks Laboratories, Inc.</i>, 2007 Conn. Super. LEXIS 2951 (2007) (court found that ELD has not been adopted in Connecticut in cases similar to the one at hand – for negligent performance of asbestos testing services).</p> <p><i>Am. Progressive Life & Health Ins. Co. v. Better Benefits</i>, 2007 Conn. Super. LEXIS 10 (2007) (ELD extends to any lawsuit arising out of the party's contract and the parties are both sophisticated), <i>reversed on other grounds</i>, 292 Conn. 111, 971 A.2d 17 (2009) (explaining conflict in lower courts but refusing to reach issue).</p> <p><i>Riggs-Brewer Indus. v. Shelton Senior Housing, Inc.</i>, 2006 Conn. Super. LEXIS 1741 (2006) (trial court held that contractor could sue architect in tort because</p>

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		<p>contract between architect and owner was for services and not for a product and contractor alleged he was third party beneficiary to contract with architect).</p> <p><i>CW Waterbury LLC v. Mahler</i>, 2006 Conn. Super. LEXIS 3834 (2006) (ELD did not apply to contractor negligence claim against owner's agent because no contract existed between these two parties).</p> <p><i>Colonial Sur. Co. v. Lenard Eng'g, Inc.</i>, 2004 Conn. Super. LEXIS 3421 (2004) (reporting that there are conflicting trial court rulings regarding the applicability of the ELD without reaching the issue).</p> <p><i>Best Friends Pet Care, Inc. v. Design Learned, Inc.</i>, 2003 WL 22962147 (Conn. Super. 2003) (court permitted building owner to sue engineer in tort despite lack of privity because engineer knew that owner would rely on engineer's design).</p> <p><i>RAC Constr. Co., Inc. v. Harp</i>, 2003 Conn. Super. LEXIS 2609 (2003) (ELD does not prevent contractor from recovering purely economic damages against architect in absence of contractual privity and in absence of personal injury and property damage).</p> <p><i>Worldwide Preservation Serv., L.L.C., v. Ivth Seha, L.L.C.</i>, 2001 Conn. Super. LEXIS 305 (2001) (court adopted ELD prohibiting contractors from suing design firms in tort absent privity of contract).</p> <p><i>Flagg Energy Development Corp. v. General Motors Corp.</i>, 244 Conn. 126, 709 A.2d 1075 (1998) (court held that claim for breach of contract cannot be combined with claim for negligent misrepresentation where only commercial losses were sustained).</p> <p><i>Ins. Co. of North America v. Town of Manchester</i>, 17 F. Supp. 2d 81 (D. Conn. 1998) (federal district court held that Connecticut Supreme Court would not bar contractor from suing design firm in tort to recover purely economic losses).</p> <p><i>Williams Ford v. Hartford Courant Co.</i>, 232 Conn. 559, 657 A.2d 212 (1995)</p>

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		(court rejected application of ELD to negligent misrepresentation claim). <i>Coburn v. Lennox Homes, Inc.</i> , 173 Conn. 567, 378 A.2d 599 (1977) (Supreme court holds that homeowner can proceed with negligence action against developer, even though the damages sought are economic and lack of privity. The court does not discuss the ELD).
Delaware	Negligence claim probably barred; negligent misrepresentation claim will not be barred if design professional is found to be in business of providing information (known as “information supplier” exception to ELD).	<i>Palma, Inc. v. Claymont Fire Co.</i> , 2009 Del. Super. LEXIS 426 (Del. Super. Ct. Nov. 18, 2009) (ELD bars claim that architect’s negligent misrepresentation resulted in damage to the epoxy floor and the costs to repair that damage; plaintiff did not plead facts that would allow it to avail itself of the "information supplier" exception to the ELD but was granted leave to amend complaint accordingly). <i>Commonwealth Const. Co. v. Endecon Inc.</i> , 2009 Del. Super. LEXIS 76 (2009) (contractor’s claim for tortious interference with contractual relations against engineer who recommended that owner not pay contractor pay application is not barred by ELD). <i>RLI Ins. Co. v. Indian River School Dist.</i> , 556 F. Supp. 2d 356 (D. Del. 2008) (subcontractor insurer sued school district, construction manager and project architect claiming that payment to subcontractor impaired collateral; court held that negligent misrepresentation claim barred by ELD because neither construction manager nor architect was in business of supplying information; information provided was incidental to construction project). <i>Delaware Art Museum v. Ann Beha Architects, Inc.</i> , 2007 U.S. Dist. LEXIS 66636 (D. Del. 2007) (negligent misrepresentation claim against architect dismissed because only architect did not act as ‘pure information provider’). <i>Millsboro Fire Co. v. Construction Management Services, Inc.</i> , 2006 Del. Super. LEXIS 536 (2006) (Delaware court declined to apply negligent misrepresentation exception to ELD where architect and engineer did not

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		<p>engage in business of supplying information).</p> <p><i>Int'l Fid. Ins. Co. v. Mattes Elec.</i>, 2002 Del. Super. LEXIS 441 (2002) (refusing to permit surety company to pursue negligence claim against construction manager for alleged negligent performance of obligation to project owner to manage project).</p> <p><i>Danforth v. Acorn Structures, Inc.</i>, 608 A.2d 1194 (Del. 1992) (applying ELD to preclude homeowner from asserting tort claim against corporation that sold kits for construction of mobile homes, even though parties were not in privity).</p> <p><i>But see</i> 6 Del. Code § 3651 (1996) (Delaware state legislature enacted law prohibiting application of ELD in residential construction defect cases).</p> <p><i>Council of Dorset Condo. Apts. v. Dorset Apts.</i>, 1992 Del. Super. LEXIS 373 (1992) (negligent misrepresentation claim against engineers not within ELD; court suggested that claims against architects would be barred because architects prepare plans which are converted into a tangible product, whereas engineers prepared information to be relied on by condo owners).</p> <p><i>Pierce Assoc., Inc. v. The Nemours Foundation, Gilbane Bldg. Fund</i>, 865 F.2d 530 (3d Cir. 1988) (dismissing negligence claim seeking recovery of economic damages brought by owner against subcontractor, Third Circuit predicts that the Delaware Supreme Court would adopt the ELD, citing the <i>Crowell</i> decision, which was drafted by a trial judge who subsequently was named chief justice of the Delaware Supreme Court).</p> <p><i>Crowell Corp. v. Topkis Constr. Co.</i>, 280 A.2d 730 (Del. Super. 1971) (owner sues subcontractor seeking to recover purely economic loss damages. Trial court dismisses action, finding that claims sound in contract and are barred due to lack of privity. One of the earliest applications of the economic loss doctrine).</p>
District of	Probably in cases where parties are in	<i>RLI Ins. Co. v. Pohl, Inc.</i> , 2006 U.S. Dist. LEXIS 45958 (D.D.C. 2006)

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Columbia	contractual privity.	(District of Columbia has not authorized tort recovery for purely economic losses in a contract setting; tort claims arising out of installation of allegedly defective zinc panels on building barred by ELD).
Florida	Under <i>Moransis</i> , ELD will not bar a client with privity from suing an engineer in tort. ELD may not be applied to professionals, including surveyors. Since <i>Moransis</i> , federal courts have limited the holding of that case to its facts.	<p><i>Vesta Const. and Design LLC v. Lotspeich & Associates</i>, 974 So.2d 1176 (Fla. App. 2008) (developer’s claim of negligent misrepresentation against individual ecologist arising out of environmental assessment was barred by ELD).</p> <p><i>Florida Auto. Joint Underwriting Ass’n v. Milliman, Inc.</i>, 2007 U.S. Dist. LEXIS 33016 (N.D. Fl. 2007) (non-design professional case: breach of fiduciary duty claim barred by ELD).</p> <p><i>Granat v. AXA Equitable Life Ins. Co.</i>, 2006 U.S. Dist. LEXIS 93300 (S.D. Fla. 2006) (<i>Moransis</i> refused to extend ELD to professional malpractice claims; in non-design professional case, breach of fiduciary duty claim barred by ELD).</p> <p><i>Kraft Co. v. Marsh McLennan</i>, 2006 U.S. Dist. LEXIS 45261 (D. Fla. 2006) (Kraft’s negligence against Marsh arising out of its management of CCIP program dismissed under ELD; negligent misrepresentation claim (claim of fraud in the inducement) was not barred).</p> <p><i>Indemnity Insurance Co. of N. America v. American Aviation, Inc.</i>, 891 So.2d 532 (Fla. 2004) (ELD bars a negligence action to recover solely economic damages only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product; claim for negligent maintenance and inspection of aircraft landing gear allowed to proceed in tort).</p> <p><i>Florida State Bd. of Administration v. Law Eng’g & Enviro. Servs., Inc.</i>, 262 F. Supp.2d 1004 (D. Minn. 2003) (Federal court in Minnesota applying Florida law distinguishes <i>Moransis</i>, holding that Florida investor’s negligence and breach of fiduciary duty claims against engineering firm who performed inspection of building were barred by ELD because of the contractual privity between the parties, but recognized negligent misrepresentation as an exception</p>

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		<p>to ELD and allows this claim to proceed).</p> <p><i>Moransais v. Heathman</i>, 744 So.2d 973 (Fla. 1999) (ELD does not extend to homeowner’s negligent misrepresentation claim against individual engineer who performed inspection services).</p> <p><i>Stone’s Throw Condo. Assoc., Inc. v. Sand Cove Apartments, Inc.</i>, 749 So.2d 520 (Fla. 1999) (condo association’s claims of negligent misrepresentation allowed to proceed against architect; Florida recognizes a tort cause of action against design professionals in absence of contractual privity; court suggested ordinary negligence claim may also be viable under the “special relationship” exception to ELD).</p> <p><i>Spancrete, Inc. v. Ronald E. Frazier Assocs.</i>, 630 So.2d 1197 (Fla. Dist. Ct. App. 1994) (subcontractor suing for economic losses not in contractual privity with architect could not state claim under either tort or contract).</p>
Georgia	No.	<p><i>City of Cairo v. Hightower Consulting Engineers, Inc.</i>, 629 S.E.2d 518 (Ga. App. 2006) (city allowed to sue engineering firm in tort for alleged losses arising out of design of wastewater treatment plant; negligent misrepresentation exception to ELD applies to allow action).</p> <p><i>Holloman v. Horton, Inc.</i>, 241 Ga. App. 141, 524 S.E.2d 790 (1999), <i>cert denied</i> (Ga. 2000) (ELD does not bar negligence action against construction manager if there is evidence of “passive concealment or fraud.”)</p> <p><i>Rowe v. Akin Flanders, Inc.</i>, 240 Ga. App. 766, 525 S.E.2d 123 (1999) (landowner not barred from suing contractor for negligent construction on the basis of ELD).</p> <p><i>Robert & Co. Assoc. v. Rhodes-Haverty Partnership</i>, 250 Ga. 680, 300 S.E. 2d 503 (1983) (holding that claimant may assert negligent misrepresentation claim against engineer for purely economic losses despite absence of privity. Adopts Restatement (Second) of Torts § 552, which holds that a person who supplies</p>

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		information during the course of business owes a duty of reasonable care to all persons or classes of persons who may foreseeably rely upon the information).
Hawaii	Yes.	<p><i>Ass'n of Apt. Owners v. Venture 15, Inc.</i>, 115 Haw. 232, 167 P.3d 225 (2007) (ELD bars condo association negligence claim against engineer even in absence of privity – but ELD does not bar claim for negligence by homeowner where builder has violated applicable building code).</p> <p><i>City Express, Inc. v. Express Partners</i>, 87 Hawaii 466, 959 P.2d 836 (1998) (the ELD bars an owner seeking recovery of economic losses from bringing a negligent misrepresentation claim against a design professional when there is contractual privity).</p> <p><i>State v. Bronster</i>, 82 Hawaii 32, 919 P.2d 294 (1996) (in product liability case not involving design professional, supreme court holds that ELD does not bar negligent misrepresentation claim).</p>
Idaho	Generally, ELD bars tort claims in absence of “special relationship.” A professional providing personal services to a client may qualify as having a special relationship.	<p><i>Millenkamp v. Davisco Foods Int'l</i>, 391 F. Supp.2d 872, 879 (D. Idaho 2005) (special relationship exists where a professional or quasi-professional performs personal services).</p> <p><i>Blahd v. Richard B. Smith, Inc.</i>, 108 P.3d 996 (Ida. 2005) (holding that “special relationship” and “unique circumstances” exceptions to ELD under Idaho law did not apply because there was no evidence that plaintiff homeowner relied upon geotech’s representations regarding suitability of site for construction).</p> <p><i>Nelson v. Anderson Lumber Co.</i>, 2004 WL 1146386 (Idaho App. 2004) (homeowners’ negligence claim against county and building materials supplier barred by economic loss rule; “special relationship” exception to rule did not apply to lumber company).</p> <p><i>Ramerth v. Hart</i>, 133 Idaho 194, 983 P.2d 848 (1999) (ELD prohibits buyer of airplane from bringing negligence action against mechanic who inspected plane).</p>



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		<i>Tusch Enters. v. Coffin</i> , 113 Idaho 37 (1987) (ELD bars purchaser of duplex from suing both seller and developer for negligence, but holding that a negligent representation claim was actionable).
Illinois	Yes, except in cases of “sudden, dangerous, calamitous event,” or in limited cases, if claim is for negligent misrepresentation. ELD also called the “ <i>Moorman Doctrine</i> ” in reference to seminal case of <i>Moorman Mfg. Corp. v. Nat'l Tank Co.</i> , 91 Ill. 2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (1982).	<p><i>Perez v. AMCO Ins. Co.</i>, 2009 U.S. Dist. LEXIS 22928 (N.D. Ill. Mar. 23, 2009) (good succinct description of exceptions to ELD recognized in Illinois. ELD does not apply in (1) cases involving property damage from a sudden and calamitous event, (ii) cases in which the party who incurred the property damage was not a party to any agreement, (iii) allegations of fraud, and (iv) negligent misrepresentation by one in the business of supplying information for the guidance of others).</p> <p><i>F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, L.L.C.</i>, 372 Ill. App. 3d 89, 865 N.E.2d 228, 309 Ill. Dec. 865 (Ill. App. Ct. 2007) (ELD/<i>Moorman</i> barred negligent design cause of action by LLC member against architectural firm).</p> <p><i>Moorman Mfg. Corp. v. Nat'l Tank Co.</i>, 91 Ill. 2d 69, 435 N.E.2d 443, 61 Ill. Dec. 746 (1982) (in general, purely economic losses are not recoverable in tort actions in Illinois, absent application of one of several limited exceptions, including, negligent misrepresentation cases where the defendant was "in the business of supplying information for the guidance of others in their business transactions.").</p> <p><i>GE v. Honeywell Int'l, Inc.</i>, 2006 U.S. Dist. LEXIS 19203 (D. Ill. 2006) (negligent misrepresentation is only an exception to the ELD when the person or entity making the misrepresentation is in the business of supplying information).</p> <p><i>Neumann v. Carlson Env'tl, Inc.</i>, 429 F. Supp. 2d 946 (E.D. Ill. 2006) (tort claim against environmental consultant for negligent preparation of Phase I ESA report is not barred by ELD).</p> <p><i>Cement-Lock v. Gas Tech. Inst.</i>, 2005 U.S. Dist. LEXIS 22058 (D. Ill. 2005) (“where a duty arises outside of the contract, the economic loss doctrine does</p>

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		<p>not prohibit recovery in tort for the negligent breach of that duty.” Negligent misrepresentation falls within exception to ELD).</p> <p><i>Mercury Skyline Yacht Charters v. Dave Matthews Band, Inc.</i>, 2005 U.S. Dist. LEXIS 29663 (D. Ill. App. 2005) (driver of motor coach emptied the motor coach's human waste collection tank while driving over bridge - contents fell ship and passengers below. ELD did not bar shipowner's tort claims because case fell into sudden or dangerous occurrence exception).</p> <p><i>Options Center for Independent Living v. G&V Development Co.</i>, 229 F.R.D. 149 (C.D. Ill. 2005) (developer defendant could assert cross-claim against co-defendant designer for professional malpractice arising out of plaintiffs’ claims of inaccessibility to housing under Fair Housing Amendments Act because plaintiffs alleged both economic and non-economic damages).</p> <p><i>Martusciello v. JDS Homes, Inc.</i>, 361 Ill. App. 3d 568, 838 N.E.2d 9 (2005) (court aff’d dismissal of homeowner claim against architect based on ELD; distinguished exception for claims of malpractice against attorneys and accountants).</p> <p><i>Menard, Inc. v. Countryside Indus., Inc.</i>, 2004 U.S. Dist. LEXIS 10820 (2004) (failure of retaining wall found to be “sudden, dangerous, calamitous event” – exception to economic loss doctrine).</p> <p><i>Tolan & Son, Inc. v. KLLM Architects, Inc.</i>, 308 Ill. App. 3d 18, 719 N.E.2d 288 (1999) (townhouse owner sued architect, soil engineer and structural engineer for foundation cracks; negligent misrepresentation claim dismissed because in this case, providing plans and specifications that are incorporated into finished product does not constitute the provision of information for the guidance of others in business transactions).</p> <p><i>Fireman’s Fund Insur. Co. v. SEC Donohue, Inc.</i>, 176 Ill.2d 160, 679 N.E.2d 1197 (Ill. 1997) (subcontractor subrogee could not sue engineering firm for negligence or negligent misrepresentation under ELD because engineers and</p>

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		<p>architects do not supply information to third parties but merely supply plans that are incidental to tangible product).</p> <p><i>Anderson Elec., Inc. v. Ledbetter Erection Corp.</i>, 115 Ill. 2d 146, 503 N.E.2d 246 (1987) (applying ELD to preclude plaintiff, not in direct privity with inspector, from bringing tort claim against inspector).</p>
Indiana	Yes.	<p><i>Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.</i>, 929 N.E.2d 722 (Ind. 2010) (library’s negligence claim against designer and engineer performing on-site inspection of garage construction barred by economic loss doctrine; “because library is connected with the defendants through a network or chain of contracts, the economic loss rule precludes it from proceeding in tort”).</p> <p><i>Hasse Construction Co. v. Gary Sanitation District Board</i>, 2008 U.S. Dist. LEXIS 41326 (N.D. Ind. 2008) (city’s third party complaint against construction manager dismissed because it could not seek to recover economic losses from its consultants but was limited to recovery under its contract).</p> <p><i>Gunkel v. Renovations, Inc.</i>, 822 N.E. 2d 150 (Ind. 2005) (ELD applies to contracts for services and the sale of goods provided the alleged damages do not arise from personal injury or damage to other property. Court reverses summary judgment, holding that the doctrine barred tort recovery for damage to subcontractor’s work, but allowed negligence action to recover damages to other parts of the residence to proceed because these damages were allegedly caused by the subcontractor’s installation of defective stone façade and constitute “damage to other property.”)</p>
Iowa	No.	<p><i>John T. Jones Constr. Co. v. Hoot Gen. Constr.</i>, 543 F. Supp. 2d 982 (S.D. Iowa 2008) (In Iowa a design engineer may be held liable for failing to exercise the ordinary skill of the profession in drafting plans and specifications or in supervising construction work. The extent of that duty is not limited by privity of contract. The duty extends to those who would foreseeably rely on the</p>

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		<p>engineer's services, or be harmed by their negligent performance. The economic loss rule does not apply to claims of professional negligence).</p> <p><i>Conveyor Co. v. Sunsource Tech. Servs., Inc.</i>, 398 F. Supp. 2d 992 (N.D. Iowa 2005) (Iowa courts draw line between tort and contract rather than between physical harm and economic loss. When the loss relates to product deterioration, internal breakdown or non-accidental cause, the remedy lies in contract).</p> <p><i>Holden Farms, Inc. v. Hog Slat Inc.</i>, 347 F.3d 1055 (8th.Cir. 2003) (buyer of hog nursery sued design/builder of hog nursery in tort; builder not in business of supplying information for guidance of others).</p> <p><i>Richards v. Midland Brick Sales Company, Inc.</i>, 551 N.W.2d 649 (Iowa App. 1996) (homeowner claim against contractor for negligent brickwork barred by economic loss doctrine).</p>
Kansas	Yes.	<p><i>Prendiville v. Contemporary Homes, Inc.</i>, 32 Kan. App. 2d 435, 83 P.3d 1257 (2004) (ELD bars negligent construction claim brought by homeowner against contractor, finding that allowing negligence action to go forward would effectively nullify contractor's one year express warranty), <i>review denied</i>, 278 Kan. 847 (2004).</p> <p><i>Koss Construction v. Caterpillar, Inc.</i>, 25 Kan.App.2d 200, 960 P.2d 255, <i>review denied</i> (1998) (purchaser of hydraulic roller sued manufacturer for products liability; ELD barred negligence or strict liability claims).</p>
Kentucky	ELD probably bars negligence claim, but does not bar negligent misrepresentation claim.	<p><i>Westlake Vinyls, Inc. v. Goodrich Corp.</i>, 518 F. Supp. 2d 955 (D. Ky. 2007) (ELD bars tort claims arising out of "business purchases" and not just the purchase of goods).</p> <p><i>Pioneer Res. Corp. v. Nami Res. Co. LLC</i>, 2006 U.S. Dist. LEXIS 43192 (D. Ky. 2006) (Kentucky Supreme Court would not likely extend ELD outside the products liability, business purchase or construction cases).</p>



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		<p><i>Davis v. Siemens Med. Solutions USA, Inc.</i>, 2005 U.S. Dist. LEXIS 27232 (D. Ky. 2005) (ELD applies to products liability cases but not to fraudulent inducement claim).</p> <p><i>Presnell Constr. Managers v. EH Constr., LLC</i>, 134 S.W.3d 575 (Ky. 2004) (contractor claim of negligent misrepresentation against construction manager was not barred by ELD).</p>
Louisiana	Yes, if damage is defective work; no, if damage is caused by defective work.	<p><i>Young v. City of Plaquemine</i>, 818 So.2d 892 (La. App. 2002) (painter sued contractor and architect for personal injuries sustained during paint removal; court acknowledged that if damage sued for is defective work, only those with contractual privity may sue for breach. If damage is caused by defective work, a tort action may be pursued).</p> <p><i>Standard Roofing Co. v. Elliot Constr. Co., Inc.</i>, 535 So.2d 870 (La. App. 1988) (roofing subcontractor could sue architect for negligence but failed to produce evidence to support claim of breach of duty of care).</p>
Maine	Yes.	<p><i>Maine Rubber Int'l v. Envtl. Mgmt. Group</i>, 298 F. Supp. 2d 133 (D. Me. 2004) (land buyer's claim against engineering firm for negligence and negligent misrepresentation in connection with Phase I ESA barred by ELD).</p> <p><i>Oceanside at Pine Point Condo Owners Ass'n v. Peachtree Doors, Inc.</i>, 659 A.2d 267 (Me. 1995) (applying economic loss rule to preclude plaintiff's claim against engineer for negligent misrepresentation).</p>
Maryland	Yes, unless (1) there is a contract between design professional and party asserting claim; (2) the alleged defect created substantial risk of death or injury; or (3) there is an "intimate nexus" between design professional and non-client.	<p><i>Nat'l Labor College, Inc. v. Hillier Group Architecture N.J., Inc.</i>, 2010 U.S. Dist. LEXIS 95825, 13-14 (D. Md. Sept. 14, 2010) (declining to dismiss on grounds of ELD and reframing the ELD question as independent duty question: "the real question here is whether Hillier was bound by any duty independent of the contract. The complaint alleges that Hillier had a duty to meet the ordinary standard of care required of architects and engineers, but does not cite to any source of that duty outside of the contract. On the other hand, Plaintiff does allege that it engaged Hillier to perform professional services, normally giving</p>

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		<p>rise to the duty. In any event, Defendant's argument that the economic loss rule bars this claim is misplaced. <i>See City of Richmond v. Madison Mgmt. Group, Inc.</i>, 918 F.2d 438, 446 (4th Cir. 1990) ("[I]f, when the surface is scratched, it appears that the defendant has breached a duty imposed by law, not by contract, the economic loss rule should not apply.").</p> <p><i>Potomac Constructors, LLC v. EFCO Corp.</i>, 530 F. Supp. 2d 731 (D. Md. 2008) (negligence claim against engineer not barred by ELD because ELD does not bar recovery of cost to replace negligent work that poses a substantial and reasonable risk of death or personal injury).</p> <p><i>RLI Ins. Co. v. John H. Hampshire Inc.</i>, 461 F. Supp. 2d 364 (D. Md. 2006) (contractor's surety could not sue university's architect in tort for allegedly failing to detect that contractor was installing wall panels incorrectly).</p> <p><i>Heritage Harbour LLC v. John J. Reynolds, Inc.</i>, 143 Md. App. 698, 795 A.2d 806 (2002) (ELD barred developer's statutory contribution and indemnification claims for alleged defects in condos).</p> <p><i>Walpert, Smullian & Blumenthal v. Katz</i>, 361 Md. 645, 762 A.2d 582 (Md. App. 2000) (malpractice claim brought by non-client against accounting firm allowed to proceed under theory of negligent misrepresentation because non-client alleged facts sufficient to demonstrate that accounting firm knew of non-client's reliance on financial information).</p> <p><i>Milton Co. v. Council of Unit Owners of Bentley Pl. Condo.</i>, 121 Md. App. 100, 708 A.2d 1047 (1998), <i>aff'd on other grounds</i>, 354 Md. 264 (1999) (court recognized two exceptions to ELD in case by condo association against builder: (1) defect creates substantial risk of death or personal injury; and (2) parties share "intimate nexus." Claim allowed to proceed on first exception).</p> <p><i>Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.</i>, 308 Md. 18, 517 A.2d 336 (Md. App. 1986) (court of appeals</p>

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		required privity of contract between builder and architect for an action in tort to be allowed; however, court created limited exception in cases where a dangerous condition was discovered before it resulted in a personal injury).
Massachusetts	Negligence claims barred. Negligent misrepresentation claims not barred.	<p><i>Thomas Brennan v. Joel P. Morano et al.</i>, 24 Mass. L. Rep. 101, 2008 Mass. Super. LEXIS 137 (2008) (developer’s tort claim against engineer for alleged negligence in laying out lots for development was barred by ELD).</p> <p><i>Pro Con, Inc. v. J&B Drywall, Inc.</i>, 20 Mass. L. Rep. 466 (Mass. Super. Ct. 2006) (contractor filed suit against subcontractor and exterior insulating and finish system (EIFS) manufacturer, alleging water intrusion due to faulty application of EIFS and sealant. Court held claims barred by ELD because no other property was damaged, contractor only lost benefit of bargain under the contract).</p> <p><i>Josefek v. Loitherstein Envtl. Eng’g</i>, 2004 Mass. Super. LEXIS (2004) (negligent misrepresentation claims are an exception to the ELD).</p> <p><i>Aldrich v. ADD Inc.</i>, 437 Mass. 213, 770 N.E.2d 447 (2002) (claim for negligent design of condominium not barred by ELD because plaintiff alleged physical property damage to condo).</p> <p><i>Berish v. Bornstein</i>, 437 Mass. 252, 770 N.E.2d 961 (2002) (condo association sued developer and contractor for negligent design and construction; claim not barred by ELD because defects caused property damage beyond the damage to condo units themselves).</p> <p><i>Nota Constr. Corp. v. Keyes Assocs.</i>, 45 Mass App. 15, 694 N.E.2d 401 (1998) (economic losses resulting from negligent misrepresentation are exception to the ELD, when claimant reasonably relies upon design professional’s work product).</p>
Michigan	ELD does not apply to claims arising out of contract for professional services or to	<i>Taxi-Rockford v. GMC</i> , 2006 Mich. App. LEXIS 1777 (2006) (holding that ELD does not apply to “claims emanating from a contract for services”).

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	claims of fraud in the inducement.	<p><i>Alternative Aviation Servs. V. Meggitt [UK] Ltd.</i>, 2006 U.S. App. LEXIS 31497 (6th Cir. 2006) (ELD does not bar fraud in the inducement claims in Michigan).</p> <p><i>Caldwell v. Delta Land Surveying & Eng'g, Inc.</i>, 2004 Mich. App. LEXIS 1132 (2004) (without expressly citing to ELD, court holds that lack of privity bars plaintiffs' claims against developer because damages sought were purely economic).</p> <p><i>Quest Diagnostics, Inc. v. MCI WorldCom, Inc.</i>, 254 Mich. App. 372, 656 N.W.2d 858 (2002), <i>review denied</i>, 469 Mich. 975 (2003) (holding that ELD does not apply in absence of privity of contract. Court observes that application of the ELD in Michigan has been limited to contracts for the sale of goods and questions whether the doctrine extends to services contracts).</p> <p><i>Neibarger v. Universal Cooperatives, Inc.</i>, 439 Mich. 512, 486 N.W.2d 612 (1992) (dairy farmers' negligence and products liability action against designers and sellers of defective milking system; claims barred by ELD).</p> <p><i>Bacco Construction Co v American Colloid Co</i>, 148 Mich. App 397, 384 NW2d 427 (1986) (holding that contractor can proceed with negligence action to recover purely economic losses from project engineer. Court applies a foreseeable risk of harm analysis).</p>
Minnesota	No.	<p><i>McCarthy Well Co. v. St. Peter Creamery, Inc.</i>, 410 N.W.2d 312 (Minn. 1987) (Where the "predominant factor" in an agreement is the performance of services rather than the sale of goods, the ELD does not apply).</p> <p><i>See</i> Minn. Stat. § 604.10 (in sale of goods, economic loss rule does not bar consumer's tort claim; ELD does bar such claim between merchants).</p> <p><i>Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assoc.</i>, 386 N.W.2d 375 (Minn. App. 1986) (engineer liable to subcontractor for negligence in drafting and interpreting specifications; rejected application of ELD).</p>

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Mississippi	No.	<p><i>Lyndon Prop. Ins. Co. v. Duke Levy & Assocs.</i>, 475 F.3d 268, 274 (5th Cir. 2007) (ELD does not bar tort action against engineer for negligent inspection and approval of work because Mississippi does not apply ELD outside of the products liability claim arena).</p> <p><i>State Farm Mut. Auto. Insur. Co. v. Ford Motor Co.</i>, 736 S.2d 384 (Miss. App. 1999) (court adopted ELD in non-design firm case; rule barred car buyer’s tort claim against car dealer).</p> <p><i>Magnolia Constr. Co., Inc. v. Mississippi Gulf South Engineers, Inc.</i>, 518 So.2d 1194 (Miss. 1988) (contractor allowed to pursue negligence claim against architect – no discussion of ELD).</p> <p><i>May v. Ralph L. Dickerson Constr. Corp.</i>, 560 So. 2d 729 (Miss. 1990) (statutory provision authorizes negligence action to recover economic losses against architect despite lack of privity. No discussion of ELD).</p> <p><i>But see</i>, Miss. Code Ann. § 11-7-20 (“In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action”).</p>
Missouri	Yes, if plaintiff has no contract with design professional. No, if plaintiff is client in privity with design professional.	<p><i>Summer Chase Second Addition Subdivision Homeowners Assoc. v. Taylor-Morley, Inc.</i>, 146 S.W.3d 411 (Mo. App. 2004) (holding the ELD precludes negligent construction claim brought by homeowners’ association against contractor and, in the alternative, that negligence claim is barred absent privity between the parties).</p> <p><i>Korte Constr. Co. v. Deaconess Manor Ass’n</i>, 927 S.W.2d 395 (Mo. Ct. App., 1996) (construction defect case holding that ELD barred negligence action where parties are in privity and the only losses alleged are economic).</p> <p><i>Business Men's Assurance Co. of Am. v. Graham</i>, 891 S.W.2d 438 (Mo. App.</p>

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		<p>1994) (architect owes independent professional duty of care to client with whom it has privity of contract; economic ELD does not bar negligence claims).</p> <p><i>Fleischer v. Hellmuth, Obata & Kassabaum, Inc.</i>, 870 S.W.2d 832 (Mo. App. 1993) (holding that, generally, “an architect owes no tort duty of care and is not liable to a general contractor or construction manager for damages for economic losses arising as a result of the architect’s negligent performance of its contract with the owner”).</p> <p><i>Sharp Bro. Contracting Co. v. American Hoist & Derrick Co.</i>, 703 S.W.2d 901 (Mo. App. 1986) (court adopted ELD in case involving alleged negligent design of crane).</p> <p><i>Bryant v. Murray-Jones-Murray, Inc.</i>, 653 F. Supp. 1015 (D. Mo. 1985) (upholding negligence claim against architect; application of ELD limited to sales of goods. Opinion relies upon several foreign cases that are no longer good law).</p>
Montana	No.	<p><i>Glacier Tennis Club at the Summit, LLC v. Treweek Constr. Co., Inc.</i>, 320 Mont. 351, 87 P.3d 431 (2004) (contractor may recover for economic loss against project engineer or architect when design professional knew or should have known that plaintiff was at risk in relying on information supplied).</p> <p><i>Jim’s Excavating Serv., Inc. v. HKM Assoc.</i>, 265 Mont. 494, 878 P.2d 248 (1994) (contractor sued project engineer for extra work and delay damages allegedly caused by engineer’s negligent design and supervision of water pipeline project; court allowed claim to proceed under Section 552 of Restatement (Second) of Torts).</p>
Nebraska	Unclear at this time.	<p><i>Nat’l Crane Corp. v. Ohio Steel Tube Co.</i>, 213 Neb. 782, 332 N.W.2d 39 (1983) (buyer of defective crane parts cannot sue manufacturer in tort under economic loss rule).</p>

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Nevada	Yes, if parties are in privity and claims arise out of that contract; no, if claim is being asserted by homeowner against contractor	<p><i>Terracon Consultants Western, Inc., et al. v. Mandalay Resort Group</i>, 206 P.3d 81 (Nev. 2009) (in commercial property construction defect action for purely economic losses, ELD applies to bar tort claims against design professionals who have provided professional services in process of developing or improving property).</p> <p><i>SMI Owen Steel Co., Inc. v. Marsh USA, Inc.</i>, 520 F.3d 432 (5th Cir. 2008) (Court interpreted Nevada law to exclude application of the ELD in cases for negligent provision of professional services – allowing a claim for negligent failure to procure insurance).</p> <p><i>G.K. Las Vegas L.P. v. Simon Prop. Group, Inc.</i>, 460 F. Supp. 2d 1222 (D. Nev. 2006) (Nevada has adopted the ELD and tort claims will be barred if based on breached contractual promises).</p> <p><i>Skender v. Brunsonbuilt Constr. & Dev. Co. LLC</i>, 148 P.3d 710 (Nev. 2006) (homeowner’s tort claim against contractor for negligent construction governed by statute, not ELD).</p> <p><i>Olson v. Richard</i>, 89 P.3d 31 (Nev. 2004) (ELD does not apply to preclude tort claims resulting from construction defect in newly constructed residential property; NRS § 40.640 governs contractor liability for construction defect cases and preserves right of purchasers of newly constructed property to sue in tort).</p> <p><i>Calloway v. City of Reno</i>, 116 Nev. 250, 993 P.2d 1259 (2000) (townhouse owners’ negligence claims against contractors and subcontractors barred by ELD).</p>
New Hampshire	Yes.	<p><i>Plourde Sand & Gravel v. JGI Eastern, Inc.</i>, 154 N.H. 791, 917 A.2d 1250 (N.H. 2007) (New Hampshire applies ELD to construction cases and barred gravel supplier’s tort claim against inspector who erroneously determined that gravel failed to meet spec).</p>

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		<p><i>Lempke v. Dagenais</i>, 130 N.H. 782, 547 A.2d 290 (1988) (reaffirming economic loss doctrine bars recovery of purely economic loss damages in tort; but allowing recovery of economic loss for breach of warranty).</p> <p><i>Ellis v. Robert C. Morris, Inc.</i>, 128 N.H. 358, 513 A.2d 951 (1986) (home buyers cannot ordinarily recover in a negligence action for purely economic loss against builder, overruled on other grounds).</p>
New Jersey	Unclear. Negligent misrepresentation claims appear to be allowed; fraud in the inducement is allowed.	<p><i>Hunter v. Sterling Bank</i>, 2010 U.S. Dist. LEXIS 111548 (E.D. Pa. Oct. 19, 2010) (noting that New Jersey courts have suggested that a tort claim premised on a legal duty independent from the duties arising from the contract will survive the economic loss doctrine).</p> <p><i>CapitalPlus Equity, LLC v. Prismatic Dev. Corp.</i>, 2008 U.S. Dist. LEXIS 54054 (D. N.J. 2008) (ELD applies to contracts for services).</p> <p><i>Vukovich v. Haifa, Inc.</i>, 2007 U.S. Dist. LEXIS 13344 (D. N.J. 2007) (buyer claimed seller of building materials committed fraud when it did not deliver what it promised to deliver; court allowed fraud in the inducement claim to proceed despite adoption of ELD in New Jersey).</p> <p><i>Titan Stone, Tile & Masonry, Inc. v. Hunt Constr. Group, Inc.</i>, 2007 U.S. Dist. LEXIS 4661 (D. N.J. 2007) (panelized wall subcontractor claim against owner's engineer for fraud and conversion barred by ELD).</p> <p><i>Wartsila NSD N. Am., Inc. v. Hill Int'l, Inc.</i>, 342 F. Supp. 2d 267 (D. N.J. 2004) (ELD does not bar contractor's action against engineering firm for negligent misrepresentation and negligent hiring in case in which employee listed fraudulent credentials in resume).</p> <p><i>Conforti & Eisele, Inc. v. John C. Morris Associates</i>, 175 N.J. Super. 341, 418 A.2d 1290 (1980) (third party contractor allowed to sue design professional who prepared mechanical plans under tort theory).</p>

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New Mexico	No if claim is professional malpractice asserted by client in contractual privity; unclear as to non-clients	<p><i>Farmers Alliance Mut. Ins. Co. v. Naylor</i>, 452 F. Supp. 2d 1167 (D. N.M. 2006) (federal court predicts New Mexico Supreme Court will apply ELD to contracts for services and contracts for sale of goods when the parties to an agreement are sophisticated commercial entities; however, ELD will not bar a claim for professional malpractice).</p> <p><i>Adobe Masters, Inc. v. Downey</i>, 118 N.M. 547, 883 P.2d 133 (1994) (architect’s client can sue architect in either tort or in contract).</p>
New York	No if relationship between design professional and third party is “functional equivalent to privity of contract” or if there is property damage beyond the project property.	<p><i>Castle Vil. Owners Corp. v. Greater N.Y. Mut. Ins. Co.</i>, 2008 NY Slip Op 9470 (N.Y. App. Div. 1st Dep’t 2008) (design professional may be subject to tort liability for failure to exercise reasonable care, irrespective of contractual duties).</p> <p><i>Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects</i>, 192 A.D.2d 151, 601 N.Y.S.2d 116 (N.Y. App. Div. 1993) (public policy exception to ELD permits recovery under a tort theory, because “separate tort liability [] can arise independently of the contractual relationship between the parties where the nature of the performance called for is affected with a significant public interest and failure to perform the service carefully and competently can have catastrophic consequences.”).</p> <p><i>Bri-Den Const. Co. v. Kapell & Kostow Architects</i>, 867 N.Y.S.2d 437 (N.Y. App. Div. 2008) (dismissing action for lack of contractual privity or functional equivalent of privity between contractor and architect).</p> <p><i>Weiss v. Polymer Plastics Corp.</i>, 802 N.Y.S.2d 174 (N.Y. App. Div. 2005) (ELD barred homeowner claim for defective stucco that damaged substrate. Tort recovery in strict products liability and negligence against a manufacturer not available to downstream purchaser where losses flow from damage to the property that was the subject of the contract and where personal injury not alleged).</p> <p><i>ECOR Solutions, Inc. v. Malcolm Pirnie, Inc.</i>, Cause No. 1:02-cv-01103 (N.D.</p>

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		<p>N.Y. 2005) (contractor allowed to proceed in tort against engineering firm on theory that contractor has a relationship with firm that was “functional equivalent of privity” of contract).</p> <p><i>QB LLC v. A/R Architects LLP</i>, 19 A.D.2d 675, 797 N.Y.S.2d 552 (2005) (client could sue architect in tort for failing to determine proper code provisions for maximum building height and set-backs).</p> <p><i>Hodgson, Russ Andrews, Woods & Goodyear, LLP v. Isolatek Int’l Corp.</i>, 300 A.D.2d 1051, 752 N.Y.S.2d 767 (N.Y. App. Div. 2002) (ELD would ordinarily preclude tort recovery against contractor and consultant, but damage occurred as result of mold and fungus, which caused property damage is recoverable in tort).</p> <p><i>City of Kingston Water Dept. v. Charles A. Manganaro Consulting Engineers, P.C.</i>, 2002 U.S. Dist. LEXIS 25505 (N.D. N.Y. 2002) (engineer defendant can be held liable in tort to client for economic losses under theory of malpractice and may seek contribution from other engineering firms who may be at fault).</p> <p><i>Hydro Investors, Inc. v. Dunlevy</i>, 227 F.3d (2d Cir. 2000) (economic loss doctrine does not bar tort recovery of economic damages from engineer when liability arose from breach of professional duty).</p> <p><i>17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass’n of Am.</i>, 259 A.D.2d 75, 693 N.Y.S.2d 554 (1999) (seller of building may pursue tort claim against mechanical engineer it hired to design smoke purge system even though losses were purely economic).</p> <p><i>Joseph v. David M. Schwarz/Architectural Servs., P.C.</i>, 957 F. Supp. 1334 (S.D.N.Y. 1997) (economic loss doctrine bars negligence claim against design professional when parties are in privity).</p> <p><i>Strategem Dev. Corp. v. Heron Int’l N.V.</i>, 153 F.R.D. 535 (S.D.N.Y. 1994) (construction manager could sue architect for economic loss, even in absence of</p>

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		privity of contract, because the relationship was the “functional equivalent” to privity and thus imposed a duty on the architect).
North Carolina	No.	<p><i>Lord v. Customized Consulting Specialty, Inc.</i>, 643 S.E.2d 28 (N.C. App. 2007) (homeowner sued truss designer in tort for negligent design; court held claim not barred by ELD even though parties had not contract).</p> <p><i>Pompano Masonry Corp. v. HDR Architecture</i>, 598 S.E.2d 608 (N.C. App. 2004) (subcontractor allowed to sue project expediter in tort; no express discussion of ELD).</p> <p><i>Ellis-Don Constr., Inc. v. HKS, Inc.</i>, 353 F. Supp. 2d 603 (M.D.N.C. 2004) (court rejects economic loss argument and allows contractor’s negligence claim against consultant despite absence of privity. Predicts that N.C. Supreme Court will refuse to apply ELD to service contracts).</p> <p><i>Davidson & Jones, Inc. v. County of New Hanover</i>, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (without discussing ELD, court holds that claimants seeking to recover economic damages can maintain negligent misrepresentation action against design professional absent privity).</p>
North Dakota	Unclear. No opinion addressing application of ELD to service contracts.	<p><i>Dakota Gasification Co. v. Pascoe Bldg. Sys</i>, 91 F.3d 1084 (8th Cir. 1996) (holding that North Dakota’s ELD under UCC bars tort claims for economic losses brought by plant owner against contractor who supplied defective building, finding that “thrust” of the contract was the sale of goods).</p> <p><i>Tioga Public School Dist. #15 v. U.S. Gypsum Co.</i>, 984 F.2d 915 (9th Cir. 1993) (ELD did not bar school district’s tort claim against supplier of asbestos-containing material because tiles had become friable and released asbestos).</p>
Ohio	Yes, if no contractual relationship between litigants; negligent misrepresentation claims are not barred.	<i>Waverly City Sch. Dist. Bd. of Educ. v. Triad Architects, Inc.</i> , 2008 Ohio 6917 (Ohio Ct. App., Franklin County Dec. 30, 2008) (in the absence of privity of contract or a sufficient nexus that can serve as a substitute for contractual privity, no cause of action exists in tort to recover economic damages against



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		<p>design professionals involved in drafting plans and specifications).</p> <p><i>Int'l Fid. Ins. Co. v. T C Architects, Inc.</i>, 2006 Ohio 4869, 861 N.E.2d 612 (2006) (Court awarded summary judgment to architecture firm where surety for construction firm sued architecture firm for professional negligence, negligent misrepresentation, breach of implied warranty and breach of assumed duty. Court rejected notion that the excessive control doctrine could substitute for contractual privity, and held that in the absence of a contract or a substitute for contractual privity, there is no general duty to protect another party from purely economic harm).</p> <p><i>Spring Creek Condominium Ass'n v. Colony Development Corp.</i>, 2008 Ohio 1420, 2008 Ohio App. LEXIS 1230 (Ohio App. 2008) (affirming dismissal of tort claims by purchasers of condominium units against architect for purely economic losses because no privity of contract was present and the architect owed no duty of care to the plaintiffs).</p> <p><i>Wagner-Smith Co. v. Ruscilli Constr. Co.</i>, 2006 Ohio 5463 (Ct. Common Pleas 2006) (electrical contractor's claim of tortious interference with contract with university, asserted against construction manager, barred by ELD).</p> <p><i>Mosser Const., Inc. v. W. Waterproofing Co.</i>, 2006 Ohio 3607 (2006) (contractor not allowed to sue architect in tort for alleged negligent supervision of construction).</p> <p><i>J.F. Meskill Enters., LLC v. Activity</i>, 2006 U.S. Dist. LEXIS 41491 (N.D. Ohio 2006) (negligent misrepresentation claims are not barred by ELD in Ohio).</p> <p><i>Corporex Development & Const. Management v. Shook, Inc.</i>, 101 Ohio St. 3d 412, 835 N.E.2d 701 (Ohio Supreme Court 2005) (owner cannot sue subcontractor in tort to recover economic losses).</p> <p><i>Ohio Plaza Assoc., Inc. v. Hillsboro Assoc.</i>, 1998 Ohio App. LEXIS 2977 (1998) (discussion of "sufficient nexus" exception to ELD).</p>

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		<p><i>Clevecon, Inc. v. Northeast Ohio Reg. Sewer Dist.</i>, 90 Ohio App. 3d 215, 628 N.E.2d 143 (1993) (contractor can sue tunnel designer for professional malpractice, when designer’s control over worksite caused contractor to incur economic losses; court holds “sufficient nexus” exception to ELD replaces need for privity between parties).</p> <p><i>Tomb & Assocs. v. Wagner</i>, 82 Ohio App. 3d 363, 612 N.E.2d 468 (1992) (holding contractor’s claim for economic loss against architect frivolous where there was no contract between contractor and architect and no independent tort duty).</p> <p><i>Floor Craft Floor Covering, Inc. v. Parma Comm. Gen’l Hosp. Ass’n</i>, 54 Ohio 1, 560 N.E.2d 206 (1990) (in absence of contractual privity, no cause of action exists to recover economic damages against design professional who drafted plans and specs).</p>
Oklahoma	Unclear because case does not discuss ELD.	<i>Boren v. Thompson & Assoc.</i> , 999 P.2d 438 (Ok. 2000) (subcontractor sued architect hired to oversee construction for failing to ensure that general contractor had secured payment bond before certifying payments to contractor; claim allowed to proceed – no explicit mention of ELD).
Oregon	ELD will bar claim if no “special relationship” exists between litigants. Oregon court of appeals defines “economic loss” very narrowly; deterioration to building because of defective construction is property damage and not “economic loss.”	<p><i>Harris v. Suniga</i>, 344 Ore. 301, 180 P.3d 12 (2008) (economic loss doctrine does not bar negligence claim against builder because property damage is not “economic loss”).</p> <p><i>Bunnell v. Dalton Construction, Inc.</i>, 210 Ore. App. 138, 149 P.3d 1240 (2006) (homeowner allowed to sue builder for negligent construction; damage to house deemed “property damage” and not “economic loss”).</p> <p><i>Harris v. Harvey Cain Construction, Inc.</i>, 209 Ore. App. 410, 149 P.3d 224 (2006) (same), <i>review granted</i>, 2007 Ore. LEXIS 454 (Ore. 2007).</p> <p><i>Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP</i>, 336 Or. 329, 83 P.3d 322 (2004) (steel mill could sue accountant in tort to recover economic losses</p>

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		<p>because of “special relationship” that existed between them).</p> <p><i>Int'l Paper Co. v. TCR Northwest 1993, Inc.</i>, 2004 U.S. Dist. LEXIS 10092 (D. Or. 2004) (ELD bars negligent construction claim against subcontractors, citing <i>Jones</i>).</p> <p><i>Jones v. Emerald Pac. Homes, Inc.</i>, 188 Or. App. 471, 71 P.3d 574, <i>review denied</i>, 336 Or. 125 (2003) (upholding dismissal of homeowners’ negligence claim against contractor for breach of duties imposed by contract absent special relationship. Court does not discuss ELD).</p> <p><i>Onita Pac. Corp.</i> 815 Or. 149, 843 P.2d 890 (1992) (discussion of ELD and its application to legal malpractice claims; states in dicta that relationship between design professionals and their clients may give rise to a duty of care, the breach of which could support a claim in negligence for purely economic harm).</p>
Pennsylvania	Negligence claims are barred; negligence misrepresentation claims are not barred.	<p><i>Excavation Technologies, Inc. v. Columbia Gas Co.</i>, 985 A.2d 840, 2009 Pa. LEXIS 2794 (Pa. 2009) (appellate court properly dismissed contractor’s negligent misrepresentation claim against gas company, because legislature did not intend for public utility companies to be liable for economic harm caused by an inaccurate response under the One Call Act and did not provide a private cause of action for economic losses).</p> <p><i>Waynesborough Country Club of Chester County v. Diedrich Niles Bolton Architects, Inc.</i>, 2008 U.S. Dist. LEXIS 18746 (E.D. Penn. 2008) (architect’s claims for common law contribution and indemnity against general contractor allowed to proceed for recovery of property damage only; claims for economic damages barred by ELD).</p> <p><i>McElwee Group, LLC v. Mun. Auth. of Borough of Elverson</i>, 476 F. Supp. 2d 472, 2007 U.S. Dist. LEXIS 16115 (E.D. Penn. 2007) (contractor’s fraud claim against engineer not barred by ELD because Pennsylvania allows ELD claims under Restatement Second Torts § 552).</p>

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		<p><i>Retail Brand Alliance, Inc. v. Rockvale Outlet Ctr.</i>, 2007 U.S. Dist. LEXIS 7318 (E.D. Penn. 2007) (<i>Bilt-Rite</i> narrowly construed to allow negligent misrepresentation claim only against architect or engineer with whom plaintiff had no contractual privity; not applicable to lessee's claim against lessor).</p> <p><i>Bilt-Rite Contrs. v. Architectural Studio</i>, 866 A.2d 270 (Pa. 2005) (carving out exception to ELD and holding that ELD does not bar contractors negligent misrepresentation claim against architect who was not in privity when contractor reasonably relied upon defective plans and specifications).</p> <p><i>Rock v. Voshell</i>, 397 F. Supp. 2d 616 (E.D. Pa. 2005) (ELD bars plaintiffs from recovering economic damages in tort when their entitlement flows only from a contract).</p> <p><i>David Pflumm Paving & Excavation, Inc. v. Foundation Services Co.</i>, 816 A.2d 1164 (Pa. Super. Ct. 2003) (excavation subcontractor's negligence and misrepresentation claims against township's inspector, architect and engineer dismissed under ELD).</p> <p><i>Rapidigm, Inc. v. ATM Management Services, LLC</i>, 63 Pa. D & C 4th 234 (2003) (ELD precluded negligence claim against computer consultant).</p> <p><i>Blue Mt. Mushroom Co. v. Monterey Mushroom</i>, 246 F. Supp. 2d 394 (D. Pa. 2002) (claims for negligent misrepresentation barred by ELD).</p> <p><i>Sun Co., Inc. v. Badger Design and Constr., Inc.</i>, 939 F. Supp. 365 (E.D. Pa. 1996) (refinery not allowed to sue construction management firm for negligence under ELD).</p>
Rhode Island	Not in consumer transactions, only in cases of commercial entities with equal bargaining power.	<p><i>Franklin Grove Corp. v. Drexel, et. al.</i>, 936 A.2d 1272 (R.I. Supreme Ct. 2007) (application of ELD is limited to cases involving commercial entities).</p> <p><i>Triton Realty L.P. v. Almeida</i>, 2006 R.I. Super. LEXIS 29 (R.I. Super. Ct. 2006) (Supreme Court has recognized the ELD, but limits its application to disputes involving commercial entities yielding equal bargaining power. The</p>



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		<p>ELD does not apply in consumer transactions).</p> <p><i>Anderson v. Garafalo & Assocs., Inc.</i>, 2003 R.I. Super. LEXIS 144 (2003) (engineer could raise lack of privity as defense to plaintiff's negligence claim).</p> <p><i>Rousseau v. K.N. Construction, Inc.</i>, 727 A.2d 190 (R. I. 1999) (purchaser of real property allowed to sue engineer hired by vendors for negligence in performing percolation tests).</p> <p><i>Forte Bros., Inc. v. Nat'l Amusements, Inc.</i>, 525 A.2d 1301 (R.I. 1987) (contractor allowed to sue architect/site engineer for negligent performance of oversight duties).</p>
South Carolina	No. Design professionals may have a duty separate and distinct from contractual duties such that ELD would not prohibit a tort action.	<p><i>Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc.</i>, 320 S.C. 49, 463 S.E.2d 85 (1995) (contractor allowed to sue design professional for economic losses because design professional has duty not to negligently design or supervise project).</p> <p><i>Beachwalk Villas v. Martin</i>, 305 S.C. 144, 406 S.E.2d 372 (1991) (architect may be held liable to homebuyer for negligence in connection with home construction even when no contractual privity exists between homebuyer and architect).</p>
South Dakota	Unclear. While 1993 case suggest no bar for design professional malpractice claims, 1994 construction case imposed bar under ELD.	<p><i>Fisher Sand & Gravel Co. v. State by & Through South Dakota DOT</i>, 588 N.W.2d 864 (S.D. 1997) (reversing jury's award of negligence damages where only duties alleged to have been breached were contractual, distinguishing <i>Mid-Western</i> without any reference to ELD).</p> <p><i>City of Lennox v. Mitek Indus., Inc.</i>, 519 N.W.2d 330 (S.D. 1994) (applying ELD to preclude tort claim against subcontractor based on allegedly negligent design).</p> <p><i>Mid-Western Elec., Inc. v. DeWild Grant Rekert & Assocs. Co.</i>, 500 N.W. 2d 250 (S.D. 1993) (privity not required to sustain claim for professional negligence; electrical subcontractor allowed to sue engineering firm who</p>

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		prepared specifications and gave advice regarding installation of fire detection system).
Tennessee	Yes as to ordinary negligence; no as to negligent misrepresentation.	<p><i>Amsouth Erectors, LLC v. Skaggs Iron Works, Inc.</i>, 2003 Tenn. App. LEXIS 551 (2003) (subcontractor’s claim against construction management firm dismissed because of failure to prove negligent misrepresentation, an exception to ELD).</p> <p><i>United Textile Workers of America, AFL-CIO, CLC v. Lear Siegler Seating Corp.</i>, 825 S.W.2d 83 (1992) (in non-design professional case, union’s claims against factory owner for nonpayment of wages dismissed because there can be no recovery for purely economic losses resulting from defendant’s negligence).</p> <p><i>John M. Martin Co., Inc. v. Morse/Diesel, Inc.</i>, 819 S.W.2d 428 (Tenn. 1991) (subcontractor can sue construction manager for negligent misrepresentation; no privity required).</p>
Texas	Yes.	<p><i>Archon Invs. v. Great Am. Lloyds Ins. Co.</i>, 174 S.W.3d 334 (Tex. App. 2005) (economic loss doctrine does not apply to insurance company’s duty to defend its insured).</p> <p><i>Goose Creek Consol. Indep. Sch. Dist. v. Jarrar’s Plumbing, Inc.</i>, 74 S.W.3d 486 (Tex. App.), <i>review denied</i>, (2002) (school district’s tort claim against architect and contractor for plumbing defects barred by ELD).</p> <p><i>Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.</i>, 29 S.W.3d 282 (Tex. App. 2000) (excavator’s negligence against gas line operator barred by ELD).</p> <p><i>Southwestern Bell Telephone Co. v. DeLanney</i>, 809 S.W.2d 493 (Tex. 1991) (party may only maintain a tort action, in addition to a breach of contract action if the tort action is independent of the contract action – court looks to nature of the damages in determining whether an independent tort exists).</p>
Utah	CCI and SME cases suggest ELD bar,	<i>Sunridge Dev. Corp. v. RB&G Eng'g, Inc.</i> , 230 P.3d 1000 (Utah 2010) (ELD barred negligence claims against engineering firm arising from an alleged

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	although subsequent case law not clear.	<p>inadequate analysis of the geologic condition of a development site; exception to ELD for recognized independent duty of care does not apply; court rejected petitioner's argument that, because an engineer provides specific and complicated information, engineer should be subject to a duty outside of any contract. Since there is no independent duty to refrain from acting negligently, petitioner's argument that engineer has an independent duty to Petitioners that overcomes the existence of the contracts, was misplaced and unpersuasive).</p> <p><i>Anapoell v. American Express Business Finance Corp.</i>, 2007 U.S. Dist. LEXIS 88182 (C.D. Utah 2007) (doctor's tort claims against lessor of medical equipment barred by ELD), <i>aff'd</i>, 2009 U.S. App. LEXIS 6315 (10th Cir. 2009).</p> <p><i>Associated Diving and Marine Contractors, LC v. Granite Construction Co.</i>, 2003 U.S. Dist. LEXIS 21560 (2003) (court held tort claims for fraud, negligent misrepresentation, fraudulent concealment and fraudulent nondisclosure were all barred by ELD because each claim alleged breach of a duty encompassed by the subject matter of the contract).</p> <p><i>Bower v. Stein Eriksen Lodge Owners Ass'n</i>, 201 F. Supp.2d 1134 (D. Utah 2002) (ELD did not bar unit owners' negligent misrepresentation claim against condo association).</p> <p><i>Hermansen v. Tasulis</i>, 48 P.3d 235 (Utah 2002) (purchaser of real estate sued broker for fraudulent nondisclosure; claim not barred by ELD).</p> <p><i>SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc.</i>, 28 P.3d 669 (Utah 2001) (applying ELD to preclude negligent misrepresentation claim by subcontractor against members of design team).</p> <p><i>American Towers Owners Ass'n v. CCI Mech.</i>, 930 P.2d 1182 (Utah 1996) (ELD bars unintentional tort claims against contractors and architects).</p>
Vermont	Yes in non-DP context. No reported DP	<i>Hunt Constr. Group, Inc. v. Brennan Beer Gorman/Architects, P.C.</i> , 607 F.3d 10 (2d Cir. 2010)

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	cases.	<p>(certifying two questions to Vermont Supreme Court: (1) Does ELD bar a contractor from seeking purely economic damages against design professionals who allegedly provided negligent professional services in violation of the design professionals' contractual obligations with a mutual counterparty? (2) Does the economic loss doctrine apply to claims of negligent misrepresentation? Questions certified May 24, 2010).</p> <p><i>Springfield Hydroelectric Co. v. Copp</i>, 172 Vt. 311, 779 A.2d 67 (2001) (owner of hydroelectric facility sued purchasing agent for negligence; claim barred by ELD).</p>
Virginia	Yes if design professional owes no independent common law duty to claimant.	<p><i>Travelers Property Casualty Co. of America v. Premier Project Management Group LLC</i>, Hanover Circuit Court Case No. CL08000728-00 (May 2009) (insurer sued property management company after fire damaged retirement complex; management company's third party tort claim against contractor barred by ELD because property management company's claimed damage was purely economic loss).</p> <p><i>Central Park Drive, LLC v. Rinker Design Assocs.</i>, 2008 Va. Cir. LEXIS 109 (Va. Cir. Ct. 2008) (client could sue engineer under contract but not in tort).</p> <p><i>Gonella v. Lumbermens Mut. Cas. Co.</i>, 64 Va. Cir. 229 (Va. Cir. Ct. 2004) (court held ELD barred claims of negligence where damages were purely economic; unless injury results from contractor's creation of unreasonably dangerous situation from which a separate duty of care arises).</p> <p><i>Hanover Ins. Co. v. Corrpro Cos., Inc.</i>, 312 F. Supp. 2d 816 (E.D. Va. 2004) (contractor's bond claim against inspection company denied under ELD).</p> <p><i>Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.</i>, 256 Va. 553, 507 S.E.2d 344 (1998) (owner's claims against builder for actual and constructive fraud were barred because they were related to and arose from various contractual duties specifically required under design-build contract;</p>

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		<p>breach of contract action was appropriate remedy).</p> <p><i>Gerald M. Moore & Son, Inc. v. Drewry</i>, 251 Va. 277, 467 S.E.2d 811 (1996) (client sued engineering firm and firm’s president for negligence; negligence claim against president barred by ELD).</p> <p><i>Mortorino v. Consultant Eng’g Servs.</i>, 251 Va. 289, 467 S.E.2d 778 (1996) (property owner who relied on factual statements in environmental consultant’s report could proceed with constructive fraud claim, despite lack of privity).</p> <p><i>Sensenbrenner v. Rust, Orling & Neal Architects, Inc.</i>, 236 Va. 419, 374 S.E.2d 55 (1988) (denied tort claim by pool installer who was not in contractual privity with architect).</p> <p><i>Blake Constr. Co., Inc. v. Alley</i>, 233 Va. 31, 353 S.E.2d 724 (1987) (court refused to recognize contractor’s negligent misrepresentation claim for purely economic loss against design professional; rights and duties in construction context are defined by contract).</p>
Washington	Unclear. Tort claims against DPs are likely to be permitted in cases where an independent, extra-contractual duty to use reasonable care exists, particularly in cases involving sudden and calamitous failures.	<p><i>Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.</i>, P.3d , 170 Wn.2d 442, 2010 WL 4350338, at *10 (2010) (“Applying the independent duty doctrine here, we hold that SMS may sue LTK for negligence. LTK, by undertaking engineering services, assumed a duty of reasonable care. This obligation required LTK to use reasonable care, as we have defined it, with respect to risks of physical damage to the monorail.”).</p> <p><i>Eastwood v. Horse Harbor Found., Inc.</i>, 170 Wn.2d 380, 241 P.3d 1256 (2010) (“An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. . . . [t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent. . . . Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal conclusion that the defendant did not owe a</p>

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		<p>duty. When no independent tort duty exists, tort does not provide a remedy.”).</p> <p><i>Walter v. Barnett</i>, 149 Wn. App. 1067, 2009 Wash. App. LEXIS 983 (2009) (recent court of appeals decisions appear to rule that ELD does not apply if the plaintiff has no contract remedy against defendant).</p> <p><i>Carlile v. Harbour Homes</i>, 147 Wn. App. 193, 194 P.3d 280 (2008) (homeowner claims of negligent and intentional misrepresentation against builder barred by ELD).</p> <p><i>Alejandre v. Bull</i>, 159 Wn.2d 674, 153 P.3d 864 (2007) (home buyer’s negligent misrepresentation claim against seller barred by ELD; claim of pre-contractual fraudulent concealment is not barred).</p> <p><i>Atlantic Pac. Corp. v. Associated Earth Sciences, Inc.</i>, 112 Wn. App. 1044, 2002 Wash. App. LEXIS 2199 (2002) (unpublished) (ELD barred client’s tort claim against consultant for failing to properly report soil compaction tests).</p> <p><i>Carlson v. Sharp</i>, 99 Wn. App. 324, 994 P.2d 851 (1999) (ELD barred homeowner’s claim against geotechnical firm for subsidence of home).</p> <p><i>Berschauer/Phillips v. Seattle Sch. Dist. No. 1</i>, 124 Wn.2d 816, 881 P.2d 986 (1994) (ELD barred contractor’s tort claim against engineer).</p> <p><i>Touchet Valley Grain Growers v. Opp & Seibold Gen’l Constr., Inc.</i>, 119 Wn.2d 334, 831 P.2d 724 (1992) (owner’s tort claim against contractor after collapse of grain storage building allowed to proceed because it was sudden and dangerous event).</p>
West Virginia	No.	<p><i>Eastern Steel Constructors, Inc. v. City of Salem</i>, 209 W.Va. 392, 549 S.E.2d 266 (2001) (contractor claim against design professional not barred by ELD; design firm may owe duty of care to contractor despite absence of privity of contract).</p>

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Wisconsin	<p>ELD does not bar tort claims if contract between owner and DP is purely one for professional services; ELD does bar tort claims if contract is primarily for the delivery of a product, such as a building.</p>	<p><i>Cooper Power Sys. v. Union Carbide Chems. & Plastics Co.</i>, 123 F.3d 675 (7th Cir. Wis. 1997) (privity is not a prerequisite to the application of the economic loss doctrine in Wisconsin).</p> <p><i>Aslani v. Country Creek Homes</i>, 308 Wis.2d 395, 746 N.W.2d 605 (Wis. App. 2008); <i>review denied</i> (2008) (ELD bars tort claims where contract is predominantly one for a product – but does not bar tort claims based on contract for professional services. Court held that predominant purpose of a contract to construct a home was for purchase of a product).</p> <p><i>Wicherhauser v. Lehtinen</i>, 302 Wis.2d 41 (Wis. 2007) (ELD does not bar claims for fraudulent inducement if there was an intentional misrepresentation before the contract was executed and the fraud was extraneous to the contract).</p> <p><i>Stuart v. Weisflog’s Showroom Gallery, Inc.</i>, 293 Wis.2d 668, 721 N.W.2d 127 (Wis. App. 2006) (ELD does not apply to architectural services).</p> <p><i>1325 N. Van Buren LLC v. T-3 Group, Ltd.</i>, 716 N.W. 2d 822 (Wis. 2006) (ELD barred owner’s malpractice claim against contractor because primary purpose of contract was to construct condos, not to manage construction services).</p> <p><i>D & B Auto. Equip., Inc. v. Snap-On, Inc.</i>, 2006 U.S. Dist. LEXIS 17329 (2006) (ELD bars claims for misrepresentation if damages are purely economic. Damages are economic in nature if they relate to the "loss of value of an inadequate or inferior product.").</p> <p><i>Fed. Ins. Co. v. Grunau Project Der., Inc.</i>, 295 Wis.2d 840, 721 N.W.2d 157 (Wis. App. 2006) (building owner’s tort claims against contractor barred by ELD because contract was primarily for a product - a completely renovated building).</p> <p><i>Manitowoc Marine Group, LLC v. Ameron Int’l Corp.</i>, 424 F. Supp. 2d 1119 (E.D. Wis. 2006) (ELD bars fraud claims where plaintiff suffered only</p>



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		<p>economic loss rather than personal injury or property loss, even if there is no privity of contract).</p> <p><i>Trinity Lutheran Church v. Dorschner Excavating, Inc.</i>, 289 Wis.2d 286, 710 N.W.2d 680 (Wis. App. 2006) (owner could sue contractor in tort because contract was a “design-build” contract and contract was essentially for construction management services; excavator could similarly assert contribution claim against contractor).</p> <p><i>Linden v. Cascade Stone, Co., Inc.</i>, 283 Wis.2d 606, 699 N.W.2d 189 (2005) (homeowner cannot sue subcontractor in tort because defects in home were economic loss and not damage to “other property”; economic loss rule applies because pertinent contract was for the provision of a “good,” i.e., a house, rather than the provision of services; integrated products limitation of “other property” exception to ELD is applicable because homeowners contracted for a finished product, a house, not its various components).</p> <p><i>Grams v. Milk Products, Inc.</i>, 699 N.W.2d 167 (Wis. 2005) (court applies the “disappointed expectations” test: when damage to “other property” could have been the subject of negotiations between the parties, and such damage occurs, the ELD applies to bar tort claims). Note: this test has also been compared to a reasonable foreseeability approach to application of the ELD.</p> <p><i>Insurance Co. of N. America v. Cease Electric, Inc.</i>, 276 Wis.2d 361, 688 N.W.2d 462 (Wis. 2004) (economic loss doctrine does not apply to contracts for professional services and does not bar negligence action against designer-installer of barn ventilation system).</p> <p><i>KHLH, Inc. v. Wisconsin Land Surveyors, Ltd.</i>, 239 Wis. 2d 232, 619 N.W. 2d 307 (Wis. 2000) (upholding contribution action against land surveyor whose negligently placed stakes caused home to violate set back requirements; court rules ELD does not apply because damage was not merely economic).</p> <p><i>Wausau Paper Mills Co. v. Chas. T. Main, Inc.</i>, 789 F. Supp. 968 (D. Wis.</p>

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State	Does ELD bar tort claims against DP?	Case Citation
		<p>1992) (papermill’s claim against design professional barred by economic loss doctrine but rule limited to cases where there is a contract between two sophisticated parties).</p> <p><i>Link Builders, Inc.</i>, 62 Wis.2d 479, 214 N.W.2d 764 (Wis. 1974) (holding that tenant can bring negligence action against architect despite lack of privity; ELD not discussed).</p>
Wyoming	Yes.	<p><i>Excel Constr., Inc. v. HKM Eng'g, Inc.</i>, 2010 WY 34 (Wyo. 2010) (plaintiff’s allegations of negligence against engineer involve performance of contractual duties and are barred by the economic loss rule in <i>Rissler</i>. “The Court continues to believe that parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and that they do not need the special protections of tort law to shield them from losses arising from risks, including negligence of a design professional, which are inherent in performance of the contract.”).</p> <p><i>United States Aviation Underwriters, Inc. v. Dassault Aviation</i>, 505 F. Supp. 2d 1252 (D. Wyo. 2007) (contract language may not create a right to pursue a claim that would otherwise be barred by ELD).</p> <p><i>Grynberg v. Questar Pipeline Company</i>, 70 P.3d 1 (Utah 2003) (applying Wyoming law, economic loss rule barred owners of natural gas wells from suing gas purchaser in tort).</p> <p><i>Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Board and HKM</i>, 929 P.2d 1228 (Wyo. 1996) (contractor’s claim against engineer for negligence barred by economic loss rule).</p>

BIBLIOGRAPHY OF ECONOMIC LOSS DOCTRINE CASES

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Related Treatise & Law Review Materials

ALR	Wagner, Frank, <i>Tort Liability of Project Architect for Economic Damages Suffered by Contractor</i> , 65 A.L.R.3d 249 (2004).
Law Review	Barrett, Sidney R., <i>Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis</i> , 40 S.C. L. Rev. 891 (1989).
Law Review	Steffey, Matthew S., <i>Negligence, Contract and Architects' Liability for Economic Losses</i> , 82 Ky. L.J. 659 (1994).
Law Review	D'Angelo, Christopher, <i>The Economic Loss Doctrine: Saving Contract Warranty Law from Drowning in a Sea of Torts</i> , 26 U. Toledo L. Rev. 591 (1995).
Bar Journal	McCarter, <i>Economic Loss Doctrine: Is Privity Required?</i> 53 Journal of Missouri Bar 23 (1997).
Book	Spangler, John & Hill, William, <i>The Evolving Liabilities of Construction Managers</i> , 19 CONSTRUCTION LAW 30 (1999).
Law Review	Barton, R. Joseph, <i>Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims</i> , 41 William & Mary L. Rev. 1789 (2000).
Law Review	Yocum, Thomas & Hollis, Charles, <i>The Economic Loss Rule in Kentucky: Will Contract Law Drown in a Sea of Tort?</i> , 28 N. Ky. L. Rev. 456 (2001).
Law Review	<i>Replacing a Solid Wall with a Chain Link Fence: Special Relationship Analysis for Tort Recovery of Purely Economic Losses</i> , 105 W. Va. L. Rev. 213 (2002).

BIBLIOGRAPHY OF ECONOMIC LOSS DOCTRINE CASES

(01/03/11)

Bar Journal	<i>Still Viable: Economic Damage Claims Against Design Professionals</i> , 39 Az. Attorney 24 (2003).
Law Review	Finerty & Crueger, <i>A Commentary on the Economic Loss Doctrine Under the Rule of <u>Cease Electric and Cascade Stone</u></i> , 89 Marquette Law Review 137 (Fall 2005).
Law Review	Feature, <i>Tort Killer: The Applicability of Economic Loss Doctrine to Service Contracts</i> , 20 Maine Bar J. 100 (2005).
Law Review	<i>When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services</i> , 84 Neb. L. Rev. 162 (2005).
Law Review	Comment, <i>Construction Defect: Crafting an Exception to Arizona's Economic Loss Rule to Permit Breach of Fiduciary Duty Tort Claims</i> , 38 Ariz. St. L. J. 337 (2006).
Law Review	Note, <i>Drowning in a Sea of Confusion: Applying the Economic Loss Doctrine to Component Parts, Service Contracts and Fraud</i> , 84 Wash. U. L. Rev. 1513 (2006).
Law Review	Note, <i>Walking the Line between Contract and Tort in Construction Disputes: Assessing the Use of Negligent Misrepresentation to Recover Economic Loss after Presnell</i> , 95 Ky. L. J. 146 (2006).
Law Review	Anzivino, <i>The Fraud in the Inducement Exception to the Economic Loss Doctrine</i> , 90 Marquette Law Review 921 (2007).
Law Review	Circo, <i>Placing the Commercial and Economic Loss Problem in the Construction Industry Context</i> , 41 J. Marshall L. Rev. 39 (Fall 2007).
Law Review	<i>Construction Law: A Critical Examination of Minnesota's Treatment of the Economic Loss Doctrine in Construction Cases – Is Contract Law Drowning in a “Sea of Tort?”</i> , 34 William Mitchell L. Rev. 109 (2007).
Law Review	Johnson, Vincent R. <i>The Boundary-Line Function of the Economic Loss Rule</i> , 66 Wash. & Lee L. Rev. 523, 556

BIBLIOGRAPHY OF ECONOMIC LOSS DOCTRINE CASES

(01/03/11)

	(2009).
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