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Legal Malpractice: Is It Tort or Contract?

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Legal Malpractice: Is it Tort or Contract?

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I. INTRODUCTION

A large number of client complaints against attorneys are based upon the alleged neglect of client affairs.[2] A legal malpractice action may take the form of a contract action predicated upon an attorney's failure to perform pursuant to a contract of employment.[3] Legal malpractice actions in Illinois, however, have developed as actions in tort.[4] In these actions, plaintiffs generally seek recovery for economic loss damages resulting from the attorney's breach of duty to his client.[5]

In order to prevail on a tort-based claim of attorney malpractice, a plaintiff must prove that the attorney-client relationship created a duty on the part of the attorney and that the attorney breached that duty.[6] An attorney's duty of care arises upon formation of the attorney-client relationship.[7] An attorney breaches his duty of care if he fails to exercise the care and skill expected of a member of the legal profession when handling his client's case.[8]

The plaintiff in a legal malpractice action must also establish

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1. Justice, Illinois Appellate Court, First District, J.D. 1967, The John Marshall Law School. I wish to acknowledge the invaluable assistance of Drella C. Savage, my judicial law clerk, and Patricia Sowinski, a student of Loyola University School of Law, for their research and assistance throughout this article.

2. *See* R. MALLEN & J. SMITH, 1 LEGAL MALPRACTICE (1989). The authors explain that the most common client complaint is that the attorney failed to give the matter sufficient attention. *Id.* at 183. One-fourth of legal actions against attorneys are the result of negligence in handling the attorney-client relationship. *Id.* at 7.

3. Keeton, *Professional Malpractice*, 17 WASHBURN L.J. 445, 448 (1978). *See also* Annotation, *What Statute Governs Actions Against Attorneys for Negligence in Performance of Professional Services*, 49 A.L.R.2d 1216, 1219-21 (1956).

4. *See, e.g.*, Pelham v. Griesheimer, 92 Ill. 2d 13, 18, 440 N.E.2d 96,98 (1982); Bartholomew v. Crockett, 131 Ill. App. 3d 456, 475 N.E.2d 1035 (1st Dist. 1985). *See also* Sexton v. Smith, 112 Ill. 2d 187, 492 N.E.2d 1284 (1986).

5. *See, e.g.*, Christison v. Jones, 83 Ill. App. 3d 334, 405 N.E.2d 8 (3d Dist. 1980).

6. *Sexton*, 112 Ill. 2d at 193, 492 N.E.2d at 1286-87; *Pelham*, 92 Ill. 2d at 18, 440 N.E.2d at 98; *Bartholomew*, 131 Ill. App. 3d at 465, 475 N.E.2d at 1041.

7. Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516, 521-22, 394 N.E.2d 559, 563 (1st Dist. 1979).

8. This standard generally is established through expert testimony. Schnidt v. Henehan, 140 Ill. App. 3d 798, 801, 489 N.E.2d 415, 417 (2d Dist. 1986). The law recognizes a distinction between negligence and errors in judgment. Brainerd v. Kates, 68 Ill. App. 3d 781, 386 N.E.2d 586 (1st Dist. 1979).

that "but for" the attorney's negligence, the client would not have suffered any damages.[9] For example, damages for legal malpractice in the course of litigation arise only if the client would have prosecuted or defended the underlying lawsuit successfully but for the attorney's neglect of his client's affairs.[10] Because attorney malpractice rarely results in personal injury or property damage, the damages plaintiffs seek most often in malpractice claims against attorneys are for economic or pecuniary losses allegedly caused by the attorney's failure to exercise adequate care.[11]

Traditionally, the concepts of standard of care and negligence, which are central to most attorney malpractice actions in Illinois, have been associated solely with actions in tort. In contrast, the economic loss damages malpractice plaintiffs customarily seek are most often associated with actions for breach of contract. With this crossover between concepts and disciplines, it was inevitable that serious questions would arise as to the recoverability of economic loss damages in tort-based attorney malpractice claims. Those problems were ushered in by the Illinois Supreme Court's decision in *Moorman Manufacturing Co. v. National Tank Co.*[12]

In *Moorman*, the court adopted what has been termed the "economic loss doctrine," the rule that purely economic losses cannot be recovered in many tort actions.[13] The Illinois Supreme Court has stated in dicta that *Moorman* would not prohibit recovery in tort actions for legal malpractice.[14] However, the Illinois courts have not yet reached a consensus on this precise issue. Because of this uncertainty, *Moorman* may yet lead the courts to question

9. Zych v. Jones, 84 Ill. App. 3d 647, 406 N.E.2d 70 (1st Dist. 1980). *See also* Trustees of Schools v. Schroeder, 2 Ill. App. 3d 1009, 1012-13, 278 N.E.2d 431, 433 (1st Dist. 1971). Other states have also taken the view that in a legal malpractice action, the plaintiff "must allege and prove that the actionable wrong proximately caused the damage for which recompense is sought." Mylar v. Wilkinson 435 So. 2d 1237, 1239 (Ala. 1983); *see also* Strobel v. Peterson, 149 Ariz. 213, 717 P.2d 892 (1986).

10. Claire Assocs. v. Pontikes, 151 Ill. App. 3d 116, 122, 502 N.E.2d 1186, 1190 (1st Dist. 1986).

11. *See* Harrison v. Dean Witter Reynolds Inc., 715 F. Supp. 1425, 1433-34 (N.D. Ill. 1989) (allowing recovery of economic losses in negligence claim against brokerage firm because the firm had an extra-contractual duty to prevent economic losses). As one Illinois court noted, the injury resulting from attorney malpractice is not easily categorized. *Christison*, 83 Ill. App. 3d at 338, 405 N.E.2d at 11. Such injury "has aspects of the tort to property, inasmuch as the injuries resulting are to property interests, and it has highly personal aspects without being a personal injury tort." *Id.*

12. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

13. *Id.* at 87-89, 435 N.E.2d at 451-52 (economic loss damages are not recoverable in tort actions based on negligence, strict liability, or innocent misrepresentation).

14. 2314 Lincoln Park West Condominium Assoc. v. Mann, 136 Ill. 2d 302, 317-18, 555 N.E.2d 346, 353 (1990).

whether a plaintiff may recover for economic losses in contract-based legal malpractice actions in Illinois.[15] Indeed, it has been suggested that *Moorman* may have opened the way for a new era of professional liability actions in Illinois.[16]

This Article examines the *Moorman* decision and its applicability to legal malpractice actions. First, this Article briefly discusses the rationale behind the *Moorman* decision.[17] Second, the Article analyzes the parameters of *Moorman* outside the context of products liability, focusing upon the conflicting appellate decisions in the professional negligence area.[18] Next follows a discussion of *Moorman* and legal malpractice.[19] This Article concludes with a review of policy considerations underlying the application of *Moorman* to legal malpractice and a discussion of the possiblity that the economic loss doctrine could bar all negligence claims against professionals for purely economic losses.[20]

II. THE MOORMAN DECISION AND ITS EARLY APPLICATION

Although Illinois courts first embraced the principle that recovery of economic losses falls within the purview of contract law,[21] the rule that economic losses generally are not recoverable in tort was not clearly enunciated by the Illinois Supreme Court until its decision in *Moorman Manufacturing Co. v. National Tank Co.*[22] In *Moorman*, the purchaser of a grain storage tank sued the seller for the cost of repairing a crack in the tank and for loss of the use of the tank.[23] The plaintiff had argued that these damages were

15. Stein, Cottrell and Friedlander, *A Blueprint for the Duties and Liabilities of Design Professionals After Moorman*, 60 CHI.-KENT L. REV. 163, 189 (1984).

16. *Id.*

17. *See infra* notes 21-36 and accompanying text.

18. *See infra* notes 50-75 and accompanying text.

19. *See infra* notes 76-99 and accompanying text.

20. *See infra* notes 100-22 and accompanying text.

21. In Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (2d Dist. 1977), the plaintiff suffered damages as a result of the breakdown of two air conditioning units manufactured by the defendant. In dismissing a negligence count, the court indicated that situations involving the "reasonably foreseeable commercial expectations of purchasers and sellers" are "the province of contract law." *Id.* at 203-04, 364 N.E.2d at 106-07. In Fireman's Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1st Dist. 1981), the Illinois Appellate Court for the First District anticipated *Moorman* by affirming a trial court's dismissal of negligence and strict liability counts seeking economic loss damages from the supplier of a burglary alarm system. *Id.* at 301, 417 N.E.2d at 134. *But see* Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist., 92 Ill. App. 3d 90, 414 N.E.2d 1274 (2d Dist. 1980) (distinguishing *Koplin* and awarding economic losses in design defect case).

22. 91 Ill. 2d 69, 435 N.E.2d 443 (1982)

23. *Id.* at 72, 435 N.E.2d at 445.

recoverable under the tort theories of strict liability, misrepresentation, and negligence.[24] The appellate court reversed the trial court's dismissal of the plaintiff's tort claims and allowed recovery in tort for the plaintiff's economic dlosses.[25]

The Illinois Supreme Court reversed the appellate court's decision and held that damages for economic losses are recoverable in tort actions only in three situations: when the plaintiff has sustained additional damages in the form of personal injury or destruction of property because of a sudden or dangerous occurrence,[26] when the plaintiff's damages are a proximate result of a defendant's intentionally false representations,[27] or when the plaintiff's damages are a proximate result of a negligent misrepresentation by a defendant who is in the business of supplying information for the guidance of others in their business transactions.[28]

The court defined economic losses 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";[29] that is, economic losses seek recovery for diminished value owing to inferior product quality.[30] In his concurring opinion in *Moorman*, Justice Simon brought this point sharply into focus:

> [i]f a product simply fails to live up to its promise, if it does not accomplish what it was supposed to the way it was supposed to, that is only an invasion of a contract-like interest: the user has lost the benefit of his bargain. . . . The only risk is to commercial expectations.[31]

The holding in *Moorman* rests largely on the theory that tort law affords a remedy only for losses arising from personal injuries or damage to one's property; contract law and the Uniform Commercial Code offer the appropriate remedy for economic losses occasioned by diminished commercial expectations.[32] In reaching this

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24. *Id.*

25. *Id.* at 73, 435 N.E.2d at 444. The appellate court did not rule on the sufficiency of the plaintiff's claim based upon breach of express warranty. *Id.*

26. *Id.* at 86, 435 N.E.2d at 450-51.

27. *Id.* at 88-89, 435 N.E.2d at 452.

28. *Id.* at 89, 435 N.E.2d at 452.

29. *Id.* at 82, 435 N.E.2d at 449 (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

30. *Id.* (quoting Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966)). In contrast, non-economic damages may include personal injuries or damages to the property itself as a result of the inferior quality. *Id.* at 82, 435 N.E.2d at 449.

31. *Id.* at 96, 435 N.E.2d at 455 (Simon, J., concurring).

32. *Id.* at 88-89, 435 N.E.2d at 452. The *Moorman* court opined that qualitative

holding, the court drew upon a substantial line of authority providing that economic losses are not recoverable in strict liability actions because to permit such recovery would virtually eviscerate the law of sales.[33] The *Moorman* court then applied the same rationale to prohibit recovery for economic loss actions based on negligence and innocent misrepresentation.[34]

According to the majority in *Moorman*, the "extension of the tort theories of strict liability, negligence or innocent misrepresentation to cover solely economic losses would, in effect, make a manufacturer the guarantor that all of its products would continue to perform satisfactorily throughout their reasonably productive life."[35] Further, the court stated that to hold a manufacturer liable for economic loss under these theories would contravene the legislature's enactment of Article 2 of the Uniform Commercial Code as the law governing transactions for the sale of goods.[36] The court expressed its desire to defer to the legislature in this area of commercial law " 'and accommodate when possible the evolution of tort law with the principles laid down in the UCC.' "[37]

In the same year that *Moorman* was decided, the Illinois Supreme Court applied the reasoning in *Moorman* in a case involving a claim for negligence against a home builder. In *Redarowicz v. Ohlendorf*,[38] the plaintiff alleged that after he purchased a house constructed by the defendant, the chimney and adjoining brick wall began to pull away from the structure of the house.[39] The cement wall cracked, resulting in water seepage.[40]

Addressing the plaintiff's negligence action, the court first noted that the claim was not one in which the defective construction created a hazard that resulted in physical injury.[41] Rather, the plaintiff was seeking damages solely for the cost of repair and

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defects are best handled by contract rather than tort law because tort law is "appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence . . . [whereas] the remedy for a loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or non-accidental causes . . . lies in contract." *Id.* at 86, 435 N.E.2d at 450.

33. *See id.* at 76-77, 435 N.E.2d at 446, and cases cited therein.

34. *See id.* at 87-88, 435 N.E.2d at 451, and cases cited therein.

35. *Id.* at 91, 435 N.E.2d at 453.

36. *Id. See* ILL. REV. STAT. ch. 26, paras. 2-101 to 2-725 (1987).

37. *Moorman*, 91 Ill. 2d at 91, 435 N.E.2d at 453 (quoting Clark v. International Harvester Co., 99 Idaho 326, 335, 581 P.2d 784, 793 (1978)).

38. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

39. *Id.* at 175, 441 N.E.2d at 326.

40. *Id.*

41. *Id.* at 178, 441 N.E.2d at 327.

replacement of the defective chimney, the wall and the patio.[42] The court analogized these damages resulting from inferior workmanship to those suffered by the disgruntled tank owner in *Moorman*.[43] The court stated that although the *Redarowicz* plaintiff's commercial expectations were not met, "the only danger to the plaintiff [was] that he would be forced to incur additional expenses for living conditions that were less than what was bargained for."[44] The court then denied the plaintiff recovery for economic losses under his negligence claim.[45]

In short, a buyer's desire to enjoy the benefit of his bargain is not an interest traditionally protected under tort law.[46] The *Redarowicz* court elaborated upon this point by stating that " '[t]raditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a duty in negligence has been readily found.' "[47] Although property interests generally have been found to merit protection from physical harm, " 'where mere deterioration or loss of the bargain is claimed, the concern is with a failure to meet some standard of quality. This standard of quality must be defined by reference to that which the parties have agreed upon.' "[48] To recover in negligence, therefore, there must be a harm other than mere disappointed expectations.[49]

III. Applicability of *Moorman* in Professional Malpractice Cases

Since *Moorman* and *Redarowicz*, the Illinois Supreme Court has expanded application of the *Moorman* doctrine beyond products liability cases. For example, in *Anderson Electric, Inc. v. Ledbetter*,[50] the plaintiff entered into a contract as a subcontractor respon-

42. *Id.*
43. *Id.* at 176-77, 441 N.E.2d at 326-27.
44. *Id.* at 178, 441 N.E.2d at 327.
45. *Id.*
46. W. Prosser, The Law of Torts § 92, at 613 (4th ed. 1971).
47. *Redarowicz*, 92 Ill. 2d at 177-78, 441 N.E.2d at 327 (quoting Crowder v. Vandendeale, 564 S.W.2d 879, 882 (Mo. 1978) (emphasis in original)).
48. *Id.* (quoting *Crowder*, 564 N.E.2d at 882). At least one other state supreme court has held that an action for breach of a service contract, resulting solely in economic loss, is more appropriately suited for contract than tort. Oleyar v. Kerr, 217 Va. 88, 225 S.E.2d 398 (1976) (characterizing the plainitff's legal malpractice claim as a breach of contract action for statute of limitations purposes).
49. *Redarowicz*, 92 Ill. 2d at 177, 441 N.E.2d at 327.
50. Anderson Elec., Inc. v. Ledbetter Erection Corp., 115 Ill. 2d 146, 503 N.E.2d 246 (1986).

sible for performing electrical work on certain machinery and then installing that machinery. Plaintiff alleged that although it performed under the contract in a workmanlike manner, the defendant improperly required that certain work be redone and failed to supervise plaintiff's work as promised.[51]

The plaintiff sought damages in negligence and breach of contract against the engineer for the additional costs incurred because the defendant failed to perform according to the contract.[52] Relying on *Moorman*, the court held that a plaintiff seeking to recover purely economic losses due to defeated expectations of a commercial bargain cannot recover in tort.[53] Unlike the plaintiff in *Moorman*, the *Anderson* plaintiff's action involved a service contract.[54] The plaintiff, therefore, could not bring a claim under the U.C.C. to recover its economic losses.[55] The *Anderson* court noted this disctinction, but it held that the plaintiff could not recover for its economic losses in tort "regardless of [its] inability to recover under an action in contract."[56]

After *Anderson*, the lower courts in Illinois applied the *Moorman* doctrine to a myriad of tort actions. The courts frequently concluded, without extensive analysis or distinction, that an action for economic losses resulting from breach of a duty or breach of a service contract lies only in contract and not in tort.[57] Courts disagree, however, over whether the *Moorman* doctrine applies to professional malpractice actions such as those involving architects or engineers.[58]

In *Rosos Litho Supply Corp. v. Hansen*,[59] the Illinois Appellate Court for the First District stated that it did not read *Moorman* as "having abolished by inference all professional malpractice actions charging economic losses, arising from service contracts, based

51. *Id.* at 148-49, 503 N.E.2d at 246-47.

52. *Id.* at 147, 503 N.E.2d at 246.

53. *Id.* at 153, 503 N.E.2d at 249.

54. *Id.* at 152, 503 N.E.2d at 248-49.

55. *Id.* at 152, 503 N.E.2d at 249.

56. *Id.* The court noted that the plaintiff, in any event, was not without an available remedy because it had an action pending against a third party for the same damages. *Id.* at 153, 503 N.E.2d at 249.

57. *See, e.g.*, Palatine Nat'l Bank v. Charles W. Greengard Assocs., Inc., 119 Ill. App. 3d 376, 456 N.E.2d 635 (2d Dist. 1983).

58. *Compare* People *ex rel.* Skinner v. FGM, Inc., 166 Ill. App. 3d 802, 520 N.E.2d 1024 (5th Dist. 1988); Rosos Litho Supply Corp. v. Hansen, 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984) *with* Fence Rail Dev. Corp. v. Nelson & Assocs., Ltd., 174 Ill. App. 3d 94, 528 N.E.2d 344 (2d Dist. 1988); People *ex rel.* Skinner v. Graham, 170 Ill. App. 3d 417, 524 N.E.2d 642 (4th Dist. 1988).

59. 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984).

upon negligent violation of professional standards of care and skill."[60] The court indicated that such a "significant departure from established law" would affect malpractice claims against all professional groups and, thus, "should be signalled expressly by the supreme court itself."[61]

The Appellate Court for the Fifth District also has declined to apply the *Moorman* rule to professional negligence actions against an architect and an engineer.[62] In contrast, the Appellate Courts for the Second, Third, and Fourth Districts have expressly held that the *Moorman* rule applies to negligence and tort actions against both architects and engineers.[63] In *People ex. rel. Skinner v. Graham*, the fourth district declined to embrace the reasoning in *Rosos*, stating that when applying *Moorman*, "the relevant inquiry [is] the type of loss sustained not the relationship giving rise to the damage."[64] The court then stated that "[w]e do not perceive [that] *Moorman* has carved out an exception for professionals."[65] Under the fourth district's approach, the applicability of the *Moorman* doctrine depends solely on the nature of the damages sought, not upon the particular defendant involved.

The Illinois Supreme Court finally addressed the issue of whether there should be an exception to *Moorman* to permit a plaintiff seeking to recover in tort for purely economic losses due to professional negligence in *2314 Lincoln Park West Condominium Association v. Mann, Ginn, Ebel & Frazier Ltd.*[66] In *2314 Lincoln Park West*, a condominium association sought to recover for alleged defects in workmanship in the construction of a condominium building under both tort and contract theories.[67] The association sued the developer, contractor, roofer, manager, and the architect, and the defendants moved to dismiss the plaintiff's complaint.[68] The circuit court dismissed all counts except a negligence claim against the building architect, ruling that recovery under that count was not barred by *Moorman*.[69]

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60. *Id.* at 297, 462 N.E.2d at 572.
61. *Id.*
62. *See, e.g., FGM Inc.*, 166 Ill. App. 3d 802, 520 N.E.2d 1024.
63. *See Fence Rail Dev. Corp.*, 174 Ill. App. 3d 94, 528 N.E.2d 344; *Graham*, 170 Ill. App. 3d 417, 524 N.E.2d 642; Ferentchak v. Village of Frankfort, 121 Ill. App. 3d 599, 459 N.E.2d 1285 (3d Dist. 1984).
64. *Graham*, 170 Ill. App. 3d at 435-36, 524 N.E.2d at 652.
65. *Id.* at 436, 524 N.E.2d at 652.
66. 136 Ill. 2d 302, 555 N.E.2d 346 (1990).
67. *Id.* at 304-06, 555 N.E.2d at 346-47.
68. *Id.*
69. *Id.* at 306, 555 N.E.2d at 347-48.

The circuit court certified the question of whether there was an exception to the rule in *Moorman* for tort actions against engineers and architects seeking recovery for economic losses.[70] The appellate court denied review of the circuit court's decision, but the Illinois Supreme Court granted plaintiff's petition for review[71] and reversed the trial court, refusing to recognize an exception to *Moorman* for professional malpractice claims against architects and engineers.[72] After reviewing the development of the *Moorman* doctrine and its expansion to actions based on personal service contracts, the court concluded that a plaintiff could not recover in tort for economic losses resulting from an architect's professional malpractice.[73]

The court distinguished cases allowing recovery in tort for malpractice claims against physicians and certain other professionals, reasoning that in such cases "the defendant owe[d] a duty in tort to prevent precisely the type of harm, economic or not, that occurred."[74] The court then declined to impose upon architects a duty to protect unit owners from loss due to frustrated expectations, stating that "[t]he architect's responsibility originated in its contract with the original owner, and . . . its duties should be measured accordingly."[75]

In declining to create an exception to the *Moorman* doctrine for professional malpractice claims against architects, the court expressly refused to foretell the future of *Moorman* with respect to other areas of professional malpractice.[76] Thus, the extent to which *Moorman* applies to actions based on professional service contracts remains unclear.

IV. Legal Malpractice Actions

In addressing the applicability of *Moorman* to legal malpractice

70. *Id.*
71. *Id.*
72. *Id.* at 317-18, 555 N.E.2d at 353.
73. *Id.* at 307-18, 555 N.E.2d at 348-53.
74. *Id.* at 315, 555 N.E.2d at 351-52 (citing, *inter alia*, Board of Educ. v. A.C.&S., Inc., 131 Ill. 2d 428, 439-51, 546 N.E.2d 580, 588 (1989) (allowing tort recovery for damages to property incurred from installation of asbestos-containing material); Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 387-88, 493 N.E.2d 1022, 1029 (1986) (allowing tort action where defects in an alarm system failed to detect a warehouse fire); Vaughn v. General Motors Corp., 102 Ill. 2d 431, 436, 466 N.E.2d 195, 197 (1984) (tort recovery allowed because defective brakes caused a truck to roll over and lose its load)).
75. *Id.* at 317, 555 N.E.2d at 353.
76. *Id.* at 317-18, 555 N.E.2d at 353.

claims, some commentators and state courts have stated that the very essence of professional malpractice actions in general, and legal malpractice actions in particular, is the relationship between the parties and the nature of the services involved. Thus, although the attorney-client relationship includes an element of the bargained-for commercial expectations of the parties, inherent in the relationship is the existence of an underlying agency relationship.[77] Whereas the agency relationship may have an implied or express contract as its basis, any harm caused by misconduct of the agent (the attorney) usually is remedied through an action based on negligence, grounded in traditional tort theories.[78]

In *Pelham v. Griesheimer*,[79] the Illinois Supreme Court unambiguously characterized a legal malpractice claim as an action sounding in tort. In *Pelham*, the children of a deceased insured sued the insured's attorney, arguing that the attorney failed to exercise a reasonable degree of professional care and skill when he failed to see that the plaintiffs became the prime beneficiaries in certain life insurance policies.[80] The court held that under the facts as pleaded, the attorney owed no duty of care to his client's children and, therefore, the complaint failed to state a cause of action.[81]

Significantly, the *Pelham* court found that plaintiff's claim for legal malpractice was "couched in terms of negligence, not contract."[82] According to the court, a proper complaint sounding in negligence must set forth facts that establish "the existence of a duty owed by the defendant to the plaintiffs, a breach of that duty, and an injury proximately resulting from the breach."[83] Because plaintiffs failed to allege that defendant owed them a duty, the

77. *See* People Express Airlines v. Consolidated Rail, 100 N.J. 246, 495 A.2d 107,112 (1985).

78. *See, e.g., Christison*, 83 Ill. App. 3d 334, 405 N.E.2d 8.

79. 92 Ill. 2d 13, 440 N.E.2d 96 (1982).

80. *Id.* at 16, 440 N.E.2d at 97.

81. *Id.* at 24, 440 N.E.2d at 101. The plaintiffs additionally argued that their complaint stated a cause of action for breach of contract. They maintained that the complaint should have been construed to allege that the children were third-party beneficiaries of the contract between their mother and her attorney. *Id.* at 17, 440 N.E.2d at 98. The defendant argued that the breach of contract claim was insufficiently pleaded because the plaintiffs failed to allege that a contract was entered into for their direct benefit. The court agreed with the defendant and stated that "the making of a contract with an attorney for the benefit of a third party does not necessarily create an attorney-client relationship between the attorney and the third-party beneficiary." *Id.* at 18, 440 N.E.2d at 98.

82. *Id.* at 18, 440 N.E.2d at 98.

83. *Id.*

court dismissed the plaintiffs' complaint.[84] Consequently, the *Pelham* court never addressed the question of whether economic losses are recoverable in a tort-based legal malpractice action.

While *Pelham* characterized a legal malpractice action as one sounding primarily in tort, other Illinois courts have indicated that a breach of contract theory may also be used in a legal malpractice claim.[85] For example, in *Competitive Food Systems, Inc. v. Laser*,[86] the Illinois Appellate Court for the Second District allowed the plaintiffs to use a breach of contract theory in their legal malpractice claim and rejected the defendant's argument that, as a matter of law, an attorney may only be sued for breach of duty in a legal malpractice action.[87] The court reasoned that because the plaintiffs had adequately pleaded all the elements of a breach of contract claim, they were not limited, as a matter of law, to suing only under a legal malpractice theory; rather, the plaintiffs could sue the defendants under a breach of contract theory.[88]

Pelham and *Competitive Food Systems* indicate the substantial amount of confusion among the Illinois courts in characterizing a claim for legal malpractice. Although the more traditional approach characterizes legal malpractice as a tort, several courts have recognized the viability in certain circumstances of a breach of contract claim to remedy attorney malpractice. Because the *Moorman* doctrine precludes economic recovery in tort in many circumstances, alleging an alternative contract claim for damages arising out of legal malpractice may be vital to the plaintiffs recovery if the only damages alleged are for economic losses. Alternatively, an exception to *Moorman* must be clearly stated to allow recovery of economic damages in legal malpractice cases.

To date, only one Illinois court has directly addressed the applicability of the *Moorman* doctrine to legal malpractice claims.[89] In

84. *Id.* at 19, 440 N.E.2d at 100.

85. *See, e.g.*, Collins v. Reynard, 195 Ill. App. 3d 1067, 553 N.E.2d 69 (4th Dist. 1990).

86. 170 Ill. App. 3d 606, 524 N.E.2d 207 (2d Dist. 1988).

87. *Id.* at 615-16, 524 N.E.2d at 212-13. The plaintiffs in *Competitive Food Systems* alleged that they had entered into a separate agreement with the defendant more than one year after initially retaining the defendants as legal counsel. Pursuant to this agreement, the defendants were to perform all necessary legal work for preparing a stock offering circular for the plaintiffs in exchange for a flat fee. *Id.*

88. *Id.*

89. In *2314 Lincoln Park West*, 136 Ill. 2d at 318, 555 N.E.2d at 353, supreme court dicta offered some insight into the applicability of the *Moorman* doctrine to legal malpractice actions. *Id.* The court stated that its application of *Moorman* to architectural malpractice cases did not indicate the applicability of *Moorman* to all cases of professional malpractice, and in particular, to legal malpractice actions. *Id.* It distinguished

Collins v. Reynard,[90] the plaintiff sued an attorney and his law firm for legal malpractice based upon breach of contract and negligence theories. The defendant contended that Collins failed to state a cause of action because she only alleged economic damages that were not recoverable in tort. The circuit court denied the motion to dismiss, but certified the question to the appellate court.[91]

On appeal, the Fourth District reversed the trial court on the grounds that *Moorman* and its progeny precluded recovery of economic losses in tort cases based on claims of negligence, including cases alleging legal malpractice.[92] In so holding, the appellate court specifically rejected the rationale of *Rosos Litho Supply Corp. v. Hansen*.[93] The *Collins* court interpreted the *Moorman* doctrine as a broad mandate prohibiting economic recovery in all tort claims based on negligence and, therefore, the court declined to recognize an exception for professional malpractice claims.[94]

Although the Illinois Supreme Court has not yet addressed the applicability of the *Moorman* doctrine to legal malpractice claims, the court offered some insight to this question in *2314 Lincoln Park West Condo. Assoc. v. Mann, Ginn, Ebel & Frazier, Ltd.*[95] In *2314 Lincoln Park West*, the court refused to recognize an exception to *Moorman* for professional malpractice actions against architects. The court refused, however, to create a blanket extension of the *Moorman* holding to all other professional malpractice claims.[96] In particular, the court distinguished actions for legal malpractice as claims involving an "extracontractual duty not only

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legal malpractice claims as actions in which economic recovery may be possible because of an extracontractual duty existing between the attorney and the client. The court declined to provide a more definitive statement on whether *Moorman* applies to legal malpractice claims because that issue was not before the court. *Id.*

90. *Collins*, 195 Ill. App. 3d 1067, 553 N.E.2d 69.

91. *Id.* at 1068, 553 N.E.2d at 70.

92. *Id.* at 1072, 553 N.E.2d at 73.

93. *Id.* (citing *Rosos*, 123 Ill. App. 3d 290, 462 N.E.2d 566 (allowing recovery of economic damages in architectural malpractice action)).

94. *Id.* at 1070-72, 553 N.E.2d at 71-73 (citing *Moorman*, 91 Ill. 2d 69, 435 N.E.2d 443; *Anderson Elec.*, 115 Ill. 2d 1456, 503 N.E.2d 246 (barring recovery for economic losses from contractor in tort); Morrow v. L.A. Goldschmidt Assoc., 112 Ill. 2d 87, 97-98, 492 N.E.2d 181 (1986) (barring recovery against a builder); *Scott & Fetzer Co.*, 112 Ill. 2d 378, 493 N.E.2d 1022 (disallowing recovery for economic losses from a seller in a negligence action); Tolona Pizza Prods. Corp. v. Davy McKee Corp., 187 Ill. App. 3d 365, 370-71, 543 N.E.2d 225 (1st Dist. 1989) (engineer and architect malpractice); Werblood v. Columbia College of Chicago, 180 Ill. App. 3d 967, 974, 536 N.E.2d 750 (1st Dist. 1989) (action for negligenct administration brought against college trustees, president and dean); *Fence Rail Dev. Corp.*, 174 Ill. App. 3d 94, 528 N.E.2d 344 (architect).

95. 136 Ill. 2d 302, 555 N.E.2d 346 (1990).

96. *Id.* at 317, 555 N.E.2d at 353.

to the client but also to the group of persons the client intended benefit."[97]

By recognizing an extracontractual duty between the attorney and his client, the court implied that an attorney's obligation to his client is not based solely on the contract existing between them.[98] Rather, the nature of the laywer's undertaking and the lawyer's "traditional responsibilities" create a duty to render legal services with due care.[99] The court indicated that the appropriate means for redressing a breach of this extracontractual duty would be an action in tort.[100]

V. Policy Concerns

Moorman and its progeny leave numerous and substantial unresolved questions regarding the application of the economic loss doctrine in Illinois.[101] While some courts have held that *Moorman* did not intend a wholesale revision and automatic shift of professional and legal malpractice actions from tort to contract law, other courts have reached the opposite conclusion.[102] To resolve these conflicting interpretations of *Moorman*, the courts must develop a remedial scheme that remains consistent with the *Moorman* doctrine and yet considers the interests of the parties.[103] The end result may very well be a substantial change in the way the Illinois courts look at "contractually-originated liability involving products, realty and services."[104]

Clearly, the *Moorman* decision is not limited solely to cases involving product liability or the Uniform Commercial Code.[105] As one commentator suggested, "[t]he *Moorman* opinion is a philosophical exposition of the bases of contract and tort law and there is nothing in its theoretical analysis which would limit application

97. *Id.* at 318, 555 N.E.2d at 353.

98. *Id.* at 317-18, 555 N.E.2d at 353. In contrast, the court stated that an architect's duty to his clients stemmed entirely from the contract for the architect's services. Accordingly, the court declined to impose on an architect a duty to protect clients from losses stemming from defects in building quality. *Id.* at 317, 555 N.E.2d at 353.

99. *Id.* at 318, 555 N.E.2d at 353.

100. *Id.* at 317-18, 555 N.E.2d at 353.

101. Bertschy, *The Economic Loss Doctrine in Illinois After Moorman*, 71 ILL. B.J. 346, 355 (1983).

102. See *Rosos*, 123 Ill. App. 3d 290 462 N.E.2d 566; *FGM Inc.*, 166 Ill. App. 3d 802, 520 N.E.2d 1024; *Graham*, 170 Ill. App. 3d 417, 524 N.E.2d 642; *People Express Airlines*, 100 N.J. at 255-57, 495 A.2d at 112.

103. Stein, Cottrell and Friedlander, *supra* note 15, at 168.

104. Bertschy, *supra* note 101, at 355.

105. *Id.* at 354.

of the theory to [product liability] cases."[106] Both *Moorman* and *Redarowicz* used the term "economic loss" as a "shorthand" way of indicating injuries suffered as a result of disappointed commercial expectations, or the failure to obtain the full benefit of a bargain.[107] Given this broad definition of "economic loss," it would be impossible to limit *Moorman* to the product liability context.

In an effort to limit application of *Moorman*, other commentators assert that the definition of economic loss used in *Moorman* suggests a loss in something that is negotiated.[108] These commentators assert that in an attorney-client relationship, unlike most contractual relationships, services are not bargained for, results are not warranted or promised and, although the client agrees to pay fees, the attorney agrees to do more than be employed.[109] A special relationship exists between the attorney and the client which imposes upon the attorney the duty to protect the client from being deprived of economic expectations through the attorney's negligence.

The decision in *People Express Airlines v. Consolidated Rail Corp.*[110] provides a summary of yet another approach toward permitting recovery for economic losses in tort-based professional malpractice actions. In *People Express Airlines*, the New Jersey Supreme Court discussed, in great detail, the problems underscoring a pure *per se* bar of recovery for negligently caused economic losses,[111] the analysis for avoidance of this rule,[112] and specific exceptions that have developed to this rule.[113] One such exception is the "special relationship" exception.[114] This exception applies if a

106. Id.

107. Stein, Cottrell and Friedlander, *supra* note 15, at 171.

108. *See generally Rosos*, 123 Ill. App. 3d 290, 462 N.E.2d 566. *Rosos* states that there is, and should be, a recognized difference between economic loss resulting from failed commercial deals and those resulting from professional negligence. *Id.* at 293-98, 462 N.E.2d at 570-73.

109. *See generally People Express Airlines*, 100 N.J. 246, 255-57, 495 A.2d 107, 112 (1985).

110. *Id.*

111. *Id.* at 252-53, 495 A.2d at 110.

112. *Id.* at 255-63, 495 A.2d at 112-16.

113. *Id.*

114. *Id.* at 256-58, 495 A.2d at 112-13. This exception encompasses auditors, surveyors, termite inspectors, engineers, attorneys, notary publics, architects, weighers and telegraph companies. *See* H. Rosenblum Inc. v. Adler, 93 N.J. 324, 461 A.2d 138 (1983) (auditor negligently prepared public financial statement; auditor held liable to plaintiff who purchased worthless stock); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (surveyor's negligence resulted in incorrect depiction of boundary of lot; surveyor held liable to remote purchaser); Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962) (termite inspector liable to purchaser of infested home); M.

defendant is professional who breaches a specific duty to avoid economic injury to a foreseeable plaintiff. In a legal malpractice claim, the client is a particularly foreseeable plaintiff.[115] Additionally, an attorney, who because of his negligence, causes economic or purely pecuniary damage to his client, recognizes and should fully comprehend that such breach of duty and subsequent damages are the natural and probable consequence of his negligence. Consequently, the special relationship exception applies to the attorney-client relationship and allows recovery for economic loss in a legal malpractice action.

The "special relationship" exception recognized in other jurisdictions effectively precludes the application of the economic loss doctrine to professional malpractice actions. While the Illinois courts have declined to adopt a similar exception, some courts have limited the application of *Moorman* through the recognition of an extracontractual duty.[116] This extracontractual duty arises in professional relationships because persons generally repose a great degree of trust and confidence in professionals.[117] Moreover, a client's reliance on a professional places the client at great risk of injury from substandard performance.[118] Given the great trust placed in professionals, a duty to the client exists apart from the

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Miller Co. v. Central Contra Costa Sanitary Dist., 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (Cal. Ct. App. 1961) (engineer liable for negligence resulting in contractor's losses); Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (Cal. Ct. App. 1961), *cert. denied*, 368 U.S. 987 (1962) (attorney negligently caused intended beneficiary of will to be deprived of will proceeds); Immerman v. Ostertag, 83 N.J. Super. 364, 199 A.2d 869 (N.J. Super. 1964) (notary public held liable for negligence resulting in out-of-privity mortgagee's economic loss); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary public's negligence caused intended beneficiary of will to be deprived of expected proceeds; notary held liable); United States v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal. 1958) (architects' negligence resulted in use of defective concrete; architect held liable to contractor); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922) (public weigher held liable for negligent acts causing remote buyer's losses); Western Union Tel. Co. v. Mathis, 215 Ala. 282, 110 So. 399 (1926) (telegraph company's negligent transmission resulted in plaintiff's loss); *see also* W. PROSSER, THE LAW OF TORTS § 107, at 705 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 552 (1977). *Cf.* Strauss v. Belle Realty Co., 65 N.Y.2d 399, 492 N.Y.S.2d 167, 482 N.E.2d 34 (1985); Newlin v. New England Tel. & Tel. Co., 316 Mass. 234, 54 N.E.2d 929 (1944) (plaintiffs recovered economic losses either in negligence or as third party beneficiaries of contract for electricity due to utility blackout; in each cse, plaintiffs had suffered some physical harm as well).

115. *People Express Airlines*, 100 N.J. at 267, 495 A.2d at 118.

116. *See, e.g.*, *2314 Lincoln Park West*, 136 Ill. 2d 302, 555 N.E.2d 346 (1990) (dicta recognizing an extracontractual duty in an attorney-client relationship); *Harrison*, 715 F. Supp. 1425 (recognizing an extracontractual duty in a broker-client relationship).

117. Bertschy, *supra* note 101, at 354.

118. *Id.*

contractual arrangement between the two.[119] Imposing this duty upon certain professionals would emphasize their affirmative obligation to protect their clients from economic injury. Breach of this duty would be remedied in tort, and the plaintiff would be allowed to recover economic damages.[120]

Although the extracontractual duty approach would allow courts to award recovery for economic losses in professional malpractice claims, the courts have been reluctant to adopt this theory. To date, an extracontractual duty has only been recognized between a brokerage firm and its client.[121] The Illinois supreme court indicated in dicta that the attorney-client relationship involves an extracontractual duty, but perhaps signalling its willingness to consider such an approach, the court has not yet definitively resolved this issue.[122]

VI. CONCLUSION

The application of the *Moorman* doctrine to professional malpractice actions in general, and legal malpractice actions in particular, remains an unsettled question in Illinois. Because most professional malpractice claims sound in tort and *Moorman* precludes recovery for economic losses in tort, some alternative remedy must be developed to compensate clients harmed by professional malpractice and, simultaneously, to deter professional negligence. Perhaps it is through the recognition of an extracontractual duty that the courts most appropriately can allow recovery for economic losses in certain professional malpractice claims. The precise basis and scope of this extracontractual duty, however, must be clearly defined to prevent the complete erosion of the *Moorman* doctrine.

119. *See supra* note 116 (citing *2314 Lincoln Park West* and *Harrison*).

120. *See, e.g., Harrison*, 715 F. Supp. 1425 (economic loss can be recovered in malpractice action against brokerage firm).

121. *Id.*

122. Additionally, the adoption of this extracontractual duty approach stands in direct opposition to those Illinois decisions that find contract law more appropriately suited for professional malpractice claims. *See, e.g., Collins*, 195 Ill. App. 3d 1067, 553 N.E.2d 69.