

2005

A Commentary on the Economic Loss Doctrine Under the Rule of Cease Electric and Cascade Stone

John D. Finerty Jr.

Charles J. Crueger

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

John D. Finerty Jr. and Charles J. Crueger, *A Commentary on the Economic Loss Doctrine Under the Rule of Cease Electric and Cascade Stone*, 89 Marq. L. Rev. 137 (2005).

Available at: <https://scholarship.law.marquette.edu/mulr/vol89/iss1/11>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

A COMMENTARY ON THE ECONOMIC LOSS DOCTRINE UNDER THE RULE OF *CEASE ELECTRIC* AND *CASCADE STONE*

JOHN D. FINERTY, JR.*

CHARLES J. CRUEGER

I. INTRODUCTION

The economic loss doctrine is a judge-made rule that seeks to preserve the distinction between contract and tort on the basis that “contract law, and the law of warranty in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena.”¹ Wisconsin courts have struggled, however, to fashion uniform rules to apply this doctrine. The result is a line of inconsistent cases constructing artificial eligibility requirements that have, ultimately, abandoned the very principles the economic loss doctrine was created to safeguard.

An excellent example of the unworkable consequences of this struggle is *Insurance Co. of North America v. Cease Electric, Inc.*² and its recent progeny *Linden v. Cascade Stone Co.*³ and *Grams v. Milk Products, Inc.*⁴ In *Cease Electric*, the Wisconsin Supreme Court held that the economic loss doctrine does not apply to contracts for services; thus, a property owner who hired Cease Electric by virtue of an oral contract to wire a ventilation system could pursue a tort claim for negligent performance of services provided under the contract.⁵ The court’s holding diverged from its earlier holdings in cases such as *Van Lare v. Vogt, Inc.*,⁶ which threw out tort claims over representations

* Mr. Finerty (UW-Milw. MA Econ. 1999; Marq. JD 1992; UW-Madison BBA 1988) and Mr. Crueger (UW-Madison JD 1997; BA 1993) are partners in the Litigation Practice Group at Michael Best & Friedrich LLP, Milwaukee, WI. The authors wish to thank Justice William A. Bablitch (Ret.) for helpful comments on early drafts and David F. Loeffler, Esq. for an insightful critique of the final article.

1. *Daanen & Jassen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 845-46 (Wis. 1998).
2. 2004 WI 139, 688 N.W.2d 462.
3. 2005 WI 113, 699 N.W.2d 189.
4. 2005 WI 112, 699 N.W.2d 167.
5. *Cease Elec.*, 2004 WI 139, ¶ 2, 688 N.W.2d at 464.
6. 2004 WI 110, 683 N.W.2d 46.

made in the sale of real property,⁷ and *Mackenzie v. Miller Brewing Co.*,⁸ which applied economic loss doctrine precedent to limit tort claims in breach of employment contract cases.⁹ Further, the court's inconsistent holdings and its selective reliance on decisions from other states, blur the distinction between tort and contract law and create marketplace uncertainty that inhibits the ability of parties to service contracts to set prices. In essence, by overlaying tort law on service contract cases, as the court did in *Cease Electric*, the court injected an element of social commentary—specifically, that those who purchase services are in an inferior bargaining position—into the terms of a select category of private contracts. The court then compounded the problem in *Cascade Stone* when it held that whether the economic loss doctrine applies to contracts for services and products turns on a multi-factor test to determine if the contract is “predominantly” for services or a product.¹⁰ We propose a new rule.

When commercial parties freely and voluntarily enter into a contract, such that the contracting process has integrity and the policy implications of tort law do not arise, the parties are limited to their bargain. The issue courts should decide is whether the contracting process had integrity, not whether the contract called for services, products, or some combination of the two. Unlike tort law that “is rooted in the concept of protecting society as a whole from physical harm to person or property[.]” contract law—without regard to whether the contract is one for products or services—“rests on obligations imposed by bargain[.]” and it allows parties to protect themselves through bargaining.¹¹ The rule we propose preserves this distinction between tort and contract law and leaves policy-making, for the most part, to the parties.

As things stand now, however, the court in *Cease Electric* and *Cascade Stone* has set itself up as the ultimate second-guesser in the contracting process between private parties; its role is now to label a contract either for services or products and, in so doing, determine the remedies available to a buyer for a breach by a seller, but without regard to the remedies the parties agreed upon in the contract. But contracting parties want enforcement, not judicial explanations about

7. *Id.* ¶ 42, 683 N.W.2d at 56.

8. 2001 WI 23, 623 N.W.2d 739.

9. *Id.* ¶ 1, 623 N.W.2d at 740.

10. 2005 WI 113, ¶¶ 8-12, 699 N.W.2d at 193-94.

11. *Daanen & Jassen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998).

artificial distinctions and multifactor tests that have no practical use in the contracting process.¹² As a result, the rules of contract common law in Wisconsin should change to return control over contractual relationships to private parties. The court's decision in *Cease Electric* demonstrates the need for this reform.

II. THE *CEASE ELECTRIC* DECISION

An egg farmer, Cold Spring, needed to upgrade the ventilation system in its barn.¹³ It purchased a new ventilation system but needed an electrician to wire the system according to an one-page wiring schematic provided by the ventilation system's manufacturer.¹⁴ Therefore, Cold Spring entered into an oral contract with Cease Electric to install the necessary wiring and conduit.¹⁵ Cold Spring became dissatisfied with Cease Electric's work and terminated the relationship after Cease Electric finished "because it believed that Cease [Electric] had not completed the project correctly or in a timely fashion."¹⁶ The ventilation system subsequently failed, resulting in the death of nearly 18,000 hens. Cold Spring had insured against this loss, however, and it recovered its lost income and damages for the death of the hens under the policy.¹⁷ Its out-of-pocket cost was \$39,762, which included the policy deductible.¹⁸

Cold Spring hired an electrician to investigate the cause of the ventilation system failure.¹⁹ The electrician concluded that Cease Electric had improperly wired the system by wiring the main and back-up systems to the same power source.²⁰ Based on this analysis, Cold

12. "Thirsty folk want beer, not explanations." *Montgomery v. Thompson*, [1891] 8 RPC 361 (L.R.H.L.S.C.).

13. *Ins. Co. of N. Am. v. Cease Elec., Inc.*, 2004 WI 139, ¶ 3, 688 N.W.2d 42, 465.

14. *Id.* ¶ 7, 688 N.W.2d at 465.

15. *Id.*

16. *Id.*

17. Cold Spring's hens were "scheduled property" on its policy that protected against just such an accident as occurred here by virtue of a "Ventilation Coverage Endorsement." See Petitioner's Brief at 3, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (Case No. 03-0689); Petitioner's Reply Brief at 2, 15, Supp. App. at 201-04. See *Ins. Co. of N. Amer. v. Cease Elec.*, 2004 WI App 15, ¶ 8, 674 N.W.2d 886, 889. ("Pursuant to the insurance contract, INA paid Cold Spring \$118,339.20 for the loss of income and \$40,704.89 for the loss of chickens."). This fact was not mentioned by the court.

18. *Cease Elec.*, 2004 WI App 15, ¶ 8, 674 N.W.2d at 889.

19. *Id.* ¶ 8, 688 N.W.2d at 465.

20. *Id.* ¶ 9, 688 N.W.2d at 465.

Spring's insurer, the Insurance Company of North America ("INA"), with Cold Spring as an involuntary plaintiff, sued Cease Electric, alleging that it was negligent in performing the electrical services.²¹ The parties stipulated to damages of \$204,065 (the loss of income plus the cost of rewiring the system and replacing the hens).²² The sole count on the special verdict form submitted to the jury was for negligence.²³ A jury found Cease Electric liable.²⁴ Cease Electric moved for judgment notwithstanding the verdict to preclude the tort claim, citing the economic loss doctrine.²⁵ The trial court denied the motion.²⁶ The court of appeals rejected Cease Electric's primary appeal argument that the economic loss doctrine barred Cold Spring's tort claim, and the Wisconsin Supreme Court affirmed.²⁷

The Wisconsin Supreme Court found that the oral contract to install the ventilation system was for a service, not for a product, because all Cease Electric had to do was follow the wiring schematic.²⁸ Based on that factual finding, the court then held that INA and Cold Spring could pursue their tort claims because the economic loss doctrine does not apply to contracts for services.²⁹ It reasoned that the policy behind applying the economic loss doctrine to contracts for the sale of goods—(1) to maintain the distinction between tort and contract law, (2) to protect the freedom to allocate risk, and (3) to encourage the party best situated to assess the risk of loss to assume, allocate or insure against that risk—did not apply to contracts for services.³⁰ The court found tort

21. The complaint alleged three negligence theories: Cease Electric mis-wired the main and backup systems to the same power source, the components Cease Electric used were defective, and Cease Electric failed to test the final installed system. Petitioner's Brief at 8, 10, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (No. 03-0689); Transcript of Record at 58-59, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (No. 03-0689).

22. *Cease Elec.*, 2004 WI 139, ¶ 11, 688 N.W.2d at 465.

23. Petitioner's Motion to Supplement the Record at 2, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (No. 03-0689); Transcript of Record at 43:1-2, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (No. 03-0689).

24. *Cease Elec.*, 2004 WI 139, ¶ 11, 688 N.W.2d at 465.

25. Transcript of Record at 293, *Cease Elec.*, 2004 WI 139, 688 N.W.2d 462 (No. 03-0689).

26. *Id.*

27. Neither party argued, and the court never addressed, whether the "other property" exception to the economic loss doctrine allowed Cold Spring's insurer to pursue its tort claim against Cease Electric for the death of the hens. See, e.g., *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330 (Md. 1994) (finding the economic loss doctrine inapplicable because chickens killed by ventilation system malfunction were "other property").

28. *Cease Elec.*, 2004 WI 139, ¶ 18, 688 N.W.2d at 466.

29. *Id.* ¶ 53, 688 N.W.2d at 472.

30. *Id.* ¶ 38, 688 N.W.2d at 470.

law, not contract law, was instead better suited to deal “with purely economic loss in the context of service agreements.”³¹

The court offered several reasons for its conclusion that contract law was ill suited to remedy breaches of service contracts. For starters, the court wrote that the Uniform Commercial Code (“U.C.C.”), does not apply to service contracts.³² According to the court, not only does the U.C.C. assume a bargain between two parties of relatively equal bargaining power, but it also provides comprehensive remedies that ensure contracts for products are uniformly enforced; thus, “the built-in warranty provisions that the U.C.C. may provide in a contract for the sale of products or goods would not apply to a contract for services.”³³ Because the court believed that the U.C.C. does not apply to service contracts, it “decline[d] to extend the economic loss doctrine in this case.”³⁴

The court further concluded that “the fundamental premise” of contract law—that the parties will allocate the risks and remedies—“simply is not at work with many service contracts.”³⁵ Thus, “the policy of maintaining the distinction between tort and contract law does not warrant the invocation of the economic loss doctrine.”³⁶ The court went so far as to opine that “information disparities” and unequal bargaining power between parties to service contracts precluded any presumption that the party in the best position to assess the risk of economic loss should be encouraged to assume, allocate, or insure against the risk.³⁷

Finally, the court expressed a fear that applying the economic loss doctrine to contracts for services could be interpreted to extinguish professional malpractice claims against attorneys, engineers, architects, and other professionals.³⁸ In doing so, it declined to follow Illinois common law that applies the doctrine on a case-by-case basis to services that result in tangible objects, such as an improvement to real property.³⁹

31. *Id.* ¶ 35, 688 N.W.2d at 469.

32. *Id.*

33. *Id.*

34. *Id.* ¶ 36, 688 N.W.2d at 469.

35. *Id.* ¶ 42, 688 N.W.2d at 470. The court provided no citation to authority or supporting evidence for this assertion.

36. *Id.* ¶¶ 42-43, 688 N.W.2d at 470.

37. *Id.* ¶¶ 45-48, 688 N.W.2d at 471. The court again cited no authority or evidence supporting its conclusions; indeed, it did not mention the undisputed fact that Cold Spring had insurance protecting it against the very same loss it incurred in the case. That fact, as we discuss later, undermines the court’s social policy argument.

38. *Id.* ¶¶ 49-50, 688 N.W.2d at 471.

39. *See, e.g., Fireman’s Fund Ins. Co. v. SEC Donohue, Inc.*, 679 N.E.2d 1197 (Ill. 1997).

The court opted for what it called a “bright-line” rule that would avoid the problems lower courts would face in applying the doctrine in future contract cases.⁴⁰ As we shall see, the court’s underlying assumptions are, for the most part, untrue.

III. IMPLICATIONS OF *CEASE ELECTRIC* AND THE PROBLEMS IT RAISES

The premise of *Cease Electric* is that tort law, not contract law, is better suited to remedy breaches of contracts for services. *Cease Electric*’s conception of the role of tort law diverges widely from the conception underlying the court’s earlier precedent. The conflict between these differing conceptions of the role of tort law in general, and the economic loss doctrine in particular, is troubling for two related, but different, reasons. First, *Cease Electric* represents a new line of reasoning on how and, most importantly when, to overlay tort law on contract law. The distinction drawn in prior cases between tort and contract law is important because the two areas of law serve different purposes. Tort law regulates social conduct; liability in tort arises when one party breaches a duty imposed as a matter of social policy.⁴¹ In contrast, contract law protects the bargained-for expectations of parties to a contract.⁴² A breach of contract claim thus arises when one party breaches a duty imposed by mutual consent.⁴³ *Cease Electric* turns duties that arise under private contracts into societal obligations.

The second reason that the premise of *Cease Electric* is troubling is that the court’s conflicting conceptions of the economic loss doctrine will prove problematic for lower courts to apply in future cases. This is especially in cases that involve written contracts for services and those that call for a mix of products and services. A better rule—the rule we propose here—would dictate that parties to a contract that is entered into freely and with the opportunity to bargain can have their contract, and only their contract, enforced.

40. *Cease Elec.*, 2004 WI 139, ¶ 52, 688 N.W.2d at 472.

41. Economic loss doctrine cases such as *Van Lare v. Vogt* have made this point: “[T]ort law focuses on ‘protecting society as a whole from physical harm to person or property.’” 2004 WI 110, ¶ 25, 683 N.W.2d 46, 52 (quoting *Daanen & Jassen, Inc. v. Cedarapids Inc.*, 573 N.W.2d 842, 846 (Wis. 1998)).

42. *Van Lare*, 2004 WI 110, ¶ 25, 683 N.W.2d at 52.

43. *Daanen*, 216 Wis. 2d at 403, 573 N.W.2d at 846.

A. *The Conception of the Role of Tort and Contract Law to Remedy Contract Breaches Prior to Cease Electric*

Wisconsin courts prior to *Cease Electric* refused to extend tort liability to wrongs committed within the confines of a contract and adopted the economic loss doctrine. That is, these cases rejected attempts to turn duties imposed by mutual consent by virtue of a contractual relationship into duties imposed by social policy in tort law. Put yet another way, the doctrine was thought of traditionally as a limitation on who may sue in tort for personal injury damages or damage to property outside the contractual relationship. This view made tort claims, in the context of a contract, the exception.

This conception of the respective roles of tort and contract law reflected in the economic loss doctrine arose first in product liability cases. The doctrine developed because courts viewed warranty law and the law of contracts as better suited to deal with product defect cases. One of the first applications appeared in the California case of *Seely v. White Motor Co.*⁴⁴ Eventually, the United States Supreme Court approved the economic loss doctrine in *East River Steam Ship Corp. v. Transamerica Delaval.*⁴⁵ That case held that a claim for purely economic losses arising out of a product's failure to perform up to the purchaser's expectations should be a contract case, rather than a tort case.⁴⁶

The court wrote the following in *East River*: "Contract law, and the law of warranty in particular, is well suited to commercial controversies . . . because the parties may set the terms of their own agreements."⁴⁷ Wisconsin adopted the economic loss doctrine in *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*⁴⁸ Importantly, all three of these leading cases involved an alleged defective product. *Seely* was a warranty case that involved defective

44. 403 P.2d 145 (Cal. 1965). The first case to apply the economic loss doctrine was *Santor v. A&M Karagheusian*, 207 A.2d 305 (N.J. 1965), which predated *Seely* by only a few months. See Steven C. Tourek & Thomas H. Boyd, *Bucking the "Trend": The Uniform Commercial Code, The Economic Loss Doctrine and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 885-91 (1999) (providing a history of the economic loss doctrine). In *Santor*, the New Jersey Supreme Court held the warranty provisions of the U.C.C. were not the exclusive remedies available to commercial purchasers. 207 A.2d at 311.

45. 476 U.S. 858 (1986).

46. *Id.* at 872-73.

47. *Id.*

48. 437 N.W.2d 213 (Wis. 1989).

truck brakes that failed and caused a rollover accident;⁴⁹ in *East River*, the product was a defective turbine in a super-tanker;⁵⁰ in *Sunnyslope Grading*, the case involved alleged defects in a piece of construction equipment. Subsequent cases applied the economic loss doctrine to cement,⁵¹ fireproofing material,⁵² and the component parts of a rock crusher⁵³. Important here is that all of these cases involved contracts between a commercial buyer and seller.⁵⁴

The court expanded application of the doctrine to consumer purchasers in *State Farm Mutual Automobile Insurance Co. v. Ford Motor Co.*⁵⁵ In that case, the court held that a consumer who purchased a truck in "as is" condition could not sue in tort after a fire caused by a faulty ignition switch destroyed the entire vehicle.⁵⁶ Ironically, Ford Motor Company issued a recall notice for a faulty ignition switch on the plaintiff's Ford Bronco, which the company believed could start a fire, about two months after the fire at issue in the case.⁵⁷ The fire, however, occurred after the owner's extended warranty expired.⁵⁸ The court dismissed the case and held that warranty law applied, rather than tort

49. *Seely*, 403 P.2d at 147.

50. *E. River*, 476 U.S. at 861.

51. *See Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445 (Wis. 1999).

52. *See Northridge Co. v. W.R. Grace*, 471 N.W.2d 179 (Wis. 1991).

53. *See Daanen & Jassen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842 (Wis. 1998).

54. Following *East River*, federal courts expanded the economic loss doctrine to apply "to contracts for professional services rendered in connection with [the] manufacture or construction of the product by a party other than the builder or manufacturer." *See, e.g., Nathaniel Shipping, Inc. v. General Elec. Co.*, 920 F.2d 1256, 1265 (5th Cir. 1991) (citing *Employers Ins. of Wausau v. Suwanee River Spa Lines, Inc.*, 866 F.2d 752 (5th Cir. 1989)). This application of the economic loss doctrine is also the majority rule under state law. For example, in *Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 679 N.E.2d 1197, 1201 (Ill. 1997), a case considered but rejected by the court in *Cease Electric*, the Illinois Supreme Court held that the economic loss doctrine applied to services when the "ultimate result" of the services in question was a tangible object, such as an improvement to real estate. *See also Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 144 (D. Me. 1999) (the majority rule is that the economic loss doctrine applies to construction-related services); *Cathco, Inc. v. Valentiner Crane Brunjes Onyon Architects*, 944 P.2d 365, 368 (Utah 1997) (economic loss doctrine applies to claims against architects); *Bristol-Myers Squibb v. Delta Star, Inc.*, 206 A.D.2d 177, 181 (N.Y. App. Div. 1994) ("The economic loss rule does not provide any basis for distinguishing between the liability of product manufacturers and product installers for damages relating to the expectations of contracting parties."); *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 950 (11th Cir. 1982) (applying Georgia law and holding that the economic loss doctrine applies to services "where the exercise of professional skills occurred only in the process of manufacturing or constructing a product").

55. 592 N.W.2d 201 (Wis. 1999).

56. *Id.* at 203-04, 213-14.

57. *Id.* at 204.

58. *Id.*

law.⁵⁹ Although the case expanded the economic loss doctrine to apply to consumers as well as commercial purchasers, *State Farm* is still a case that involved only a defective product.

In a number of decisions released since 2001, however, the court applied the economic loss doctrine to contracts involving things other than products. The implication of those cases is that the distinction between a contract for products and services is not dispositive. For example, the court applied economic loss doctrine precedent in the employment contract case of *Mackenzie v. Miller Brewing Co.*⁶⁰ In that case, Jerald Mackenzie sued his former employer, Miller Brewing Company, for intentional misrepresentation and wrongful termination, both tort claims.⁶¹ Mackenzie alleged Miller Brewing Company lied to him when his supervisor told Mackenzie that his position would not be affected by a corporate reorganization.⁶² After having been misled, Mackenzie alleged, he was later turned down for a more lucrative position in a new department again based on a misrepresentation by his supervisor.⁶³

The jury found in Mackenzie's favor and awarded approximately \$26.5 million.⁶⁴ The court of appeals reversed.⁶⁵ The Wisconsin Supreme Court affirmed the reversal and held that employment is, in essence, a contractual relationship and that the employee was precluded from suing in tort.⁶⁶ According to the court, employees may sue for breach of the employment contract, violation of a duty beyond the terms of the employment contract, or promissory estoppel.⁶⁷ The court declined to create a new tort for intentional misrepresentation to induce continued employment.⁶⁸

Two years later in *Digicorp, Inc. v. Ameritech Corp.*,⁶⁹ the Wisconsin Supreme Court applied the economic loss doctrine in a contract case that involved the sale of Ameritech calling services and calling plans. There, Digicorp entered into a contract with Ameritech to become an

59. *Id.* at 218-19.

60. 2001 WI 23, ¶¶ 27-28, 623 N.W.2d 739, 749.

61. *Id.* ¶ 1, 623 N.W.2d at 740.

62. *Id.* ¶ 3, 623 N.W.2d at 740.

63. *Id.* ¶ 6, 623 N.W.2d at 741.

64. *Id.* ¶ 7, 623 N.W.2d at 741.

65. *Mackenzie v. Miller Brewing Co.*, 2000 WI App 48, 608 N.W.2d 331.

66. *Mackenzie*, 2001 WI 23, ¶ 27, 623 N.W.2d at 749.

67. *Id.* ¶¶ 23-25, 623 N.W.2d at 748.

68. *Id.* ¶ 22, 623 N.W.2d at 747-48.

69. 2003 WI 54, 662 N.W.2d 652.

authorized Ameritech distributor and sell Ameritech's "Value-Link" calling plan through Bacher Communications, a third-party sales agency.⁷⁰ Ameritech's policy was that it must approve all employees who sell its services, including third party agents.⁷¹ Digicorp sued Ameritech after a Bacher employee forged signatures on more than 250 Value-Link applications;⁷² Ameritech knew the Bacher employee was a problem because he had been fired previously by another Ameritech distributor for the same reason.⁷³ Digicorp "alleged breach of contract, intentional misrepresentation, strict liability misrepresentation, negligent misrepresentation, and negligence" because Ameritech failed to disclose the prior forgeries by the Bacher employee.⁷⁴ Ameritech filed a third party complaint against Bacher, who in turn sued Ameritech for various tort and contract claims, but not for punitive damages.⁷⁵

The trial court in *Digicorp* refused to dismiss Digicorp's or Bacher's tort claims.⁷⁶ Instead, the court applied a fraud-in-the-inducement exception to the economic loss doctrine and sent all the tort claims against Ameritech to the jury.⁷⁷ The jury returned a verdict, for the most part, in Digicorp's favor and awarded it \$13,080 for breach of contract, \$254,926 for misrepresentation, and \$139,051 in punitive damages; it awarded Bacher \$100,000.⁷⁸ The court of appeals affirmed the portions of the verdict in Digicorp's favor. In doing so, it also affirmed the verdict in favor of Bacher, again applying a fraud in the inducement exception to the economic loss doctrine, even though Bacher and Ameritech had no contract between them.⁷⁹ The Wisconsin Supreme Court affirmed and held the economic loss doctrine applied but that Wisconsin recognized a narrow fraud in the inducement exception.⁸⁰

70. *Id.* ¶ 6, 662 N.W.2d at 654-55.

71. *Id.* ¶ 7, 662 N.W.2d at 655.

72. *Id.* ¶¶ 9-12, 662 N.W.2d at 656.

73. *Id.* ¶ 6, 662 N.W.2d at 655.

74. *Id.* ¶ 12, 662 N.W.2d at 656.

75. *Id.*

76. *Id.* ¶ 15, 662 N.W.2d at 656.

77. *Id.*

78. *Id.* ¶ 16, 662 N.W.2d at 657.

79. *Id.* ¶ 18, 662 N.W.2d at 657.

80. *Id.* ¶ 21, 662 N.W.2d at 657. The court restated the definition of the economic loss doctrine as follows: "[A] commercial purchaser of a product cannot recover solely economic losses from the manufacturer under negligence or strict liability theories, particularly, as here, where the warranty given by the manufacturer specifically precludes the recovery of such

Later, in *Van Lare v. Vogt*, the court held that the economic loss doctrine applied to contracts to buy and sell real estate.⁸¹ In *Van Lare*, the plaintiff was a purchaser of real property who asserted a strict liability claim for the previous owner's alleged failure to disclose that the property had been used as an unlicensed disposal site for construction waste.⁸² The buyer, Van Lare, knew that the property had some refuse dumping on it, had the chance to test for further dumping and, despite those warning signs, opted to purchase the property "as is."⁸³ The Wisconsin Supreme Court held the economic loss doctrine applied.⁸⁴

The defendant in *Van Lare* argued the economic loss doctrine applied only to products. The court's response, however, was the following: "[W]e conclude that the economic loss doctrine may not be discarded simply because a transaction involves real estate."⁸⁵ The court noted that its prior decisions defined the economic loss doctrine both narrowly and broadly.⁸⁶ Specifically, the court restated the definition of the doctrine from *Digicorp* and then set out a broader definition first announced in *Tietsworth v. Harley-Davidson, Inc.*:⁸⁷ "a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contractual relationship."⁸⁸ The *Van Lare* court then rendered its decision based on the facts that surrounded the transaction; it wrote, "In this case, we have a written, bargained-for contract for the sale of commercial-use land between two sophisticated parties represented by counsel during the negotiation process."⁸⁹ Thus, finding all the hallmarks of a contract freely entered into, the court held the case was "tailor made" for contract law.⁹⁰

damages." *Id.* ¶ 33, 662 N.W.2d at 659 (quoting *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213, 217-18 (Wis. 1989)).

81. 2004 WI 110, ¶ 2, 683 N.W.2d 46, 48.

82. *Id.* ¶¶ 4-11, 683 N.W.2d at 49-51.

83. *Id.* ¶¶ 4-6, 683 N.W.2d at 49.

84. *Id.* ¶ 41, 683 N.W.2d at 56.

85. *Id.* ¶ 21, 683 N.W.2d at 52.

86. *Id.* ¶ 19, 683 N.W.2d at 51.

87. 2004 WI 26, 677 N.W.2d 233.

88. *Van Lare*, 2004 WI 110, ¶ 19, 683 N.W.2d at 52 (quoting *Tietsworth*, 2004 WI 26, ¶ 23, 677 N.W.2d at 241).

89. *Id.* ¶ 21, 683 N.W.2d at 51-52.

90. *Id.* Note the contrast in application of the doctrine and the end-results: the court applied the broad definition to preclude recovery in *Tietsworth* and *Van Lare*, but applied the narrow definition to allow recovery in *Cease Electric* with only a passing reference to the broader definition and no recognition of the difference.

B. The Court's Conflicting Conception of Tort and Contract Law in Cease Electric

The holding in *Cease Electric* is built upon an entirely different premise: that tort law—the law regulating duties imposed by social policy, not the bargained for expectations of parties to a transaction—is best suited to remedy wrongs committed within the confines of a contract for services. Thus, according to the court in *Cease Electric*, if the contract is one for services, there is no longer any need to maintain the distinction between tort and contract law, no need to protect the freedom to allocate risk, and no need to encourage the party best situated to assess the risk of loss to assume, allocate or insure against the risk.

This new conception of tort law in contract cases has pivotal significance because it challenges the fundamental principles of the role of tort in contract law that previously applied to all contracts. Before *Cease Electric*, the economic loss doctrine was a tool to help courts determine appropriate cases to over-lay tort law on the law of private contracts; the rule was that tort law would apply only in exceptional cases, such as personal injury cases, damage to other property, or the sale of hazardous materials.⁹¹ The underlying problem with *Cease Electric's* new conception of the role of tort law in enforcing contracts is that the court established the opposite presumption for service contracts, but provided no rational, fact-based explanation for such a radical departure from the common law of contracts. In fact, the court apparently failed to take note of the facts in *Cease Electric* that

91. To illustrate, if a party entered into a contract to purchase a product but the product failed, yet did no damage to other property nor injured the product's owner, the owner could sue under the contract, but not in tort. As a result, the reason for the product's failure—whether it was a known defect, negligent manufacturing or simply a mistake—was irrelevant. The owner, whose expectations were not met, could recover his or her economic losses unless provided for otherwise by the contract. But, if a product failed, and in doing so, caused a personal injury to the owner, such as those sustained in an auto accident caused by defective brakes, or causes damage to other property, for example, an engine that destroys other equipment on a ship, the owner would have a claim in tort law for these injuries. Therein lies the basis for the "other property" and "personal injury" exceptions to the economic loss doctrine created as matter of social policy and specifically crafted not to eviscerate the distinction between tort and contract law. Indeed, such exceptions preserve the distinction, provided the economic loss doctrine is otherwise applied uniformly when a contract exists. As a matter of policy, therefore, contracts are to be enforced, and tort claims arise only when parties to a contract violate duties beyond the contract that cause extra-contractual injuries or damage.

undermine its presumptions and cast a long and skeptical shadow over the value of the court's reasoning.

For example, the *Cease Electric* court concluded that a fundamental premise of contract law—that parties will allocate risks and remedies—is not present in many contracts for services; thus, there is no need to maintain the distinction between tort and contract law.⁹² The court, however, failed to cite any authority for that sweeping conclusion. The court claimed that the “facts demonstrated in this case” show that parties typically do not allocate risk in service contracts.⁹³ The court further presumed, again without citing facts or precedent, that there were “informational disparities between parties” to many service contracts and, thus, unequal bargaining power.⁹⁴ The court, however, ignored the undisputed facts that belie the fallacy of its premise.

First, the egg farmer, Cold Spring, insured against losses caused by the failure of its ventilation system.⁹⁵ Indeed, Cold Spring's insurer was the *lead plaintiff*.⁹⁶ The egg farmer and its insurer, not the electrician, had accurately calculated the value of the potential loss, should the ventilation system fail and the chickens die, based on information in Cold Spring's sole possession. That information was far beyond the scope of any information readily available to the electrician. The egg farmer, not the electrician, was thus in the best position to assess the risk thereby demonstrating the *absence* of “informational disparities.”

The facts of *Cease Electric* also demonstrate that no such informational disparities existed with respect to remedies. The contract in *Cease Electric* was between relatively sophisticated commercial parties and, if anything, the electrician, not the egg farmer, was at a bargaining disadvantage. After all, Cold Spring terminated the relationship when *Cease Electric* failed to meet its expectations.⁹⁷ Further, as a general matter, electricians are relatively easy to find,⁹⁸ and

92. *Cease Elec.*, 2004 WI 139, ¶¶ 42-43, 688 N.W.2d at 470.

93. *Id.* ¶ 42, 688 N.W.2d at 470.

94. *Id.* ¶ 46, 688 N.W.2d at 471.

95. *Id.* ¶ 10, 688 N.W.2d at 465.

96. *Id.*

97. *Id.* ¶ 7, 688 N.W.2d at 465.

98. Wisconsin lists a total of 390 businesses and individuals licensed as electricians with credentials approved by the state (which means the entity providing the services of an electrician must be or employ a state licensed master-electrician). See WISCONSIN DEPT. OF COMMERCE, SAFETY AND BUILDINGS DIVISION, LICENSES/CREDENTIALS, LIST OF PREREQUISITES FOR OBTAINING CREDENTIALS, <http://commerce.wi.gov/SB/Sbcredentialprerequisites.html> (last visited October 12, 2005). Further, according to Wisconsin Manufacturers and Commerce, there are 161 Wisconsin firms in its membership engaged in

if some electricians charge too much or propose objectionable terms, egg farmers may take their business elsewhere (which is precisely what Cold Spring did).

The court compounded the problem by adopting the premise that contract law was not as useful when applied to service contracts because many are informal, oral contracts.⁹⁹ According to the court, “few parties actually address the allocation of risk or the limitation of remedies” when entering into “informal” contracts.¹⁰⁰ What the court failed to acknowledge is that the decision not to formally allocate risk is, in and of itself, an allocation decision. That is, Cold Spring had no reason to allocate risk to Cease Electric, and thereby delay the start of work or increase the cost of installation, because Cold Spring had insurance. In a sense, it allocated the risk of loss to itself. The court’s holding, therefore, imposed on the parties contract terms that the court conceded the parties did not agree upon—that Cease Electric would bear the risk of loss despite Cold Spring’s insurance.

In the end, the court’s decision seems motivated by one concern only—that applying the economic loss doctrine to service contracts would provide lawyers, accountants, and other professionals with a shield to ward off professional liability lawsuits.¹⁰¹ *Cease Electric*, however, was by no means a professional negligence case. Claims that arise from a breach of a duty imposed independently of a contract, such as a fiduciary duty, are an altogether different situation.¹⁰² Lawyers,¹⁰³ doctors¹⁰⁴ and accountants¹⁰⁵ owe duties to clients, patients and third parties that other service providers do not. In those cases, the alleged tortfeasor may not use contract law to shield a tort liability for the breach of the duty.

providing electricians’ services. See WISCONSIN BUSINESS SERVICES DIRECTORY, 458, SIC 1731-Electrical Work (2004).

99. *Cease Elec.*, 2004 WI 139, ¶¶ 43-44, 688 N.W.2d at 470-71.

100. *Id.* ¶ 44, 688 N.W.2d at 471.

101. *Id.* ¶¶ 49-50, 688 N.W.2d at 471.

102. See, e.g., *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79 (3d Cir. 2001) (applying Pennsylvania law); *U. Int’l Holdings, Inc. v. Wharf Ltd.*, 210 F.3d 1207 (10th Cir. 2000) (applying Colorado law).

103. See WIS. SUP. CT. R. 20:1.1-20:8.5 (West 2005).

104. See WIS. ADMIN. CODE § Med. 10 (2002).

105. See WIS. ADMIN. CODE § Accy. 1.203 (2004) (Accounting principles). That Code section provides, in part: “No [accountant] shall express an opinion that financial statements are presented in conformity with generally accepted accounting principles if such statements contain any departure from [GAAP].” See also *Chevron Chem. Co. v. Deloitte & Touche*, 483 N.W.2d 314 (Wis. Ct. App. 1992) (resolving a claim by creditors against outside auditors).

C. *The Results in Cease Electric Demonstrate the Need to Restore Efficiency*

Once contractual relationships exist, contract law is more efficient than tort law to remedy disappointed expectations. The underlying objectives of tort law are to compensate the injured and deter future tortious conduct. Tort law, as an overall system of incentives and deterrence, may efficiently guide individuals to act reasonably or otherwise within the confines of some social norm. Once two parties begin a relationship, even an informal one, however, the justification for applying tort law begins to disappear.

Parties to a contract are no longer in an accidental relationship that may arise by happenstance, such as a car accident. The terms of the relationship that the parties decide for themselves, rather than the rules of tort law imposed by societal consensus, dictate how the parties interact. This fact creates efficiencies because the generalities of tort law are not specific enough to deal with each individual relationship. Once a relationship develops, any number of things are possible; the parties may negotiate a comprehensive contract or may enter into a contract covered by the U.C.C. or that incorporates U.C.C. type remedies. On the other hand, the parties may decide an informal contract meets their needs. In the event of a breach, without regard to the formality of the contract, contract law is sufficient to compensate the non-breaching party; tort law, on the other hand, allocates liability and damages less efficiently because it ignores the terms of the parties' voluntary interaction. The result in *Cease Electric* illustrates this point.¹⁰⁶

The Insurance Company of North America, the plaintiff in *Cease Electric*, was the only party to the transaction that came out ahead. The company wrote an insurance policy for the egg farm and, within the policy, issued a specific endorsement for the ventilation system failure. INA priced the policy based on the risk posed and then spread that risk among its other policyholders to set premiums for all of its customers. The premium INA set, presumably, contained a built-in profit margin—even if INA paid losses on some of its policies. But when it came time to payout under Cold Spring's policy, INA paid Cold Spring for its losses, less the policy deductible, and then recovered the full amount it paid to its policyholder from Cease Electric. In the meantime, INA got

106. See *Milwaukee Art Auction Galleries Ltd. v. Chalk*, 13 F.3d 1107, 1111 (7th Cir. 1994); see also E. ALLAN FARNSWORTH, *CONTRACTS* § 2.19, at 99-101 (2d ed. 1990).

to keep the premiums Cold Spring paid (with the built-in profit margin).

The egg farm, theoretically, came out even. Its own insurance company paid its losses, and Cease Electric reimbursed it for the policy deductible.¹⁰⁷ Cease Electric, on the other hand, is likely much worse off in the long run. That is, it may have insurance coverage for the losses sustained in this case, but to the extent its insurance coverage failed to consider the risk of loss of the nature imposed by the court, Cease Electric will bear the cost of that loss over time in the form of higher premiums. In the end, the allocation of recovery in this case by the court was entirely inefficient. Eschewing predictable contract law, therefore, in favor of less predictable tort remedies, the court created the very inefficiencies the contracting parties tried to avoid.

If tort claims for negligent contract performance proliferate, judges and juries will be called upon regularly to determine whether a particular contract or contract non-performance violated a social standard rather than the terms of the contract. The cost of doing business by contract, and accordingly the cost of services, will increase to reflect the parties' perceptions of a judge's or jury's satisfaction with the contract, *ex post*, rather than the expectations of the parties, *ex ante*.¹⁰⁸ Because costs and the potential for liability create incentives, we question whether the court evaluated fully the impact of its rule. Perhaps the rule of *Cease Electric* creates incentives to enter into contracts carefully to avoid tort liability; on the other hand, it also creates escape hatches for buyers who do not pay attention to the terms of contracts to which they agree.

Cease Electric also sets the stage for a potential parade of horrors in contract cases. Punitive damages are not awardable in breach of contract cases.¹⁰⁹ But, as a result of *Cease Electric*, companies that provide services or participate in the chain of providers that render the end-result services,¹¹⁰ are subject to both tort and contract claims for providing services negligently. The result is a legal rule with yet more consequences the court probably never contemplated. For example, suppose the egg farmer in *Cease Electric* breached its contractual duty

107. *Cease Elec.*, 2004 WI 139, ¶ 10, 688 N.W.2d at 465.

108. The court in *Wausau Tile, Inc. v. County Concrete Corp.*, made the following related point: "If tort recovery were permitted, sellers of products would be 'potentially liable for unbargained-for and unexpected risks'... leading eventually to higher prices for consumers." 593 N.W.2d 445, 456 (Wis. 1999) (citation omitted) (quoting *Daanen & Jassen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 849 (Wis. 1999)).

109. *Entzminger v. Ford Motor Co.*, 177 N.W.2d 899, 903 (1970).

110. *See Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶ 64, 662 N.W.2d 652, 666.

to pay the electrician or supply the necessary parts. Could the electrician recover in tort for the egg farmer's default? Under *Cease Electric*, the answer is apparently "yes." After all, if society has an interest in regulating the electrician's performance of a service contract, it should have an equal interest in regulating the performance of the other party to the same service contract. We find this to be an odd but possible result.¹¹¹

IV. *LINDEN V. CASCADE STONE* COMPOUNDS THE PROBLEMS OF *CEASE ELECTRIC*

The Court in *Linden v. Cascade Stone* adopted the "predominate purpose" test, a grab bag of fact-dependent subjective and objective factors, to hold that a contract with a general contractor to build a home was predominately one for a product (a home), not for services (the construction of a home).¹¹² In that case, the Lindens signed a written contract with a general contractor, Groveland, to build a new home.¹¹³ Groveland retained various subcontractors to build the house. The Lindens brought tort claims against both Groveland and two subcontractors, alleging, among other things, that the subcontractors negligently shingled the roof and applied stucco to the exterior walls.¹¹⁴ The court held that, because the fixed-price contract between the Lindens and Groveland was predominately for a product rather than services, the economic loss doctrine barred the Lindens' tort claims

111. *Cease Electric* has implications for other cases that were correctly decided. For example, *Mackenzie v. Miller Brewing Co.* held that an employee may sue his or her employer for breach of contract if the employer failed to provide the employee with any promised benefits of the employment relationship. 2001 WI 23, ¶ 1, 623 N.W.2d 739, 740. At a very basic level, the case stands for the proposition that if someone does not like his or her job, the employee is free to change jobs; by not doing so, the person risks disappointment. The remedy for disappointment, however, is recovery of money equivalent to the amount of the unfulfilled contractual promise. *Cease Electric* could make one question whether *Mackenzie* is still good law. After all, employees provide services, not products. If we follow the rule of *Cease Electric* as stated, the economic loss doctrine does not apply. *Id.*

To be certain, *Mackenzie* is the flip-side of *Cease Electric*. That is, Gerald Mackenzie sold his employment services to Miller Brewing but wanted tort remedies as the plaintiff. *Id.* ¶ 2, 623 N.W.2d at 740. *Cease Electric* sold its services to Cold Spring egg farm but attempted to use the economic loss doctrine to shield it from tort liability. *Cease Elec.*, 2004 WI 139, ¶ 12, 688 N.W.2d at 465. The rule of *Cease Electric*, however, does not draw such a distinction. Gerald Mackenzie and *Cease Electric* provided services—not products—so their cases should arguably be treated the same under the court's "bright-line" rule.

112. 2005 WI 113, ¶ 32, 699 N.W.2d 189, 199-200.

113. *Id.* ¶ 2, 699 N.W.2d at 191.

114. *Id.* ¶ 3, 699 N.W.2d at 191.

against the subcontractors.¹¹⁵

The significant holding of *Cascade Stone* is that whether the economic loss doctrine applies to a contract for both goods and services turns on a court's application of a "predominant purpose" test—a mix of subjective and objective factors that includes "the language of the contract, the nature of the business of the supplier, the intrinsic worth of the materials, . . . the circumstances of the parties, and the primary objective they hoped to achieve by entering into the contract."¹¹⁶ The court stated that this was a "totality of the circumstances" test.¹¹⁷ In this instance, however, the court gave particular weight to its observation that "the parties bargained for costs based on the specifications of the house, not the amount of work put into completion of the project" to conclude that the contract was for a product, not services.¹¹⁸ Thus, because the court concluded that the contract was predominately one for a product, not for services, the economic loss doctrine applied. Indeed, the court noted that the Lindens had bargained for coverage of the risk of faulty workmanship with Groveland, and "[a]llowing the Lindens to maintain a tort claim against the subcontractors for services rendered to the general contractor would undermine the distinction between contract law and tort law that the economic loss doctrine seeks to preserve."¹¹⁹

Cascade Stone represents a significant expansion of *Cease Electric* and magnifies the problems that arise when the issue turns, not on the integrity of the contracting process, but rather on an analysis of whether the contract was "predominantly" one for products or services. Under *Cascade Stone*, the economic loss doctrine does not apply to contracts for "services," nor does it apply to contracts for the sale of a product when the mix of products and services is judged (by a court) to be

115. *Id.* ¶ 25, 699 N.W.2d at 197. Groveland settled with the Lindens. The court noted, however, that allowing the Lindens to maintain tort claims against the subcontractors would also allow them to circumvent their contract with Groveland, *see id.* ¶ 17, 699 N.W.2d at 195, but its reasoning on that point is irrelevant to its analysis of whether the economic loss doctrine applied. Ironically, the rule of the case implies that *Cease Electric*, had it been a sub-contractor, could have invoked the economic loss doctrine; but, because it acted alone, it faced tort liability.

116. *Id.* ¶ 21, 699 N.W.2d at 196 (citations omitted).

117. *Id.* ¶ 22, 699 N.W.2d at 196.

118. *Id.* ¶ 25, 699 N.W.2d at 197. Of course, this is the contract viewed from the buyer's perspective; any contractor would evaluate a fixed-price contract from exactly the opposite view that the price is based on the material cost plus the labor costs needed to complete the project plus a profit.

119. *Id.* ¶ 17, 699 N.W.2d at 195.

“predominantly” a contract for services.¹²⁰ Thus, under *Cease Electric* and *Cascade Stone*, the economic loss doctrine is inapplicable if fifty-one percent of a contract price is for services, even though forty-nine percent of the price represents a sale of a product. That is, the decisions in *Cease Electric* and *Cascade Stone* are nothing more than an invitation for attorneys and courts to engage in a legal exercise of artificial line drawing.

If the court stays this course, it will confuse further the marketplace contracting process. The uncertainty arises because buyers and sellers of goods and services have no way of knowing whether a court will weigh and apply the subjective and objective factors as they do, and thus have no way of knowing whether their contracts are predominately for services or products. Stated otherwise, the parties have no way of knowing whether a court will accept their bargained-for allocation of risk.

Further, a long line of future “predominate purpose” cases, exclusive to building services and products, is almost guaranteed because the courts will have to give some guidance on what factors are due what weight and what “tips” the scale from product to services in close cases. In sum, the decisions in *Cease Electric* and *Cascade Stone* ensure that future application of the economic loss doctrine will turn, not on the integrity of the contracting process between the parties, but on the arguments of lawyers and the judgments of courts on whether a particular fact pattern amounts to a contract for “services” or one for a “product.” A better rule would be to focus on the integrity of the contracting process, and we explain why in the next section.

V. A BETTER RULE

A. *The Rule Explained*

We propose a better rule: when commercial parties enter into a contract freely and voluntarily, such that the contracting process has integrity and the policy implications of tort law do not arise, the parties are limited to their bargain and may not sue in tort for remedies beyond the contract. The issue in any case in which the parties perform under a contract should be the integrity of the contracting process, not a court’s post-performance characterization of the contract nor its use of multi-

120. See *id.* ¶ 8, 699 N.W.2d at 193.

factor tests that had no meaning to contracting parties when the agreement was made. In this light, it should be clear that the rationale of *Cease Electric*, premised upon a perceived distinction between the application of contract law to service and product contracts, will prove only problematic in future cases because distinctions between service contracts and those for products, or judge-made rules to draw such distinctions, are neither as clear nor as meaningful as the court assumed.

This proposed rule of law requires two things: a contract and a bargaining process with integrity that demonstrates that the parties freely and voluntarily entered into the contract. When these two elements are present, the law should presume that the parties, rational as they are, agreed to contract terms that, on balance, are what they wanted and are sufficient to protect their respective interests. It also reverses the presumptions *Cease Electric* and *Cascade Stone* created that contract law is ill suited to enforce contracts that call for mostly services. The rule would not apply, however, in the absence of a contract, or if there was fraud or intentional misrepresentation or some other problem with the formation that induced the other party to enter into the contract or agree to a particular term. That is not to say that fraud as to any term, for example, voids or renders the contract unenforceable; the economic loss doctrine would simply not apply if one party, by fraud, induced another to agree to a term that was in dispute in the lawsuit at issue. The rule would also allow tort claims for personal injuries or breaches of other duties, such as the fiduciary duty directors and officers owe a corporation and its shareholders.

The rule we propose here has already been endorsed by one United States district court that twice held, absent injury to persons or damage to other property, the economic loss doctrine applies to contracts for services entered into by sophisticated commercial parties.¹²¹ It is also consistent with the premise underlying "freedom of contract" that courts should protect the expectancy interests of parties to a contract when there is "a bargain freely and voluntarily made through a process of bargaining which has integrity."¹²² At least in the context of contracts between commercial parties, the rule further dispenses with artificial distinctions, such as those between contracts for "services" and those for "products," that merely create more cases over the scope of the distinctions rather than add to the usefulness of the rule.

121. *Stoughton Trailers, Inc. v. Henkel Corp.*, 965 F. Supp. 1227, 1235 (W.D. Wis. 1997); *Wausau Paper Mills Co. v. Chas. T. Main, Inc.*, 789 F. Supp. 968, 974 (W.D. Wis. 1992).

122. *Merten v. Nathan*, 321 N.W.2d 173, 178 (Wis. 1982).

The proposed rule would not deprive a contracting party of remedies to the extent the court implied in *Cease Electric*. Damages for breach of contract and those that are the natural and probable consequences of a breach are potentially recoverable in contract cases.¹²³ But so are economic losses, such as repair and replacement costs¹²⁴ and lost profits.¹²⁵ Further, the traditional exceptions for personal injury and damage to other property would also apply, thereby ensuring traditional tort claims would survive.¹²⁶

Nor would this rule require overturning years of Wisconsin precedent. To the contrary, it is the same definition of the doctrine the court announced in *Tietsworth v. Harley-Davidson, Inc.* and *Digicorp, Inc. v. Ameritech Corp.*; both cases described the economic loss doctrine as follows: “A judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.”¹²⁷ The court later applied this rule in *Cascade Stone*. The rule announced in those cases required only a “contract relationship” and made no distinction between service contracts and those for products; it imposed no writing requirement; and it made no

123. *Magestro v. N. Star Envtl. Constr.*, 2002 WI App 182, ¶ 10, 649 N.W.2d 722, 726 (“Contract damages should compensate the wronged party for damages that arise naturally from the breach . . .”); *Kraemer v. Memominie Area Bd. of Educ.*, 2001 WI App 244, 635 N.W.2d 857 (consequential damages awardable in breach of employment contract case, but limited by foreseeability, mitigation and certainty).

124. *Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445, 451 (citing *E. River S.S. Corp. v. Transamerica Deleval*, 476 U.S. 858, 870 (1986); *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990); and *Northridge v. W.R. Grace & Co.*, 471 N.W.2d 179, 184 (Wis. 1991)).

125. *Wausau Tile*, 593 N.W.2d at 451 (citing *Daanen & Jassen v. Cedarapids, Inc.*, 573 N.W.2d 842, 845 (Wis. 1998); *Northridge*, 471 N.W.2d at 182; and Steven R. Swanson, *The Citadel Survives A Naval Bombardment: A Policy Analysis of the Economic Loss Doctrine*, 12 TUL. MAR. L.J. 135, 140 (1987)).

126. Also surviving adoption of our rule would be tort claims that arise from duties that exist independently of the performance of a contract. Those claims include tort claims over the delivery of professional services, (a concern of the court in *Cease Electric*; see *supra* notes 51-55 and accompanying text). Also alive and well would be tort claims for negligent performance of a contract where a party has assumed duty beyond the terms of the contract. See, e.g., *Colton v. Foulkes*, 47 N.W.2d 901 (Wis. 1951); but see *Landwehr v. Citizens Trust Co.*, 329 N.W.2d 411, 414 (Wis. 1983) (stating that “there must be a duty existing independently of the performance of the contract for a cause of action in tort to exist”) and *Greenburg v. Stewart Title Guar. Co.*, 492 N.W.2d 147, 152 (Wis. 1992) (“In *Landwehr*, we explained that our language in *Colton* was meant to indicate that the “state of things” which arises out of a contract to furnish the occasion for the tort, but not the underlying duty for the tort.”).

127. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 23, 677 N.W.2d 233, 241; see *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶¶ 33-35, 662 N.W.2d 562, 569.

prejudgments about whether contract or tort law offered a more suitable remedy.¹²⁸

B. *The Principles Behind The Rule*

1. Contracts are Necessary for Efficient Economic Exchanges

The buying and selling of goods and services, the creation of markets to facilitate transactions and institutions to regulate them, the organization of firms, and even money, are all common-place economic phenomena that exist to address some of the fundamental issues confronting society, such as how to accumulate, invest, or distribute wealth. Put otherwise, economics is mankind's pursuit of "the ordinary business of life."¹²⁹

The rule we propose is built upon the bedrock principle that "[t]he law of contracts is based on the principle of freedom of contract, on the principle that individuals should have the power to govern their own affairs without governmental interference."¹³⁰ Thus, "[t]he courts protect each party to a contract by ensuring that the promises will be performed . . . [because] [t]he law protects justifiable expectations and the security of transactions."¹³¹ As Judge Posner put it, "the fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and (the same point) obviate costly self-protective measures."¹³² Contracts thus facilitate and indeed are necessary to day-to-day economic activity.

2. For the Rule to Apply, There Must be a Contract

We agree, in part, with Chief Justice Abrahamson's dissent in *Grams v. Milk Products, Inc.*¹³³ One of the reasons for her dissent in that case

128. See *Tietzworth*, 2004 WI 32, ¶ 23, 677 N.W.2d at 241; *Digicorp, Inc.*, 2003 WI 54, ¶¶ 33-35, 662 N.W.2d at 569.

129. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 1 (8th ed. 1890).

130. *Merten v. Nathan*, 321 N.W.2d 173, 177 (Wis. 1982).

131. *Id.*

132. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 103 (5th ed. 1998) (footnote omitted).

133. 2005 WI 112, 699 N.W.2d 167.

was that the plaintiffs had no contractual relationship with the defendant and, thus, in her opinion, the economic loss doctrine should not have applied.¹³⁴ The existence of a contract and the opportunity to bargain to protect one's interest is, of course, central to the principles behind applying the economic loss doctrine.

In *Milk Products*, the purchasers of a product called "Half-Time" sued the product manufacturer and distributor for breach of warranty, negligence, and other torts.¹³⁵ Their suit claimed the product, a nutritional supplement or milk replacer for livestock, damaged their calves' immune system and increased mortality rates among the herd.¹³⁶ The Grams had a contractual relationship with the distributor, but they had no contact with Milk Products Inc., the manufacturer, until a problem arose.¹³⁷ The court, nevertheless, held that the economic loss doctrine applied to bar the plaintiff's tort claims because the claimed damages were "the result of disappointed expectations of a bargained-for product's performance."¹³⁸

That is not to say that *Milk Products* was wrongly decided; it is, perhaps, ambiguous in its wording. The court referred repeatedly to the Grams' "disappointed expectations," but it also wrote that their only claim was against Cargil, the distributor.¹³⁹ They may, however, have a claim under section 90 of the Restatement (Second) of Contracts¹⁴⁰ against Milk Products.¹⁴¹ That claim would fit squarely within the economic loss doctrine because it is based in contract, not in tort.¹⁴² Such a claim also specifically provides for expectation damages that may or may not be different than those available in a pure breach of contract

134. *Id.* ¶ 63, 699 N.W.2d at 182.

135. *Id.* ¶ 9, 699 N.W.2d at 170.

136. *Id.* ¶ 8, 699 N.W.2d at 170.

137. *Id.* ¶ 10, 699 N.W.2d at 170.

138. *Id.* ¶ 3, 699 N.W.2d at 169.

139. *Id.* ¶ 55, 699 N.W.2d at 180.

140. Restatement (Second) of Contracts § 90 (1981):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Id.

141. See *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

142. See *Hoffman*, 133 N.W.2d 267. The majority opinion in *Milk Products*, however, made no mention of *Hoffman* or of section 90 of the Restatement (Second) of Contracts.

claim.¹⁴³

There is, however, a clear distinction in our minds between cases such as *Milk Products*, which involved an ingredient in a mass produced and widely distributed product, and those that involve a direct contractual relationship for a specified product, such as the home in *Cascade Stone*, or a defined service, such as the ventilation system installation in *Cease Electric*. For example, *Cascade Stone* involved a homeowner's claim against its subcontractors; although there was no contract between the homeowner and the subcontractors, there was a definitive general contract between the homeowner and the builder.¹⁴⁴ In that type of case, as was also the case in *Digicorp, Inc. v. Ameritech Corp.*, both parties to the contract expected that the general contractor would hire subcontractors to perform some or all of the work. If a roof is installed negligently, or some other part of the home fails to meet expectations established by the contract, the general contractor may be, and is generally prepared to be, held liable. We would, therefore, draw a clear distinction between subcontractor cases, such as *Cascade Stone* and product cases, such as *Milk Products*.

3. Courts Should Protect the Integrity of the Contracting Process

The Wisconsin Supreme Court has long held that it will enforce a contract that is the result of "a bargain freely and voluntarily made through a process of bargaining which has integrity."¹⁴⁵ There would seem to be nearly limitless scenarios in which contracts are freely and voluntarily made through a bargaining process that has integrity; courts make exceptions to contract enforcement, typically in consumer transactions, where there is unequal bargaining power, where the contract is induced by fraud, where the contract lacks consideration, where the product is a necessity or no alternative source of the product is readily available, or where the purchaser cannot reasonably insure against consequential damages.¹⁴⁶ Application of this "freely and voluntarily made" contract standard and its exceptions should be no different when the contract is between commercial parties and without regard to whether the subject matter of the contract is a service or

143. *Milwaukee Auction Galleries Ltd. v. Chalk*, 13 F.3d 1107, 1111 (7th Cir. 1994).

144. *Linden v. Cascade Stone*, 2005 WI 113, ¶¶ 2-3, 699 N.W.2d 189, 191.

145. *Merten v. Nathan*, 321 N.W.2d 173, 178 (Wis. 1982).

146. *See State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201, 218 (Wis. 1999).

product. Likewise, exceptions to application of the economic loss doctrine should be uniform as well.

Nothing in the principles behind applying the economic loss doctrine to contracts for services or products alters the rules that apply to ensuring integrity in the process of forming a contract. A court's primary objective, therefore, should be to enforce a party's reasonable, bargained for contract expectations.¹⁴⁷ Courts should decline to enforce a contract only if it "violates a statute, rule of law, or public policy."¹⁴⁸ This is where *Cease Electric* went wrong.

The court in *Cease Electric* assumed that contracts for services were not the result of a free and voluntary process because so-called "informational disparities" existed that resulted in unequal bargaining power.¹⁴⁹ But this is tantamount to finding that there is a problem with the formation of *every* contract for services and that some type of exigent circumstances require court intervention and policing of the contracting process. There is no basis to apply such a presumption—and the court cited none—to contracts between commercial entities. "Sophisticated parties are just as capable of allocating the risk of economic loss in a contract for services as in a contract for a product."¹⁵⁰ Court-imposed risk allocations based on social policy and the court's perception of unequal bargaining power between commercial entities will succeed only in imposing additional transaction costs on commercial parties. As long as the decision to contract is made freely, without force or deception material to the decision at hand, then courts should enforce commercial parties' agreements and expectations and apply the economic loss doctrine to maintain the distinction between tort and contract. To do any less, or any more as *Cease Electric* attempted to, would *create* unequal bargaining power and informational disparities where none existed previously.

Our view of the economic loss doctrine is entirely consistent with precedent that pre-dates *Cease Electric* and narrow exceptions to the pre-*Cease Electric* rule. For example, the court's key decision on the fraud in the inducement exception to the economic loss doctrine was the plurality opinion in *Digicorp, Inc.* Subsequent to *Digicorp, Inc.*, the court stressed that "the *Digicorp* majority clearly rejected a broad fraud

147. *Watts v. Watts*, 405 N.W.2d 303, 309 (Wis. 1987).

148. *See, e.g., Continental Cas. Co. v. Wis. Patients Comp. Fund*, 473 N.W.2d 584, 586 (Wis. Ct. App. 1991).

149. *Ins. Co. of N. Am. v. Cease Elec., Inc.*, 2004 WI 139, ¶ 46, 688 N.W.2d 462, 471.

150. *Stoughton Trailers, Inc. v. Henkel Corp.*, 965 F. Supp. 1227, 1233 (W.D. Wis. 1997).

in the inducement exception to the economic loss doctrine.”¹⁵¹ Of the majority of justices who rejected the broad fraud in the inducement rule of *Douglas-Hanson Co. v. BF Goodrich Co.*,¹⁵² Justice Sykes did not recognize any fraud in the inducement exception; Justices Crooks and Prosser recognized a narrow exception such as that adopted in *Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.*¹⁵³ Therefore, applying the “narrowest grounds” test¹⁵⁴ to the court’s ruling, *Digicorp, Inc.* stands for the proposition that, while there is a fraud in the inducement exception to the economic loss doctrine, it is a narrow exception.¹⁵⁵ Accordingly, the court adopted a narrow fraud in the inducement test in *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*¹⁵⁶

4. A Commercial Contract Must be Definite, but Need not be in Writing to be Enforceable

Many commercial contracts are in writing, but as *Cease Electric* demonstrates, it is also common for commercial parties to enter into oral contracts. *Cease Electric* demonstrates that commercial parties

151. *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 47, 683 N.W.2d 46, 57 (Crooks, J., concurring) (citing *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶ 3, 662 N.W.2d 652, 654).

152. 598 N.W.2d 262 (Wis. Ct. App. 1999). A particular point of a plurality opinion is considered an opinion of the court when a majority of participating judges agree upon it. *State ex rel. Thompson v. Jackson*, 546 N.W.2d 140, 142 (Wis. 1996) (citing *State v. Elam*, 538 N.W.2d 249, 250 (Wis. 1995)).

153. 532 N.W.2d 541 (Mich. Ct. App. 1995). *Digicorp, Inc.*, 2003 WI 54, ¶ 5 n.2, 677 N.W.2d at 243 n.2; see also *Van Lare*, 2004 WI 110, ¶ 51, 683 N.W.2d at 49 (Crooks, J., concurring); *Tietsworth v. Harley Davidson, Inc.*, 2004 WI 32, ¶ 32, 677 N.W.2d 233, 243 (“A majority of the justices participating . . . overruled *Douglas-Hanson Co.* to the extent that it recognized a broad exception to the economic loss doctrine for all claims of fraud-in-the-inducement of a contract.”).

154. When applying plurality decisions, the Wisconsin Supreme Court has adopted the “narrowest grounds” approach of the United States Supreme Court. *Vincent v. Voight*, 2000 WI 93, ¶ 46 n.18, 614 N.W.2d 388, 405 n.18; *Lounge Mgmt. v. Town of Trenton*, 580 N.W.2d 156, 160 (Wis. 1998). Thus, in the plurality decision, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Vincent*, 2000 WI 93, ¶ 46 n.18, 614 N.W.2d at 405 n.18 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, and Stevens, JJ.)). See also *Marks v. United States*, 430 U.S. 188, 193 (1977).

155. 2003 WI 54, ¶ 3, 662 N.W.2d at 654. The court in *Digicorp, Inc.*, wrote: “Wisconsin recognizes a narrow fraud in the inducement exception [and] recovery of the benefit of the bargain is prohibited where the fraud in the inducement exception applies and tort remedies are sought.” *Id.* ¶ 68, 662 N.W.2d at 667. This narrow exception and a forced election of remedies is yet another example of precedent that acknowledges the importance of distinguishing between tort and contract law.

156. 2005 WI 111, 699 N.W.2d 205.

operate under certain assumptions: property owners have property insurance; contractors warrant that their performance will be undertaken in a reasonable, workmanlike manner; and if a product or service is defective, the buyer should not have to pay.¹⁵⁷ The court in *Cease Electric* departed from those assumptions. In doing so, it implied there is something about oral contracts that is *less* enforceable than written contracts. Another possible implication of the holding in *Cease Electric*, therefore, is to impose a writing requirement on all commercial service contracts in order to avoid tort liability.

Perhaps cases in which parties enter into comprehensive written contracts for services that provide warranties, or spell out insurance responsibilities and other terms of liability, are the “certain circumstances” that the court was referring to in *Cease Electric* that would trigger application of the economic loss doctrine.¹⁵⁸ In other words, the rule of *Cease Electric* could be read to be limited to oral contract cases, not contracts where “we have a written, bargained-for contract for the sale of commercial . . . [services] between two sophisticated parties represented by counsel during the negotiation process” as the court found in *Van Lare*.¹⁵⁹ Those cases have the hallmarks of fairness that apparently motivated the court to decide *Van Lare* for the defense; without such protections, the court decided *Cease Electric* for the plaintiffs.

The court’s citation to the Minnesota case of *McCarthy Well Co. v. St. Peter Creamery, Inc.*,¹⁶⁰ provides support for this reading of *Cease Electric*. In *McCarthy Well Co.*, the court held that well drilling services did not arise out of a “commercial transaction” within the meaning of U.C.C. Article 2 and, therefore, were not subject to the economic loss doctrine.¹⁶¹ Important to the court’s analysis in *McCarthy Well*,

157. These assumptions run through a long history of common law in cases such as *Wells v. Calnan*, 107 Mass. 514 (1871) and *Thompson v. Gould*, 37 Mass. 134 (1838). Those seminal cases stand for the rule that owners in possession of real property bear the risk of loss; thus, the obligation to carry insurance, falls on the party in possession. See *Smith v. Hardware Dealers Mut. Fire Ins. Co.*, 33 N.W.2d 206 (Wis. 1948).

158. *Ins. Co. of N. Amer. v. Cease Elec.*, 2004 WI 139, ¶ 24, 688 N.W.2d 462, 467.

159. *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 21, 683 N.W.2d 46, 52.

160. 410 N.W.2d 312 (Minn. 1987).

161. In *McCarthy Well Co.*, St. Peter Creamery alleged that McCarthy Well negligently performed its contract to restore the creamery’s artisan well. 410 N.W.2d at 315. McCarthy Well performed a number of operations, including exploding dynamite at the bottom of the well to increase the flow of water in the well. *Id.* After the well produced a water flow, the pumps McCarthy Well installed began breaking. *Id.* Eventually, the creamery dug a new well and installed a new pump. McCarthy Well billed the creamery \$34,573 for well drilling and \$8329 for a pump. *Id.* McCarthy billed the creamery a second time for labor associated

however, were the written terms and conditions of the acknowledgement of order form. McCarthy Well claimed its terms and conditions, on the back of its acknowledgement of order form, contained a valid exculpatory clause that provided: "Contractor[s] shall not be liable for . . . [a]ny other damage or liability of any nature whatsoever arising or growing out of the Contractor's work hereunder."¹⁶² The court found the terms and conditions, including the exculpatory clause, were unenforceable because they were on the reverse side of the acknowledgement form and in font so small as to be unreadable.¹⁶³ The implication of this holding is that, had the terms and conditions been clearly set forth, the court would have enforced McCarthy Well's exculpatory clause.¹⁶⁴

with pump repairs in the amount of \$4369. The creamery made partial payment, and McCarthy Well sued to recover the balance. The creamery asserted a counterclaim that alleged McCarthy Well negligently performed drilling services and pump installation that damaged the creamery's dried milk products. *Id.* McCarthy Well raised the economic loss doctrine as a defense. The court ruled, however, that under *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981), the economic loss doctrine applied only to commercial transactions; a "commercial transaction" under the *Superwood* rule is a transaction governed by Article 2 of the U.C.C., Minnesota Statutes, Chapter 336 (1986). *Id.* Because drilling services and pump installations are not covered by Article 2, the court held that the contract between the parties was not a commercial transaction and thus, that McCarthy Well could not raise the economic loss doctrine as a defense. *Id.* at 315.

162. *Id.* at 315.

163. Specifically, the court wrote the following:

These terms, arranged in a two-column format, are, to say the least, comprehensive and cover the entire page, leaving no room for amendments. If a customer wished to negotiate, it would be difficult to know where or how to begin. What is fatal, however, is that the terms are printed on dark paper in tiny print (what appears to be about 3-point type), with no highlighting of the various sections and subsections as to their contents. The exculpatory section appears in the middle of this impenetrable text. To read the terms and conditions with any degree of comprehensibility is difficult, exceedingly tedious, and even physically painful.

Id. at 315-16. The court went on to state specifically that "this is a case where a party is not able to know what the contract terms are because they are unreadable." *Id.* at 316.

164. It is not at all clear that construction contractors in particular would be ever be able to limit their liability by contract as a result of the holding in *Cease Electric* that allows a tort claim for relief seeking economic damages from the negligent rendering of construction-related services. Section 859.49 of the Wisconsin Statutes reads as follows:

Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

If the contract in *McCarthy Well* was definite, but not in writing, should it have been enforced? We think yes, but the answer to that question has little if anything to do with the economic loss doctrine or maintaining the distinction between tort and contract law. It is an issue of contract formation and, if the terms are clear, courts should enforce the contract. Imposing the formality of an additional writing requirement as a condition of applying the economic loss doctrine to an otherwise enforceable oral or implied contract would impose costs where the commercial parties to the contract have already determined that these costs need not be imposed, and the parties have already allocated the risk through price. Subject to the statutory exceptions long recognized for policy reasons,¹⁶⁵ the parties are in the best position to determine when a written contract is necessary.

5. Contracting Parties Need to Know Their Liabilities Up-Front

Contracting parties need to know their liabilities at the time a contract is entered into in order to set prices. The uncertainty that now plagues service contracts, and those that call for a mix of products and services, demonstrates another problem with after-the-fact tests, such as *Cease Electric* and the predominate purpose test. Sellers take into account liabilities for things such as product defects, warranty work, returns, refunds, and other off-sets to revenue; buyers consider quality, warranties, delivery time, and countless other factors unique to each situation. Price reflects those factors. Further, parties to contracts often seek to limit their liability by contract; others attempt to allocate risk by requiring one party or another to carry insurance. Price setting factors

WIS. STAT. § 895.49(1) (2003-04). Because it is limited to “tort liability,” this statute prohibits contracting parties from negotiating limitations of liability for breaches of warranty or other types of breaches of contract. If there is “no tort claim to begin with” for purely economic losses, the statute is irrelevant. See *Wausau Paper Mills Co. v. Chas. T. Main, Inc.*, 789 F. Supp. 968, 974 (W.D. Wis. 1992). The court in *Cease Electric*, however, recognized a tort claim for negligent performance of a contract for services; thus, the statute might well be read to preclude even sophisticated parties from agreeing to limit a construction contractor’s liability when contracting to provide services.

165. See WIS. STAT. § 241.02(1) (2004) (“Agreements, what must be written”). That statute section is Wisconsin’s statute of frauds that requires certain contracts be in writing, such as an agreement not to be performed within one year, section 241.02(1)(a); promises to answer for the debt of another, section 241.02(1)(b); and promises made upon consideration of marriage, section 241.02(1)(c); but not to marital property agreements that otherwise comply with Chapter 766. See WIS. STAT. § 241.02(2). This statute, and others that require a writing, imply that the job of imposing a writing requirement on commercial service contracts is for the legislature.

and sellers' liability in the service contract context is now entirely unclear as a result of *Cease Electric*; the prices of even more contracts are called into question under *Cascade Stone*.

In *Cease Electric*, the parties had an oral contract for the installation of a ventilation system. The system was a deliverable, much like a road, a bridge or, as in *Cascade Stone*, a house. It could be inspected and warranted. But how should a contractor price its services when its labor is subject to tort claims (and the corresponding insurance to cover them), but the products it installs may not be? This is an impracticable confluence of risks, incentives, and penalties that will arise again and again because every electrician needs conduit and switches; every mason needs mortar; every repairman needs spare parts; every carpenter needs a hammer and nails—so just about every service has some product that comes with it. Even with the court's holding in *Cascade Stone*, the distinction between products and services blurs considerably in an increasingly technological and information-based economy.¹⁶⁶

6. Wisconsin Precedent is Sufficient to Fashion a Workable Set of Rules

At last check, there were thirteen Wisconsin Supreme Court cases that applied or, in some significant way discussed, the economic loss doctrine.¹⁶⁷ The Wisconsin Court of Appeals rendered fifteen decisions on the doctrine in the last two years alone.¹⁶⁸ In addition, United States

166. The "predominate purpose" test of the U.C.C. cannot, however, help in the entire spectrum of cases because the court has already expanded the economic loss doctrine well beyond the confines of the U.C.C. in cases such as *Mackenzie v. Miller Brewing Co.*, 2001 WI 23, 623 N.W.2d 739 (applying the economic loss doctrine to employment contracts); *State Farm v. Ford Motor Co.*, 592 N.W.2d 201 (Wis. 1999) (applying the doctrine to consumer transactions); *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, 662 N.W.2d 652 (involving long distances services and calling plans); *Van Lare v. Vogt*, 2004 WI 110, 683 N.W.2d 46 (applying the doctrine to real estate transactions).

167. See *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213 (Wis. 1989); *Daanen & Jassen, Inc. v. Cedarapids*, 573 N.W.2d 842 (Wis. 1998); *Wausau Tile Inc. v. County Concrete Corp.*, 593 N.W.2d 445; *Northridge Co. v. W.R. Grace*, 471 N.W.2d 179 (Wis. 1991); *State Farm*, 592 N.W.2d 201; *Mackenzie*, 2001 WI 23, 623 N.W.2d 739; *Digicorp, Inc.*, 2003 WI 54, 662 N.W.2d 652; *Tietzworth v. Harley Davidson Co.*, 2004 WI 26, 677 N.W.2d 233; *Van Lare*, 2004 WI 110, 683 N.W.2d 46; *Ins. Co. of N. Am. v. Cease Elec.*, 2004 WI 139, 688 N.W.2d 462; *Linden v. Cascade Stone, Co.*, 2005 WI 113, 699 N.W.2d 189; *Grams v. Milk Prods., Inc.*, 2005 WI 112, 699 N.W.2d 167; *Kaloti Enters. v. Kellogg Sales, Co.*, 2005 WI 111, 699 N.W.2d 205.

168. Chief Justice Abrahamson pointed out in *Milk Products, Inc.* that "[a]ccording to one commentator, the economic loss doctrine has been an issue in the Wisconsin Court of Appeals and Supreme Court 47 times during 2000-2004." *Grams v. Milk Prods., Inc.*, 2005 WI 112, ¶ 57, 699 N.W.2d 167, 180 (Abrahamson, C.J., dissenting).

District Courts and the United States Court of Appeals for the Seventh Circuit have issued multiple decisions on the economic loss doctrine that applied Wisconsin law. This is sufficient precedent for Wisconsin to fashion its own workable and consistent rules on when lower courts are to apply tort law to contract cases.

The Wisconsin Supreme Court in past cases relied on Illinois Supreme Court precedent to frame the rules on how to apply the economic loss doctrine. It cited Illinois law to decide whether the hazardous materials exception¹⁶⁹ would apply to the integrated systems rule.¹⁷⁰ On the issue of whether to apply the economic loss doctrine to service contracts, however, it declined to follow *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*¹⁷¹ In that case, the Illinois Supreme Court held that the economic loss doctrine applied to construction-related services when the "ultimate result" of the services in question was a tangible object, such as an improvement to real property.¹⁷² The Wisconsin Supreme Court cited subsequent criticisms of *Fireman's Fund* as the basis for not adopting its holding.¹⁷³

Instead, the court turned for the first time to Minnesota law and applied *McCarthy Well Co. v. St. Peter Creamery, Inc.*¹⁷⁴ That case held that the economic loss doctrine does not apply to service contracts because they are not "commercial" transactions within the meaning of Article 2 of the U.C.C. *McCarthy Well Co.* relied on *Superwood Corp. v. Siempelkamp Corp.*¹⁷⁵ to reach its holding.¹⁷⁶ The Minnesota Supreme Court, however, overturned *Superwood* for the most part in *Hapka v. Paquin Farms*.¹⁷⁷ It held that a property owner could *not* invoke the "other property" exception to the economic loss doctrine to sue in tort when the contract in question was between two commercial parties; the U.C.C. was the exclusive remedy.¹⁷⁸ That case drew a distinction, not recognized in Wisconsin, between consumer and commercial cases.¹⁷⁹

169. *Northridge Co.*, 471 N.W.2d at 184-86 nn.10, 12.

170. *Wausau Tile*, 593 N.W.2d at 453 (citing *Trans States Airlines v. Pratt & Whitney Can., Inc.*, 682 N.E.2d 45, 58 (Ill. 1997)).

171. 679 N.E.2d 1197 (Ill. 1997).

172. *Id.* at 1201.

173. *Cease Elec.*, 2004 WI 139, ¶¶ 50-51, 688 N.W.2d at 472.

174. 410 N.W.2d 312 (Minn. 1987).

175. 311 N.W.2d 159 (Minn. 1981).

176. *McCarthy Well Co.*, 410 N.W.2d at 315.

177. 458 N.W.2d 683 (Minn. 1990).

178. *Id.* at 688.

179. *Id.* ("[W]e continue to regard the Code remedies as something less than adequate in the ordinary consumer transaction.").

Our proposed rule, on the other hand, does not rely on the law of any other state. It would, however, bring together the holdings in *Sunnyslope Grading*, *Daanen*, and *Van Lare* and the methodology the court used to apply the economic loss doctrine in *Mackenzie*, *Digicorp*, and *Tietzworth*. There is only one way to coalesce those holdings and their application: to reaffirm that, at least in the case of contracts between commercial parties, contract law is better suited than tort law to address breaches of contract without regard to whether the contract is for products or services.¹⁸⁰

VI. CONCLUSION

The court's decision in *Cease Electric* to allow tort remedies in a contract case fails to encourage the efficient distribution of risk and reverses time-tested presumptions about the role of tort law in contract cases. By allowing a party to plead tort causes of action for a breach of contract, *Cease Electric* has introduced the prospect of a party obtaining both compensatory and punitive damages for a breach of contract. The providers of services, therefore, must now insure not only against the foreseeable risk of loss caused by their breach of a service agreement, but also against any additional compensatory and punitive damages that may stem from their actions under the rationale of *Cease Electric*. A better legal rule, the rule we propose here, is one that enforces contracts freely entered into after the opportunity to bargain through a contracting process that has integrity. That rule coalesces all of the court's previous holdings and establishes a certain and reliable rule of law that promotes efficiency.

180. To reaffirm this principle, it is debatable whether the court would even need to overrule *Cease Electric*. Arguably, the court could later clarify that the rule of *Cease Electric* applies to oral contract where there is no evidence that the parties bargained or had the opportunity to bargain over remedies. That clarification does not fit the facts of *Cease Electric* precisely—the parties were two commercial entities with a long history of doing business and most likely negotiated on an ongoing basis—but at least the record in the case does not contradict such a clarification.