

B U S I N E S S

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LITIGATION

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UNFAIR COMPETITION

Trademark Not Required: The Lanham Act

One section of Act very useful to business and commercial litigators

By **ELIZABETH T. TIMKOVICH**

Most commercial litigators are undoubtedly aware of the Lanham Act, *a.k.a.*, the Trademark Act of 1946, codified at 15 U.S.C. §§1051 *et seq.*; however, what many may not realize is that use of the Lanham Act is not restricted to trademark disputes.

While it is true that the Lanham Act primarily addresses trademark rights, including trademark registration requirements and remedies for trademark infringement, there is one section of the Lanham Act in particular that can be very useful to business and commercial litigators, even in cases where no trademarks are involved. That is the section forbidding “false designations of origin and false descriptions”—in other words,

tics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities

15 U.S.C. §1125(a)(1). “Although originally interpreted narrowly, §43(a) now is considered to confer protection against a myriad of deceptive commercial practices.” *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 139 (2d Cir. 1991) (citation omitted); and is to be interpreted broadly as a remedial statute. See, *e.g.*, *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 124 (2d Cir. 1984).

Suits under this section of the Lanham Act may be brought for unfair competition based on a party’s commercial use of words, symbols, names, etc., be they registered trademarks or not, that are likely to mislead consumers into mistakes,

services are involved; (2) interstate commerce is affected; (3) a false description or representation has been made with respect to the goods or services involved; and (4) the plaintiff reasonably believes itself to be injured. See, *e.g.*, *Manufacturers Technologies, Inc. v. Cams, Inc.*, 706 F. Supp. 984, 1003 (D. Conn. 1989) (citation omitted).

Some courts also require more specific allegations of false advertising, requiring the plaintiff to additionally allege that the false designation or representation: (1) was made in commercial advertising or promotion; and (2) concerned a material facet of the product at issue. See, *e.g.*, *New Colt Holding Corp. v. RJG Holdings of Fla., Inc.*, 312 F. Supp. 2d 195, 234 (D. Conn. 2004).

A hypothetical example of a §43(a) unfair com-



If one succeeds on a 15 U.S.C. §43(a) claim,
a *per se* violation of the Connecticut Unfair Trade
Practices Act (CUTPA) is automatically established.

unfair competition based on false advertising. 15 U.S.C. §1125.

This section of the Lanham Act, widely known as §43(a), provides for causes of action based on a person’s use in interstate commerce of:

any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteris-

only believing: (a) that one party is in some way affiliated with or sponsored by another, when, in fact, it is not; or (b) that a party’s goods or services have characteristics not actually belonging to them, or that they are produced by someone else.

In *Resource Developers*, the U.S. Court of Appeals for the 2nd Circuit has divided these potential claims into two distinct principal causes of action: “false advertising,” which encompasses false descriptions or representations; and “product infringement,” which encompasses false designations of origin or source.

Because product infringement is a cause of action more often than not associated with infringement of trademarks—registered or not—where a party is accused of passing off its goods or services as those of another, this article focuses, instead, on unfair competition claims based on false advertising.

False Advertising

Generally speaking, to assert a false advertising cause of action under §43(a) of the Lanham Act, a plaintiff must allege four things: (1) Goods or

petition/false advertising cause of action might include the following: Company X, which advertises and/or provides services in multiple states, formerly employed John D., who, following the termination of his employment with Company X, began soliciting the patronage of Company X’s customers in such a manner as would likely mislead those customers into believing he was still affiliated with Company X.

For instance, maybe John D. used Company X’s letterhead in his solicitations to customers, or maybe he referred to Company X in his conversations with customers so as to give the impression he was still associated with or sponsored by Company X.

In this case, Company X should be able to assert a cause of action for false advertising under §43(a) of the Lanham Act, because Company X can allege that: John D.’s false or misleading statements were made in the course of advertising John D.’s services; that those statements concerned a material facet of the services (*e.g.*, whether the services were offered or approved of by Company X); that customers are likely to be confused as to John D.’s

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affiliation with Company X, resulting in harm to Company X (e.g., through lost business and/or damage to its reputation); and that interstate commerce is affected by Company X's own interstate ties (regardless of whether John D.'s false statements were made in one state only). See, e.g., *Dad's Root Beer Co. v. Doc's Beverages, Inc.*, 193 F.2d 77, 82 (2d Cir. 1951). No showing of willfulness or intent to deceive by John D. is necessary. See *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 149 (2d Cir. 1997).

Standing

In the hypothetical above, there is no question as to Company X's standing to sue John D., since Company X and John D. directly compete with each other for the same customers. Competitors almost always have standing to sue under §43(a) of the Lanham Act. See, e.g., *Burndy Corp. v. Teledyne Industries, Inc.*, 584 F. Supp. 656, 663 (D. Conn. 1984).

Whether non-competitors have standing to sue is less clear. Many courts are divided on the issue, with the U.S. District Court for the District of Connecticut opining that, while the parties need not be direct competitors, if such is the case, the plaintiff will have to provide a more substantial showing of commercial or competitive injury and causation. See, e.g., *New Colt Holding Corp. v. RJG Holdings of Fla., Inc.*, 312 F. Supp. 2d 195 (D. Conn. 2004). The courts all seem to agree, however, on the question of consumers as plaintiffs: consumers lack standing to file suit for false advertising under §43(a). See, e.g., *Colligan v Activities Club of*

New York, Ltd., 442 F.2d 686 (2d Cir. 1971).

There are several benefits to being able to file an unfair competition claim under §43(a) the Lanham Act. For those attorneys who prefer litigating in federal court, a Lanham Act claim opens the door for jurisdiction based on a federal question. If one succeeds on a §43(a) claim, a *per se* violation of the Connecticut Unfair Trade Practices Act (CUTPA) is automatically established. See *Pfizer, Inc. v. Miles, Inc.*, 868 F. Supp. 437, 442 (D. Conn. 1994).

Damages

Additionally, the Lanham Act provides for the award of damages in the form of the defendant's profits in addition to plaintiff's actual damages and the costs of the action. 15 U.S.C. §1117(a). (Note that, in order to seek monetary damages in a false advertising action, actual customer confusion must be shown, not merely a likelihood of confusion, which is all that is required for injunctive relief under §43(a). See *Resource Developers* at 139.)

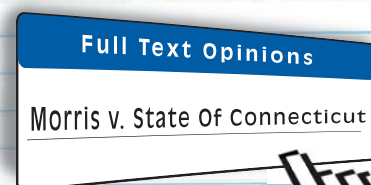
With regard to the defendant's profits, the plaintiff is required first only to show the total amount of the defendant's sales, then the burden is placed on the defendant to prove deductions not related to the unfair competition. *Id.*

Furthermore, depending on the circumstances of the case, including whether the defendant's acts of unfair competition were willful, courts may award punitive damages in treble the amount of profits or actual damages as well as attorneys' fees. Section 43(a) is, therefore, potentially a valuable tool to commercial litigators. ■

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Defective Vehicles Leave Consumers With Sour Taste

What practitioners need to know about the country's first lemon law

By **SERGEI LEMBERG**

Vehicle defects sour the lives of many consumers. By some estimates, anywhere between 1 percent and 3 percent of all vehicles sold in the United States qualify as "lemons." Yet lemon law and warranty statutes remain a mystery to most practitioners. Because defects plague so many vehicles, many lawyers will be called upon to peel away the layers of lemon law and warranty legislation.

State lemon laws protect purchasers of vehicles affected with recurring defects that a dealer is unable or unwilling to correct after a number of attempts. Connecticut was the first state to enact lemon law legislation. Since then, all other states and the District of Columbia have followed suit. In addition to lemon law, the federal Magnuson Moss Act and varied state contact statuses provide relief for aggrieved consumers.

Connecticut lemon law is limited to motor vehicles purchased or leased within the State of Connecticut. Therefore, a Connecticut client who purchased a vehicle in another state may have to look to the law of the state of purchase for lemon law coverage. This restriction sets Connecticut apart from the neighboring states of Massachusetts and New York, whose lemon laws cover vehicles transferred to—as well as purchased in—those states.

States differ on the type of vehicles covered by lemon law. Connecticut's lemon law extends broadly to all "motor vehicles," defined as all vehicles up to 26,000 pounds, including passenger cars, commercial motor vehicles, and motorcycles. By comparison, New York lemon law limits its coverage only to vehicles used for personal or family purposes, but expands it to motor homes that meet certain requirements. Massachusetts lemon law covers cars, but not vehicles used for business purposes or motor homes.

The duration of lemon law coverage also varies by state. In Connecticut, lemon law covers defects that arise within the first 2 years or 24,000 miles of a vehicle's operation. In New York, the defects must arise in the first 2 years or 18,000 miles. Massachusetts' lemon law provides by far the shortest time period of one year or 15,000 miles of ownership. Thus, not only the state of purchase, but also the type of vehicle and the duration of ownership may determine whether lemon law applies to a client's case.

To be considered a lemon, a vehicle has to have a defect that substantially impairs its

use, market value, or safety. The defect must continue to exist after a number of repair attempts or after the vehicle has spent the required number of days at the shop.

In all three states, a lemon can ripen in three different ways. First, it may have a defect that is likely to cause death or serious injury. For such a defect, Connecticut affords only two repair opportunities. If the defect

recurs after the second repair, the vehicle is deemed a lemon. Under most states' law, for non-safety related problems, the dealer and/or manufacturer has a "reasonable number of opportunities" to cure a problem. If the same problem exists after the last repair attempt, the vehicle is a lemon.

What counts as "reasonable" differs: Connecticut and New York afford four repair attempts, while Massachusetts allows three repair attempts plus a fourth 'final' cure opportunity.

Another way for a vehicle to qualify as a lemon involves a calculation of days it remains out-of-service for any number of unrelated problems. In Connecticut and New York, a vehicle may qualify as a lemon if it has been out of service for repairs for a total of thirty calendar days for any number of unrelated problems. In Massachusetts, time out of service must exceed fifteen business days.

Damages

A consumer successful in a lemon law claim may be entitled to a replacement of the lemon with a new comparable motor vehicle or a refund of the full price paid, less a reasonable deduction for mileage. The consumer may recover incidental damages, such as registration fees and other costs associated with the car purchase. Finance charges incurred after the problem is first reported to the dealer and during any subsequent period when the vehicle is out of service for repairs may also be recoverable.

Attorneys' fees may also be recoverable in a successful lemon law action or arbitration in both Massachusetts and Connecticut. New York arbitrators, however, have no authority to award attorneys' fees. Under Connecticut law, a manufacturer may recover attorneys' fees as well upon the finding that a lawsuit or arbitra-

tion was brought "without any substantial justification."

Used car lemon laws apply to the sales of used vehicles. Connecticut used car lemon law does not provide aggrieved consumers a right to a refund of the vehicle, but merely regulates the minimum length of warranties. The extent of the coverage is based on the purchase price.

If the car costs between \$3,000 and \$5,000, a warranty covering the full cost of parts and labor must extend for at least thirty days or 1,500 miles; if the motor vehicle costs more than \$5,000, the same warranty must be extended for at least sixty days or 3,000 miles. Similar provisions in Massachusetts and New York, in addition to regulating the length of used car warranties, provide a right to a refund.

Forum Selection

Forum selection becomes an important part of advising clients with respect to their rights. Connecticut, Massachusetts and New York offer state-sponsored mechanisms for the resolution of lemon law disputes. Manufacturers themselves sometimes maintain arbitration programs, but resort to such mechanisms is rarely required as a precondition to a state-sponsored arbitration or a lawsuit.

In Connecticut, a consumer has the choice of either suing the manufacturer or dealer directly, or filing a complaint with The Department of Consumer Protection's arbitration panel. The arbitration panel's decision is final and binding.

Magnuson Moss Act

Even if a vehicle falls outside the coverage of lemon law, consumers may still gain relief under the Magnuson Moss Act and state warranty law. As with any other transaction for the sale of goods, an aggrieved car purchaser may bring claims for breach of contract and for breach of express and implied warranties made during the sale. The Magnuson Moss Act in effect creates a federal cause of action for the breach of these warranties and protects the right to attorneys' fees for successful litigants.

Statistics show that incurable vehicle defects affect millions of consumers across the county. Such problems exist not only in cheaper vehicles but also in luxury cars—some of which regularly show up on lists of top lemon vehicles. Careful analysis of the facts of a client's case in relation to applicable lemon law coverage that varies state-by-state may allow for an effective resolution of a client's lemon problem. ■



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CAFA Expands Federal Jurisdiction For Class Actions

Congress seeks to strike balance between federal and state authority

By **LINDA S. MULLENIX**
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The Class Action Fairness Act of 2005 creates new and expanded federal court jurisdiction for class action litigation. See 28 U.S.C. §1332(d) and 28 U.S.C. §1453.

Notwithstanding this expanded jurisdiction, Congress also sought to strike an appropriate balance between federal and state authority to adjudicate class litigation. In an effort to accomplish this delicate balance, the CAFA statutory scheme recognizes exceptions to federal court jurisdiction over class litigation.

CAFA carve-outs and exceptions fall into different categories. This article addresses emerging judicial opinions that construe the CAFA "home-state exception" and "local-controversy exception." These are separate CAFA provisions that require or permit a federal court to decline jurisdiction when the facts underlying a proposed class action chiefly pertain to local state-based events. To date, federal courts have issued approximately a dozen decisions construing the CAFA home-state and local-controversy exceptions.

Two Exceptions To Jurisdiction

CAFA creates new federal diversity class action jurisdiction. A plaintiff may file a class action in federal court provided that the class consists of at least 100 putative members, the amount in controversy exceeds \$5 million, and the parties are citizens of different states. 28 U.S.C. §1332(d)(2).

Thus, CAFA modified the standard requirements for diversity jurisdiction by permitting minimal diversity among parties and aggregation of damages, to invoke federal jurisdiction. As such, CAFA is an exception to the normal rules for federal diversity jurisdiction.

In spite of these liberalized standards for federal class action jurisdiction, CAFA nonetheless recognizes two significant exceptions to federal jurisdiction.

These are the local-controversy and home-state exceptions. 28 U.S.C. §1332(d)(4)(A) and (B). In order for parties to invoke these exceptions, valid federal jurisdiction must first be established under 28 U.S.C. §1332(d).

The local-controversy exception is mandatory. This exception provides that a district court shall decline to exercise jurisdiction where: (1) more than two-thirds of class members are state citizens where the action originally is filed; (2) significant relief is sought from at least one defendant whose alleged conduct forms a significant basis for the claims asserted, and that the defendant is a citizen of filing state; (3) class members' principal injuries were incurred in the filing state; and (4) no duplicative class litigation had been filed against the

defendants, on behalf of the same or other persons, in the three prior years. See 28 U.S.C. §1332(d)(A).

The home-state exception also is mandatory. This exception similarly provides that a district court shall decline to exercise jurisdiction if "two-thirds or more of the members of the proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. §1332(d)(4)(B).

The two statutory exceptions suggested difficult interpretative problems for courts. How are courts to ascertain the two-thirds class membership requirement? Who is a "primary" defendant? What do the terms "significant relief" and "significant basis" mean? How are courts to apply these standards in multiple-defendant class litigation?

Similar to many other emerging CAFA problems, federal courts have first grappled with the issue of which party carries the burden of proof to demonstrate that a

CAFA exception applies to defeat federal court jurisdiction.

And, similar to many other CAFA problems, the statute itself is silent as to which party must satisfy the standards for the two CAFA local-controversy exceptions. See *Hart v. FedEx Ground Package System Inc.*, 2006 U.S. App. Lexis 20431 (7th Cir. Aug. 9, 2006); *Frazier v. Pioneer Americas LLC*, 2006 U.S. App. Lexis 16848 (5th Cir. July 6, 2006);

■ See **PLAINTIFFS** on PAGE 6

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Plaintiffs, Defendants Share Burden of Establishing Jurisdiction

■ From CAFA on PAGE 5

Evans v. Walter Industries Inc., 2006 U.S. App. Lexis 12509 (11th Cir. May 22, 2006).

Courts Of Appeal Weigh In

Three U.S. courts of appeals in the 5th, 7th and 11th circuits have all addressed this issue this year, and all seem to agree that the plaintiff—rather than the defendant—carries the burden of demonstrating that a local-controversy exception applies, if the defendant removes a state class action to federal court under CAFA. These appellate courts' interpretation relating to burdens of

proof to support the CAFA exceptions is interesting, because it represents a departure from many previously-announced decisions that the defendant carries the burden of proof to establish valid CAFA removal jurisdiction. See *e.g.*, *Brill v. Countrywide Home Loans*, 427 F.3d 446, 447-49 (7th Cir. 2005).

In essence, the appellate courts that have considered the issue have concluded that, although defendants carry the burden to establish valid CAFA removal jurisdiction, the burden then shifts to the plaintiff to demonstrate that the local-controversy or home state-exception applies to require a

remand to state court.

Appellate courts have grounded this conclusion in various rationales. In *Evans*, the U.S. Court of Appeals for the 11th Circuit articulated three reasons why plaintiffs carry the burden to satisfy the local-controversy exception.

First, the court relied on *Breuer v. Jim's Concrete of Brevard Inc.*, 538 U.S. 691 (2003), in which the U.S. Supreme Court held that the party opposing removal (*i.e.*, the plaintiff) must prove that there is an express exception to removability.

Second, the 11th Circuit reasoned that a plaintiff is better positioned to collect rele-

vant evidence concerning the location of class members.

Third, the 11th Circuit analogized CAFA's statutory scheme to cases involving the Federal Deposit Insurance Corporation (FDIC), in which the party opposing removal must prove the "state action" exception to federal jurisdiction. *Evans*, 449 F.3d at 1164-65.

More recently, Judge Diane Wood of the 7th Circuit similarly concluded that plaintiffs carry the burden to demonstrate that the CAFA exceptions apply.

While agreeing with the 5th and 11th circuits, Wood grounded her decision in CAFA's express statutory language and the interrelationship of the class action diversity provision and the subsections defining the exceptions to that jurisdiction. *Hart* at 14-15.

More surprisingly, Wood also grounded her burden-shifting conclusion in CAFA's legislative history.

"[I]t is also worth noting that this outcome is consistent with the legislative history of CAFA. The Senate Judiciary [Committee] unambiguously signaled where it believed the burden should lie."

Wood cited the Senate report, which states: "[I]t is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (*e.g.*, the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). *Hart* at 18, citing S. Rep. No. 14, 109th Cong. 1st Sess. 43 (2005).

Wood's reliance on CAFA legislative history should surprise some CAFA aficionados who are tracking the disagreement among federal courts regarding the permissible use of CAFA's legislative history.

In a prior CAFA decision, the 7th Circuit rejected reliance on CAFA's legislative history (see *Brill v. Countrywide Home Loans*, 427 F.3d 446 (7th Cir. 2005)), but not so in *Hart*.

Finally, Wood read CAFA's legislative history to understand the exceptions as manifesting congressional intent "designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing state courts to retain cases when the controversy is strongly linked to that state." *Hart* at 19.

District Court Interpretations

Other federal district courts have applied the burden to plaintiffs to demonstrate that the exceptions apply, and similarly rely on CAFA's legislative history.

In some cases, courts have concluded that the plaintiffs have not satisfied the standards for showing that the exceptions apply. See *e.g.*, *Seat v. Farmers Group Inc.*, 2006 U.S. Dist. Lexis 30575, 5-6 (D. Okla. May 5, 2006) (relying on Senate report for allocation of burden on exceptions); *Robinson v. Cheetah Transportation*, 2006 U.S. Dist. Lexis 10129, 9-10 (same; plaintiff filed to carry burden and CAFA exceptions do not apply).

Not all federal courts are on board, however, with the appellate conclusion that CAFA shifts the evidentiary burden to the plaintiff to demonstrate that a CAFA exception applies, requiring remand to state court. ■

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SPLIT AMONG COURTS

The Economic Loss Rule: A Trap For The Unwary

Courts struggle with staking out boundary between contract and tort theories

By **STEWART I. EDELSTEIN**

How would you like to explain to your client why the court struck all the tort claims in your big commercial case? To avoid this unpleasant scenario, you need to understand the economic loss rule.

For decades, courts have struggled with staking out the boundary between contract and tort theories in determining whether to award economic damages in cases where there is no physical property damage or personal injury. The economic loss rule was developed to chart the contours of that boundary.

While the rule can be stated with some clarity—damages for economic loss are not recoverable based on tort theory when unaccompanied by physical property damage or personal injury—but its application is a challenge, resulting in a variety of exceptions.

ditions provides useful guidance.

The underlying purpose of the economic loss rule is preservation of the distinction between contract and tort theories in circumstances where both theories could apply. Tort law should not be expanded to undermine basic contract principles. Contract law protects parties in the enforcement of their bargained-for promises, and awards damages based on loss of expectation damages.

Tort law protects interests independent of any bargained-for agreement, allowing for recovery of all damages proximately caused by tortious conduct. There are several exceptions to the application of the economic loss rule, summarized below, that can save your client from the rule's sometimes draconian effect.

Some courts have held that where the injury is to property—other than the property that is the sub-

ject of the commercial transaction—the economic loss rule does not apply. fraud claim rests on the defendant's conduct and not on the type of damages or on the existence of an underlying contract; 2) the source of the defendant's duty arises out of tort, not contract; and 3) the measure of damages for fraud is "benefit of the bargain" damages.

The second approach to the application of the economic loss rule allows a limited exception in cases where damages are unrelated to an underlying contract. If misrepresentations concern the subject matter of the contract, such as the quality or characteristics of the goods, they are deemed to be "interwoven" with the contract. In such instances, no independent intentional misrepresentation exists, and a plaintiff is restricted to contractual remedies.

The third approach allows no exception to the economic loss rule when the claim is for fraud. The rationale is that because the economic loss rule bars recovery in tort, and because fraud is a tort, recovery for purely economic loss is barred. This simplistic syllogism is illogical, because misrepresentation almost never produces property damage or personal injury—only economic loss.

• **Negligent Misrepresentation Exception**

Courts have had difficulty analyzing whether the economic loss rule applies to negligent misrepresentation claims, resulting in substantial disagreement in court rulings. *Williams Ford, Inc.* and *Flagg Energy*, read together, demonstrate that difficulty.


The disparate rulings regarding negligent misrepresentation claims can be divided into four approaches. The first allows for a blanket exception on the theory that, even where a contract exists, a tort action will lie for either intentional or negligent misrepresentations that are independent from acts that breached the contract.

The second approach provides an exception limited to defendants in the business of supplying information for the guidance of others. This exception applies where the duty is extra-contractual, and not when the information is conveyed merely as part of a sale or contract. Based on this exception, courts have allowed claims against health care professionals, insurance brokers, accountants, and attorneys, as members of skilled professions who have long been held liable for negligent failure to observe reasonable professional standards of competence.

Under the third approach, an action does not lie for negligent misrepresentation where there is privity of contract between the parties. But tort liability does apply where a negligent misrepresentation induces third parties justifiably to rely on a defendant's tortious conduct.

The final approach does not provide any exception to the application of the economic loss rule for negligent misrepresentation. The underlying logic is that requiring merely an allegation of negligent misrepresentation to avoid application of the economic loss rule would potentially convert every contract dispute into a negligent misrepresentation claim. There is no policy justification for this approach, because the economic loss rule was never intended to bar well-established common law causes of action.

Armed with this knowledge, you can seek to assert tort claims in contract cases if those claims fit within one of the exceptions discussed above, and seek to strike tort claims that do not. For a more comprehensive discussion, with case and law review citations, go to Publications at www.cohenandwolf.com. ■



The underlying purpose of the economic loss rule is preservation of the distinction between contract and tort theories in circumstances where both theories could apply.

Controlling Connecticut law on this rule is sparse, discussed in only two appellate court decisions (other than an 1856 case): *Williams Ford, Inc. v. Hartford Courant Company*, 232 Conn. 559, 579 (1995) (tort claims—such as negligent misrepresentation—seeking purely economic loss, may be brought in a situation involving commercial parties to a contract); and *Flagg Energy Development Corporation, et al. v. General Motors Corp.*, 244 Conn. 126, 153 (1998) (claim for commercial losses arising out of the defective performance of contracts for the sale of goods cannot be combined with negligent misrepresentation).

Since the decision in *Flagg Energy*, no appellate court has addressed whether the economic loss rule is recognized in Connecticut and, if it is, whether the rule should be extended beyond cases involving the sale of goods. Consequently, a split has emerged among the superior courts as to whether the ruling in *Flagg Energy* bars tort claims for economic loss in non-product liability cases. Those cases, and the few District of Connecticut cases discussing this rule, typically rely on cases from other jurisdictions.

Tort Theories v. Contract Cases

Accordingly, an analysis of cases from other juris-

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ject of the commercial transaction—the economic loss rule does not apply.

When a product defect results in harm to the product itself, the law governing commercial transactions may govern the rights and obligations of the parties. But where a product defect results in harm to surrounding property, consequent economic loss may be recoverable. See Connecticut Product Liability Act, C.G.S. §52-572m, *et seq.*, and the split of superior and appellate court cases on this issue construing it. This distinction is not simple, though, and is discussed comprehensively in Restatement, Torts: Products Liability (Third) §21, comments (d) and (e) (1998).

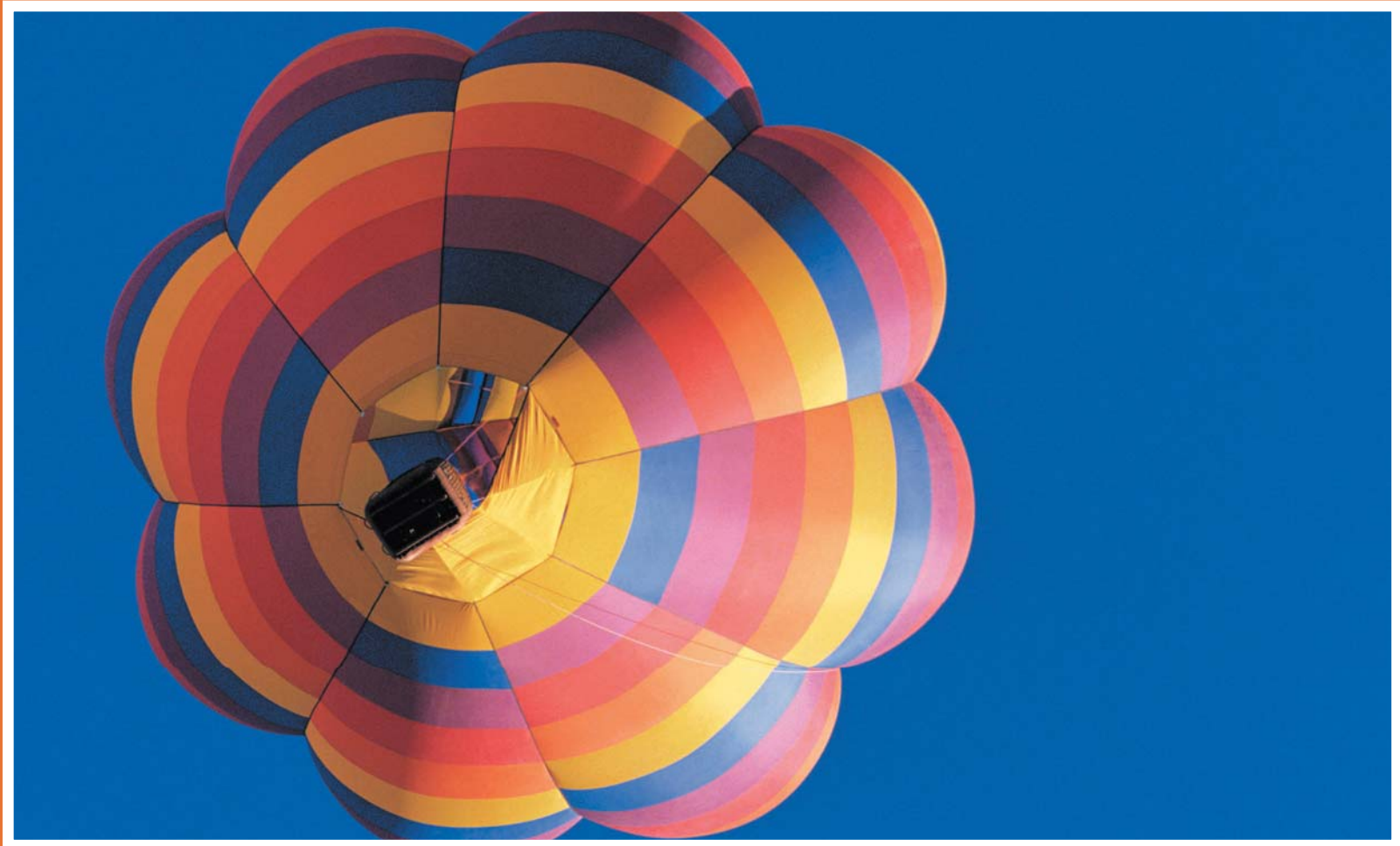
• **Service Contracts Exception**

The argument against applying the economic loss rule to professional service contracts is that the service provider relationship creates an independent duty under tort law to provide services consistent with the care, skill, knowledge and competence of members of that profession. Most jurisdictions that provide for the service exception limit remedies to those in privity and those who are identifiable third-party beneficiaries of the contract to provide services.

• **Fraud Exception**

Courts have applied three distinct approaches to the application of the economic loss rule to fraud claims, each with its own rationale. The first exempts fraud and fraudulent inducement from the economic loss rule based at least one of the following: 1) the viability of a

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