[Cite as *Trustcorp Mtge. Group v. Zajac*, 2006-Ohio-6621.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

TRUSTCORP MORTGAGE CO.,	:	APPEAL NO. C-060119 TRIAL NO. A-0307642
Plaintiff-Appellant	:	*D E C I S I O N.*
vs.	:	
JOSEPH J. ZAJAC,[1]	:	
JODY F. ZAJAC,	:	
ZAJAC APPRAISAL SERVICES,	:	
WILLIAM M. PATRICK, JR.,	:	
and	:	
WM. PATRICK APPRAISERS,	:	
Defendants-Appellees,	:	
and	:	
PREMIER LAND TITLE SERVICES, INC., et al.,	:	
	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 15, 2006

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[1] This defendant, whose real name is Joseph F. Zajac, is now deceased. His estate has been substituted as a party.

Matthew C. Blickensderfer, *Jeffery S. Rosenstiel*, and *Frost Brown Todd LLC*, and *Dale W. Eikenberry* and *Wooden & McLaughlin LLP*, for Plaintiff-Appellant,

Rasheed A. Simmonds and *Furnier Flagel Papakirk, LLC*, for Defendants-Appellees Joseph J. Zajac, Jody F. Zajac, and Zajac Appraisal Services, Inc.,

Thomas H. Pyper, *Chad M. Sizemore*, and *Jenks, Pyper & Oxley Co, L.P.A.*, for Defendants-Appellees William Patrick and Wm. Patrick Appraisers.

Please note: We have removed this case from the accelerated calendar.

WINKLER, Judge.

{¶1} In this appeal, we must determine whether a mortgage lender may recover economic losses from an appraiser, in the absence of privity of contract, under the theory of negligent misrepresentation. Under the facts of this case, we answer in the negative.

{¶2} Plaintiff-appellant Trustcorp Mortgage Company purchased a set of residential housing loans from the Midas Mortgage Company. The defendants-appellees, Joseph Zajac, Jody F. Zajac, Zajac Appraisal Services, Inc., William M. Patrick, Jr., and Wm. Patrick Appraisers ("the appraisers"), appraised the property that served as collateral for these loans, including the ten properties that are at issue in this appeal. The appraisers had been hired by three mortgage broker/originator companies, Premier Service Mortgage, Charter First Banc, and T.R. Funding, to perform the appraisals. Midas apparently obtained the loans from these three companies and sold them to Trustcorp, who ultimately funded the loans at closing. None of the appraisers directly contracted with or even knew that Midas or Trustcorp would ultimately receive their appraisal reports.

{¶3} Midas not only sold the loans to Trustcorp, but it also performed the underwriting analysis under a separate contract in which it agreed that it was not an agent for Trustcorp, but an independent contractor. By approving the underwriting of the loans, Midas warranted that the appraisals were accurate.

{¶4} The mortgagors of each of the ten properties at issue defaulted on the Trustcorp loans. Trustcorp requested that Midas repurchase the loans in accordance with the underwriting agreement and a buy-sell agreement. Midas refused.

{¶5} Trustcorp then foreclosed on the mortgages and sold the properties for less than the appraised values. Trustcorp hired its own appraiser, who stated that, in his opinion, the values set by the appraisers were inflated and not reasonable or justified.

{¶6} Trustcorp successfully sued Midas for breach of contract, but Midas filed for bankruptcy, thwarting Trustcorp's recovery on the judgment. Trustcorp then filed this separate lawsuit, naming various parties as defendants and setting forth multiple causes of action. Trustcorp asserted four causes of action against the appraisers, including constructive fraud, theft by deception, fraud, and negligent misrepresentation. In the negligent-misrepresentation claim, Trustcorp sought only economic losses as damages.

{¶7} After the appraisers moved for summary judgment, Trustcorp dismissed with prejudice the non-negligence causes of action against the appraisers. The trial court granted summary judgment in favor of the appraisers on the negligence claim and certified the judgment with the requisite Civ.R. 54(B) language.

{¶8} On appeal, Trustcorp challenges the trial court's entry of summary judgment in favor of the appraisers. We review a summary judgment de novo, applying the standards set out in Civ.R. 56.[2]

{¶9} In their motions for summary judgment, the appraisers argued that because they had never contracted with Trustcorp, Trustcorp could not, as a matter of law, recover against them for economic-loss damages.

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[2] ***Doe v. Schaffer***, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

{¶10} In opposition, Trustcorp argued that in Ohio a plaintiff can recover for economic losses in tort where the facts establish a negligent-misrepresentation claim as defined by Restatement of the Law 2d, Torts (1977), Section 552.

Economic-Loss Rule

{¶11} Typically a plaintiff must have a contractual relationship with the defendant to recover damages for economic loss, also called pecuniary loss.[3] Conversely, to recover for physical harm caused by the negligence of another, a plaintiff does not need to have a contractual relationship with the defendant, even if the defendant is a manufacturer or a service provider.[4]

{¶12} The Ohio Supreme Court in ***Corporex Dev. & Constr. Mgt. Inc. v. Shook, Inc.***[5] recently explained the "economic-loss rule" and the history behind it. As the ***Corporex*** court noted, "The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. * * * '[A] plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.' This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that 'parties to a commercial transaction should remain free to govern their own affairs.' 'Tort law is not designed * * * to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation * * * remains the particular province of the law of contracts.' "[6]

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[3] See *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Assn.* (1990), 54 Ohio St.3d 1, 8, 560 N.E.2d 206.
[4] See *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 147 N.E.2d 612.
[5] 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701.
[6] *Corporex* at ¶6 (internal citations omitted).

{¶13} But the Ohio Supreme Court has not been consistent in following the economic-loss rule in the area of professional malpractice. In ***Haddon View Investment Co. v. Coopers & Lybrand***,[7] the court held that an accountant could be liable in tort for economic losses caused by a negligent representation made while rendering professional services, even in the absence of privity of contract. The ***Haddon View*** plaintiffs had not contracted with the accountant for the professional services.[8] But the four plaintiffs were individual, limited partners of the accountant's client, the partnership.[9] These plaintiffs had lost money when the partnership collapsed.[10] The court applied a strictly tort-based test to determine to whom the accountant owed a duty of care. In doing so, the court was guided by Restatement of the Law 2d, Torts, Section 552.

Section 552 of the Restatement 2d of Torts

{¶14} This section, titled "Information Negligently Supplied for the Guidance of Others," allows for the recovery of economic losses in tort when the follow conditions are established:

{¶15} "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

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[7] (1982), 70 Ohio St.2d 154, 436 N.E.2d 212.
[8] Id. at 155.
[9] Id. at 154-155.
[10] Id.

{¶16} "(2) * * * [T]he liability stated in Subsection (1) is limited to the loss suffered

{¶17} "(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

{¶18} "(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. * * *"[11]

{¶19} The *Haddon View* court discussed the liability of an accountant for professional negligence against the backdrop of this duty set out in the Restatement. Recognizing the "modern verity" that accountants make reports that persons other than their clients reply upon "in the ordinary course of business,"[12] the court held that "[a]n accountant may be held liable to a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen."[13]

{¶20} In a later case, the Ohio Supreme Court referred to the duty that created the liability for purely economic loss in *Haddon View* as a "discrete, preexisting duty in tort" and a "generally recognized dut[y] in tort."[14] In doing so, the court distinguished this tort duty from a duty negotiated for in a contract between the parties that might provide liability for purely economic loss.

{¶21} Despite recognizing a Section-552-like duty in the accounting profession, the court has declined to recognize tort-based economic-loss claims for

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[11] Restatement of the Law 2d, Torts (1977), Section 552.
[12] *Haddon View*, 106 Ohio St.3d at 157.
[13] Id. at paragraph one of the syllabus.
[14] *Corporex*, 2005-Ohio-5409. at ¶¶ 9 and 10.

malpractice in other professions in the absence of privity. For example, in *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Assn.*,[15] the court rejected similar liability for design professionals.

{¶22} The plaintiff in *Floor Craft*, a flooring-installation contractor hired by a hospital, sought to recover in tort for economic losses caused by the negligence of an architect who had provided inaccurate specifications to the hospital for the floor-installation project.[16] The *Floor Craft* court stated that "applying the Restatement in this context [would] encompass liability that is otherwise best suited for contract negotiation and assignment."[17] The practical result of this holding is that a hospital and a flooring company must negotiate the issue of damages in the event that the architect provides incorrect specifications, and the hospital and the architect must separately negotiate their respective liabilities in the event that the specifications are incorrect. And the parties should provide for an assignment mechanism in these contracts.

{¶23} The Ohio Supreme Court has not addressed whether a strictly tort-based liability would apply to appraisers. Several appellate courts in Ohio have held that a tort-based liability for economic damages can apply to an appraiser who provides an inaccurate appraisal to a lender[18] or a purchaser,[19] despite the absence of privity of contract between the parties.

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[15] (1990), 54 Ohio St.3d 1, 560 N.E.2d 206.
[16] Id. at 1.
[17] Id. at 7.
[18] *Perpetual Federal Savings & Loan Assn. v. Porter & Peck, Inc.* (1992), 80 Ohio App.3d 569, 609 N.E.2d 1324.
[19] *Washington Mut. Bank v. Smith*, 11th Dist. No. 2001-L-238, 2002-Ohio-6910 ("an appraiser preparing a report for a lending institution should foresee that the purchaser of the property listed on the appraisal form could be within the limited class of persons who would rely on the appraisal"). Compare *Hancock v. Sigg* (Sept. 1, 1995), 6th Dist. No. WM-95-010 (sellers of home were not among the limited class of persons whose reliance on an appraiser's valuation of a property could be specifically foreseen).

{¶24} In ***Perpetual Federal Savings & Loan Assn. v. Porter & Peck, Inc.***, the Tenth Appellate District held that an appraiser of real property could be liable in tort for economic damages to a lending institution.[20] The lender had not contracted for the appraisal report but had received it from a mortgage broker who had.[21] The appraiser had negligently misrepresented the appraised property's compliance with the applicable zoning regulations.[22] The lender allegedly relied on the appraiser's representation in deciding to lend money to a purchaser of the property.[23]

{¶25} The appraiser in ***Perpetual*** argued that the lender was not a plaintiff contemplated by Section 552: a person or one of a limited group of persons for whose benefit and guidance the appraiser intended to supply the information or knew that the recipient intended to supply it.[24] But the court found that the record contained evidence suggesting that the appraiser knew that the mortgage broker was only acting as the agent of the ultimate lender and that the ultimate lender would rely on the appraisal.[25]

{¶26} Based upon this evidence, the ***Perpetual*** court reversed the summary judgment in favor of the appraiser, holding that genuine issues of fact remained as to whether the lender was in "the limited group of persons for whose benefit the information was supplied" and whether the lender had justifiably "relied on the supplied information."[26]

{¶27} The facts in our case are somewhat similar to those before the court in ***Perpetual***. As in ***Perpetual***, the record contains facts to support a finding that the

[20] (1992), 80 Ohio App.3d 3d 569, 609 N.E.2d 1324.
[21] Id. at 570.
[22] Id.
[23] Id.
[24] Id. at 572.
[25] Id. at 573.
[26] Id.

appraisers knew that the appraisal reports would be relied upon by parties other than Premier, Charter First, or T.R. Funding, the mortgage brokers/originators that had employed the appraisers' professional services.

{¶28} For example, Trustcorp presented deposition testimony from the appraisers indicating that they understood the industry practices that a mortgage broker would originate a loan for the ultimate lender and that the ultimate lender might rely upon the appraisal report. Trustcorp also cited to standard language found in the appraisal reports that supported this conclusion. This language allowed the named client on a report to distribute the report to "the borrower; the mortgagee or its successors and assigns; the mortgage insurer; consultants; professional appraisal organizations; any state or federally approved financial institution; or any department, agency, or instrumentality of the United States or any state or the District of Colombia; * * *" without first obtaining the written consent of the appraiser.

{¶29} But there is a greater degree of separation between the parties in this case than in *Perpetual*. This renders the connection between the appraisers and Trustcorp more attenuated than that between the appraiser and the mortgage broker and the mortgage lender in Perpetual. Trustcorp had obtained the appraisal report from Midas, who had obtained it from Premier, Charter First Banc, or T.R. Funding, who had obtained it from the appraisers. This attenuation made Trustcorp a less foreseeable plaintiff.

{¶30} And Midas had actually altered almost all of the reports before turning them over to Trustcorp in an underwriting package. Midas's alterations ranged from total fabrication of the appraised values to merely substituting its name

for Premier, Charter First, or T.R. Funding on the page identifying the client of a particular report. Admittedly only the reports with the non-material changes are at issue on appeal. But the fact that Midas had the opportunity to alter these reports, even in a non-material way, concerns us. Neither Trustcorp nor the appraisers were aware of these alterations until discovery was conducted in this case. The appraisers had disclaimed liability in the event of an alteration.

{¶31} Although the appraisers in this case knew that Premier, Charter First, and T.R. Funding would likely pass along their appraisal reports to an ultimate lender such as Trustcorp, they did not know that Trustcorp would be that ultimate lender. In fact, the appraisers did not know that either Midas or Trustcorp had been provided with the appraisal reports until Trustcorp sued them.

{¶32} This case is also distinguishable from *Haddon View*. Obviously the cases involve different professions: appraising and accounting. The appraising process requires more subjectivity than the accounting process. The supreme court has never held that appraisers owe the same duty of care to third parties as accountants do. The custom in the mortgage business of passing on appraisal reports does not, by itself, create a duty of care. Generally a trade custom imposes no duty on anyone unless it is part of a contract,[27] and Trustcorp is not arguing that the appraisers had a contractually assumed duty of care to provide it with accurate appraisals.

{¶33} Additionally, the cases involve different classes of plaintiffs. The court in *Haddon View* could easily characterize its plaintiffs as "a limited class of

[27] See *Thomas v. Guarantee Title and Trust Co.* (1910), 81 Ohio St. 432, 91 N.E. 183, paragraphs one and two of the syllabus (declining to allow the recovery of economic losses against a title examiner for malpractice in the absence of contractual privity).

investors whose reliance on the accountant's certified audits for purposes of investment strategy was specifically foreseen by the defendant."[28] The plaintiffs were part owners of the partnership that had employed the accounting firm for several years prior to the malpractice. Conversely, Trustcorp in this case was one of many lenders, mortgage brokers, or borrowers that might have relied upon the appraisal reports, and the record does not reflect that the appraisers had prior dealings with Trustcorp.

{¶34} A less obvious distinction between the two cases is based upon the contractual remedies available to the plaintiffs. In this case, Trustcorp had two contracts with Midas that required Midas to buy back loans that contained fraudulent statements, inaccuracies, or misrepresentations, including the overvaluing of the property in an appraisal. Trustcorp designed these provisions to limit its risk of economic loss. Conversely, the *Haddon View* court did not identify any contractual remedy the limited partners might have had against the partnership in the event that the accounting report procured by the partnership contained a misrepresentation. We make this distinction because the Ohio Supreme Court has repeatedly said that "recovery for economic loss is strictly a subject for contract negotiation and assignment."[29]

{¶35} As noted by the appraisers in their brief, this court has interpreted the holding in *Haddon View* narrowly, and we have exercised restraint in expanding tort-based economic-loss liability to professionals other than accountants.[30]

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[28] *Haddon View*, 70 Ohio St.2d at 157.
[29] *Floor Craft*, 54 Ohio St.3d at 8. See, also, *Corporex*, 2005-Ohio-5409, at ¶10.
[30] See *Amann v. Clear Channel Communications, Inc.*, 165 Ohio App.3d 291, 2006-Ohio-714, 846 N.E.2d 95 (declining to extend liability for negligent misrepresentation where a member of a radio station's listening audience detrimentally relied upon an allegedly fraudulent investment scheme advertised on the station's airwaves); *Kenney v. Henry Fischer Builder, Inc.* (1998), 129 Ohio App.3d 27, 716 N.E.2d 1189 (holding that privity of contract is required to recover for the

{¶36} After reviewing the history of the economic-loss rule and the unique facts of this case, we hold that, in the absence of privity of contract, the appraisers were entitled to judgment as a matter of law on the negligent-misrepresentation claim. Accordingly, we overrule the assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

GORMAN, P.J., concurs.
PAINTER, J., dissents.

RALPH WINKLER, retired, of the First Appellate District, sitting by assignment.

PAINTER, J., dissenting.

{¶37} Allowing real-estate appraisers to use the lack of contractual privity to third parties—who have detrimentally relied on an appraiser's material misrepresentations—is archaic and shortsighted. Allowing appraisers to escape liability for inflated appraisals by a shield of privity is to raise form over substance and pettifoggery over justice.

{¶38} This is particularly so in view of the likelihood of collusion among industry professionals and the quagmire of complexities involved in most mortgage-fraud schemes. Appraisals are the linchpin of mortgage fraud—and the banks that fund the loans are often not in technical privity with the appraisers, though they must of necessity rely on their reports.

{¶39} I would adopt the Restatement 2d of Torts, Section 552 ("§552"), and hold real-estate appraisers liable for negligently misrepresenting material information that is detrimentally relied on by foreseeable third parties. Extending

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malpractice of a title examiner, but urging the supreme court to adopt Restatement of the Law 2d, Torts, Section 552).

§552 to appraisers is justifiable because (1) mortgage fraud is a rampant pandemic with destructive effects; (2) faulty appraisals comprise the illusory cornerstones on which most mortgage-fraud schemes depend; (3) licensed real-estate appraisers are engaged in a profession and should be held to professional standards; and (4) mortgage fraud usually involves collusion among multiple parties—including appraisers. Under these circumstances, allowing appraisers to circumvent liability based on a lack of privity is wrong. And this conclusion is buttressed where, as here, there has been an adjudicated instance of mortgage fraud.

I. What's the Big Flippin' Deal?

{¶40} Property flipping and mortgage fraud are a big deal. The U.S. Department of Housing and Urban Development ("HUD") defines property flipping as a practice where property is bought, falsely appraised at a higher value, and then quickly sold—often aided by a lender's collusion with the appraiser.[31] The fraudulent appraisal is what makes property flipping illegal.

{¶41} Property flipping is a type of mortgage fraud. Mortgage fraud is a material misstatement, misrepresentation, or omission relied on by an underwriter or lender to fund, purchase, or insure a loan; and it is one of the fastest growing white-collar crimes in the United States.[32] These schemes usually involve fraudulent appraisals, doctored loan documents, and inflation of the buyer's income.[33] Last year, federally regulated institutions reported mortgage-fraud losses over one billion dollars.[34]

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[31] See http://www.fbi.gov/page2/dec05/operationquickflip121405.htm.
[32] See id.
[33] http://www.fbi.gov/page2/dec05/operationquickflip121405.htm.
[34] See id.; see, also, Mortgage Asset Research Institute's Mortgage Fraud Case Report to Mortgage Banker's Association (April 2006), http://www.mari-inc.com/pdfs/mba/MBA8thCaseRpt.pdf.

{¶42} Real-estate appraisers are paid to give a professional opinion (the appraisal) on how much a home is worth on the market. Lenders need appraisals to ensure that, if they must foreclose on the property, it will sell for at least what they are lending.[35] Inflated real-estate appraisals are necessary to almost any mortgage-fraud scheme. A faulty appraisal increases the sales value and induces lenders to issue loans that far exceed the property's true market value. The result is a home that costs more than it is worth—negative equity. In a classic property-flip, the property flipper buys property for $100,000, has the property fraudulently appraised for $300,000, and sells the property for $300,000 (a $200,000 profit). Usually the home later undergoes foreclosure, leaving the bank with a $300,000 mortgage on a $100,000 home, for a loss of $200,000.

{¶43} These scams adversely affect homeowners, lending institutions, real-estate professionals, and eventually the health of the U.S. economy. In 2005, Ohio had the nation's highest foreclosure rate.[36]

{¶44} In an attempt to abate the quick buy-sell facets of property flipping, HUD has limited financing through Federal Housing Administration ("FHA") insured mortgages. FHA-insured mortgage eligibility now requires that (1) only owners of record can sell properties that will be financed using FHA-insured mortgages; (2) the property may not be resold within 90 days from the last sale to be eligible for FHA financing; and (3) for resales that occur within 91 and 180 days where the new sales price exceeds the previous sales price by 100 percent or more, additional documentation must be provided to confirm the property's value. Also, the new rules provide flexibility for FHA to examine and require additional evidence

[35] http://www.realestatejournal.com/buysell/mortgages/20050527-simon.html.
[36] Policy Matters Ohio: Foreclosure Growth in Ohio 2006, at www.policymattersohio.org.

of appraised value when properties are resold within 12 months. Clearly property flipping is a national epidemic.

{¶45} Further, in an attempt to quell the effects of external pressure on appraisers, the Ohio General Assembly has passed S.B. No. 185, effective January 1, 2007. The bill seeks to dampen the influence of lenders and mortgage brokers on real-estate appraisers by outlawing coercion and bribery.[37] Offenders are guilty of a fifth-degree felony.[38] S.B. No. 185 also places restrictions on who may issue an appraisal. As of January 1, 2007, only licensed or certified appraisers may perform a real-estate appraisal for a mortgage loan.[39] All certified or licensed appraisers must comply with the Uniform Standards of Appraisal Practices.[40]

II. Privity: a Reprieve from Negligence?

{¶46} Patrick and Zajac furnished professional real-estate appraisals to mortgage brokers Premiere Service Mortgage, T.R. Funding, and Charter First Banc. The loans were then sold to Midas (now bankrupt), and then to Trustcorp. *In fact, Trustcorp's money funded the loans—everyone else was just a conduit.* Trustcorp alleged that it justifiably relied on the appraisals that were furnished by Patrick and Zajac, and ordered by mortgage brokers Premiere Service Mortgage, T.R. Funding, and Charter First Banc.

{¶47} Trustcorp alleged that (1) Patrick and Zajac appraised property on which Trustcorp issued mortgage loans; (2) before funding the loans, it relied on the appraised value provided by Patrick and Zajac to justify the loans; (3) the appraisals

[37] R.C. 4763.12(E).
[38] R.C. 4763.99(B).
[39] See R.C. 4763.19(A).
[40] R.C. 4763.13(A).

were inflated and unreasonable; (4) the value of the properties was substantially less than the value represented by Patrick and Zajac; (5) when the loans were foreclosed on, the properties were undercollateralized, resulting in a substantial economic loss to Trustcorp (allegations of a typical property-flipping scheme); and (6) had the appraisals been accurate, Trustcorp would not have funded the loans.

{¶48} Patrick and Zajac respond that, even if all the alleged facts were true, there were still no material issues of fact because they were not in contractual privity with Trustcorp. That is, the appraisals were ordered by another party (mortgage brokers Premiere Service Mortgage, T.R. Funding, and Charter First Banc), and lack of privity provided a reprieve against a negligence claim based solely on economic loss. That is a pure legal fiction, because Trustcorp's money really funded the loans.

{¶49} Trustcorp argues that it is industry practice for a buyer of a mortgage loan from a mortgage broker or lender to obtain and rely on an appraisal performed for the originating mortgage broker or previous lender; and that §552 should be applicable to provide a limited exception to the lack-of-privity bar. Of course they are correct.

{¶50} Generally, absent contractual privity between two disputing parties, "there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things."[41] In an action based on negligence, the economic-loss rule holds that "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or

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[41] *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3, 560 N.E.2d 206, citing Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 92.

compensable."[42] One exception to the economic-loss rule is set forth in §552, which has been adopted by the Ohio Supreme Court in limited circumstances.[43] But the Ohio Supreme Court has not said whether those limited circumstances apply to a downstream lender who relies on a real-estate appraisal provided for an intermediate mortgage broker.

{¶51} So the issue is whether we should hold professional appraisers liable to a third party for alleged negligent misrepresentation where the third party detrimentally relies upon the professional appraiser's materially inaccurate and negligent appraisal of a parcel of real property. I say yes. And so does the great weight of authority.

III. Extending §552 to Real-Estate Appraisers

{¶52} Subsection (1) of §552 states, "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Subsection (2) further explains that "the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance on it in a transaction that he intends the information to

[42] See id. (internal citations omitted).
[43] See ***Haddon View Investment Co. v. Coopers & Lybrand*** (1982), 70 Ohio St.2d 154, 436 N.E.2d 212.

influence or knows that the recipient so intends or in a substantially similar transaction." The Restatement fits this case perfectly.

{¶53} The Ohio Supreme Court in *Haddon View Investment Co. v. Coopers & Lybrand* has adopted and applied §552 in holding an accountant liable to a party other than an immediate client for negligent misrepresentation in the course of the accountant's professional services.[44]

{¶54} I would apply the Ohio Supreme Court's holding in *Haddon View* by analogy to the facts of this case. In a similar case from South Carolina, an appellate court adopted the §552 approach for determining the scope of an accountant's duty to third parties who use and rely on the accountant's work.[45] Like the Ohio Supreme Court in *Haddon View,* the South Carolina appellate court in *ML-Lee Acquisition Fund* determined that accountants can be liable to a party other than an immediate client for negligent misrepresentation in their professional services. Relying on that case, a federal appellate court sitting in diversity and interpreting South Carolina law predicted that the South Carolina Supreme Court would hold a professional appraiser liable to a third party for negligent misrepresentation if the third party detrimentally relied on the professional appraiser's materially inaccurate and negligent appraisal of the market value of a parcel of property.[46] I would follow the *Hadden View* §552 approach by analogy and hold real-estate appraisers liable to a downstream lending institution, as did the court in *Private Mortgage Investment Services*.

[44] (1982), 70 Ohio St.2d 154, 436 N.E.2d 212.
[45] See *ML-Lee Acquisition Fund v. Deloitte & Touche* (1995), 320 S.C. 143, 463 S.E.2d, 618, affirmed in part and reversed on other grounds (1997), 327 S.C. 238, 489 S.E.2d 470.
[46] See *Private Mortgage Investment Services, Inc. v. Hotel and Club Assn. Inc.* (C.A.5 2002), 296 F.3d 308.

{¶55} Ohio appellate courts have applied §552 to purchasers relying on appraisals that were generated for the lender[47] and to buyers for attorneys' negligent misrepresentations in real-estate contracts.[48]

{¶56} In ***Perpetual Federal Savings and Loan Assn. v. Porter & Peck Inc.,*** an Ohio appellate court considered the liability of an appraiser who had sold an appraisal to a mortgage broker.[49] The lender loaned money in reliance on the appraisal. The property was later found to be in violation of a zoning code. The lender then sued the appraiser, though the lender was not the immediate client of the appraiser. The court held that §552 was applicable to the appraiser and the lender even if they were not in contractual privity. The evidence in ***Perpetual Federal Savings*** showed that (1) appraisers establish values for properties; (2) lending institutions rely on the appraisals; (3) appraisals are vital to lending institutions; (4) if appraisals are wrong and lending institutions rely on them, the institutions are at risk of losing money; and (5) appraisers know that people rely on their work and expect an appraisal to be correct.[50]

{¶57} Thus §552 has already been applied to appraisers not in privity by the only court in Ohio that has considered this issue. Yet the majority blithely states that the parties are more "attenuated" because there might be one more intermediary party—ignoring that (1) if Trustcorp justifiably relied on the appraisal, it doesn't matter under Restatement §552 how many parties there are—it is a question of fact; and (2) Trustcorp actually funded the loans. Distinguishing ***Perpetual*** is sophistry—the majority just declines to follow it.

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[47] See ***Washington Mut. Bank v. Smith***, 11th Dist. No. 2001-L-238, 2003-Ohio-6910.
[48] See ***Orshoski v. Krieger*** (2001), 6th Dist. No. OT-01-009, appeal denied (2002), 94 Ohio St.3d 1488, 763 N.E.2d 1185.
[49] (1992), 80 Ohio App.3d 569, 609 N.E.2d 1324.
[50] See id. at 1326.

IV. The Bank is the Victim

{¶58} Trustcorp was duped by a property-flipping scheme. An inflated appraisal is instrumental in these schemes, and I have no problem holding a professional appraiser civilly liable for economic losses incurring because a third party justifiably relied on the appraiser's materially inaccurate and negligent appraisal. Professional appraisers should know that their appraisals will be relied on by a lending institution[51]—even if the appraisers do not know the specific lender.[52]

{¶59} Moreover, applying §552 to appraisers is a workable formula and accords with decisions from other state courts—including Utah, Alabama, California, Connecticut, Wisconsin, Iowa, North Carolina, New York, New Mexico, and another court in Ohio.[53]

{¶60} An appraisal is not a formality in the process; it is a professionally prepared report and opinion that is relied on by lenders, mortgage brokers, and buyers in the ordinary course of business. Those who are injured by inflated appraisals are not always the ones directly involved with the appraiser. I would reverse and remand to allow Trustcorp the opportunity to prove its negligent-misrepresentation case under §552.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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[51] See *Perpetual Federal Savings and Loan Assn. v. Porter & Peck Inc.*, supra.

[52] See Rest.2d Torts, Section 552, Comment h, illustrations 6, 7. See, also, *Bily v. Arthur Young & Co.* (1992), 11 Cal.2d 51, 64, 834 P.2d 745.

[53] See *West v. Inter-Financial Inc.* (2006), 553 Utah Adv.Rep. 8, 139 P.3d 1059; *Fisher v. Comer Plantation, Inc.* (Ala.2000), 772 So.2d 455; *Soderberg v. McKinney* (1996), 44 Cal.App.4th 1760; *Tackling v. Shinerman* (1993); 42 Conn.Supp 517, 630 A.2d 1381; *Costa v. Neimon* (1985), 123 Wis.2d 410, 366 N.W.2d 410; *Larsen v. United Federal Saving & Loan Assn.* (Iowa 1981), 300 N.W.2d 281; *Alva v. Cloninger* (1981), 51 N.C.App. 602, 277 S.E.2d 535; *Chemical Bank v. National Union Fire Ins.* (1980), 425 N.Y.S.2d 818, 74 A.D.2d 786; *Stotlar v. Hester* (1978), 92 N.M. 26, 582 P.2d 403; *Private Mortgage Investment Services, Inc. v. Hotel and Club Assn. Inc.*, supra; but, see, *Huntington Mortg. Co. v. Mortgage Power Fin. Servs.* (D. Md. 2000), 90 F.Supp.2d 670.