

Not Just for Products Liability? The Evolving and Uneven Application of the Economic Loss Rule by Kentucky Courts

Michelle C. Fox and Jacob Robbins

Judicially created doctrines have long played an invaluable role in American law. Whether by addressing gaps in existing law, by articulating practical mechanisms for balancing competing interests or by adapting existing

still being shaped by the courts. The economic loss rule is one such newer doctrine. Litigators—particularly those whose cases often encompass claims sounding in tort and in contract—would be wise to stay abreast

including construction contracting. See *D.W. Wilburn, Inc. v. K. Norman Berry Assocs., Architects, PLLC*, No. 2015-CA-001254-MR, 2016 WL 7405774, at *5 (Ky. Ct. App. Dec. 22, 2016). The Kentucky Supreme Court first adopted the economic loss doctrine in 2011 in *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011), however, it did not immediately adopt this broader formulation. In *Giddings*, the insurers of machining equipment that catastrophically failed brought suit against the manufacturer of that equipment, asserting claims for breach of implied warranty, breach of contract, negligence, strict liability, negligent misrepresentation and fraud by omission. *Giddings*, at 734.

The trial court granted summary judgment to the manufacturer, agreeing that the implied warranty claim was barred by the statute of limitations, and that the economic loss rule barred the tort claims. *Id.* at 735. Taken together, these rulings effectively prevented the insurers from recovering any damages

from the destruction of the equipment. The Court of Appeals largely upheld the trial court, and the Kentucky Supreme Court granted discretionary review. *Id.* Ultimately, the Kentucky Supreme Court upheld the trial court's rulings, holding that the "costs for repair or replacement of the product itself, lost profits and similar economic losses cannot be recovered pursuant to negligence or strict liability theories but are recoverable only under the parties' contract, including any express or implied warranties." *Id.* at 738.

Over the ensuing years, however, Kentucky courts have unevenly applied the economic loss rule to contexts beyond products liability. Citing the need to prevent tort claims and contract claims from collapsing into one another, courts have invoked the rule to dismiss tort claims that they determine are duplicative of contract claims, whether through analysis of the damages sought or of the duties under which the claims arise. For instance, a tortious claim for fraud

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precedent to novel contexts, judicially created doctrines fulfill a host of purposes that ensure the continued vitality and adaptability of legal adjudication. Many of these doctrines have endured for hundreds of years; others, lacking historical imprimatur, are

of the evolving application of this principle by Kentucky courts.

The economic loss rule emerged in the context of products liability cases but has expanded to apply to various other areas,

Colleagues say Steve “brings an introspective calm and incisive intuition to matters that effectively dissolves high emotions and cuts to the core of resolving conflicts” and that he “belongs on everyone’s short list of go-to mediators.”



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Mr. Reed has served in corporate leadership positions in healthcare for over 20 years. Most recently, as chief legal officer at BrightSpring Health Services, a multinational provider of specialty, pharmacy and senior care, he led the company’s legal team, its 200+ subsidiaries, and over 40,000 employees through the company’s IPO in 2024. He previously served as a U.S. attorney and assistant U.S. attorney prosecuting civil fraud matters, including health care fraud, and False Claims Act cases. At JAMS, he will resolve **business/commercial, employment, health care, personal injury and insurance** matters. Learn more at jamsadr.com/reed.



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may be dismissed where a court finds that “the damages plaintiffs seek are the same economic losses arising from the alleged breach of contract.” *New London Tobacco Mkt., Inc. v. Ky. Fuel Corp.*, 44 F.4th 393, 414–15 (6th Cir. 2022) (quoting *Nami Res. Co. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 335 (Ky. 2018)); see also *Ali v. Allstate Northbrook Indem., Co.*, 3:23-CV-108-RGJ, 2024 WL 1199023, at *5 (W.D. Ky. Mar. 20, 2024). Succinctly, “[t]he doctrine prohibits the law of contract and the law of tort from dissolving into each other.” *Ali*, 2024 WL 1199023, at *5 (W.D. Ky. Mar. 20, 2024). Where a court determines that a fraud claim is “indistinguishable” from a contract claim, the plaintiff may not be permitted to pursue the fraud claim. *Id.* But, if “[a] breach of a duty aris[es] independently of any contract duties between the parties, however, [that breach] may support a tort action.” *Nami Res. Co., L.L.C. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 336 (Ky. 2018) (quoting *Superior Steel, Inc. v. Ascent at Roebling’s Bridge, LLC*, 540 S.W.3d 770, 792 (Ky. 2017)).

The potential impact of a court’s determination that a party’s tort claims are barred by the economic loss doctrine cannot be overstated. Such a ruling may jeopardize, at minimum, a plaintiff’s access to punitive damages and attorney’s fees. No one wants to be in the position of the plaintiff in *New*


London Tobacco Mkt., Inc. v. Kentucky Fuel Corp., 44 F.4th 393, 414 (6th Cir. 2022), who won \$17 million in punitive damages, only to see the ruling vacated through the court’s application of the economic loss rule. Because of the economic loss rule, any plaintiff hoping to successfully prosecute both tort and contract claims should take special care to support their damages and plead their causes of action. The failure to do so can be, much as the machining equipment’s failure was in *Giddings*, catastrophic.

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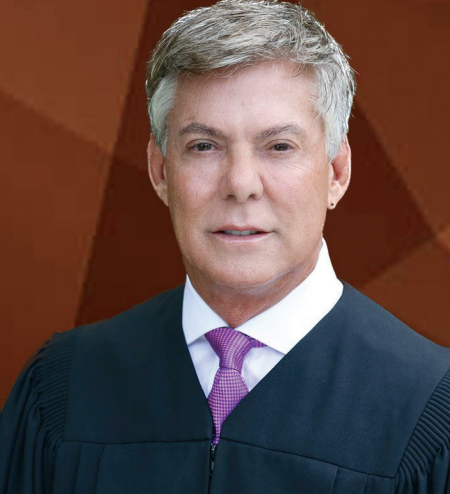

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