Contract or Tort: Applying Kentucky's Economic Loss Rule in Commercial and Consumer Contexts

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The economic loss rule can often be a bit of a headscratcher but in general aims to serve as a dividing line between when a party can recover under a tort theory of liability and when a party must rely on a contractual theory. As a refresher, an economic loss is financial damage that is unaccompanied by physical injury or damage to property, such as lost profits or a decrease in value. Kentucky's approach to the economic loss rule has been far from clear, but it is worth exploring the situations in which it applies, doesn't apply and might apply.

Adoption of the Economic Loss Rule: Giddings

Kentucky formally adopted the economic loss rule nearly 15 years ago in *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011). In *Giddings*, the Kentucky Supreme Court explained that it was adopting the economic loss rule as articulated by the United States Supreme Court decades earlier in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). Specifically, the Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." 348 S.W.3d at 738. *Giddings* was focused on defective products and the corresponding consequences to purchasers, and its holding was largely limited to that context. Notably, the rule does not apply to injury to people or other property caused by those defects.

Some jurisdictions recognize an exception to the economic loss rule, which applies if the event that damages a product is sufficiently destructive. This exception, referred to as the calamitous events exception, is largely focused on the potential damage or danger that could have occurred but for good fortune. *See Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W.Va. 1989). Kentucky does not recognize any such exception. In reaching its decision, the *Giddings* Court overruled *Real Est. Mktg., Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994) to the extent that Franz "can be read to suggest that a commercial purchaser can recover economic losses under a strict liability theory if a destructive event damages the product itself." 348 S.W.3d at 741.

Not stopping there, *Giddings* further made clear that, in Kentucky, the economic loss rule applies to negligent misrepresentation claims which find their origins in the parties' contract, reasoning that "[t]he product and any information about its character, nature or performance are properly the subject of the parties' contract," and not independent tort liability. *Id.* at 745.

Independent Duties and Tort Recovery

Giddings' bar on recovery for negligent representation based on contractual duties via application of the economic loss rule remains good law. Yet, it is important to note the nuanced treatment recent cases have given negligent misrepresentation claims in contexts that may seem to invoke the economic loss rule. In *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, the Court explained that "[a] breach of a duty *arising independently* of any contract duties between the parties, however, may support a tort action." 540 S.W.3d 770, 792 (Ky. 2017) (quoting *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575 (Ky. 2004)(Keller, J., concurring)). Looking to the plaintiff's claims, the Court found it difficult to "differentiate [plaintiff's] 'Breach of Contract' claim from its 'Negligent Performance of Contract' claim" where the specific examples of breach under the negligence claim closely matched the breach of contract allegations. *See also Nami Res. Co., L.L.C. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323 (Ky. 2018) (vacating punitive damages award where "fraudulent" underpayment of royalties was in actuality just a breach of contract claim).

> *The economic loss rule draws a critical—if often blurry—line between contract and tort, leaving litigants to navigate where one ends and the other begins.*

Though oftentimes litigants will simply plead claims in the alternative, if a party is thirsting for those sweet, sweet punitive damages and wants to pursue a negligence claim fully, these cases suggest two things to consider: first, whether there may be an independent source of duty outside the parties' contractual relationship that would provide grounds for a negligence claim; and second, if a party does plead claims in the alternative, they should be careful not to make the contractual claims and negligence claims sound too similar, lest they risk an outcome similar to *Superior Steel*.

Economic Loss in Construction Contracts

Kentucky courts have been inconsistent in their extension of the economic loss rule to other contexts. In *Cincinnati Ins. Companies v. Staggs & Fisher Consulting Eng'rs, Inc.*, No. 2008-CA-002395-MR, 2013 WL 1003543 (Ky. Ct. App. Mar. 15, 2013) (unpublished) the Kentucky Court of Appeals explained that the rule "has spread into the realm of construction litigation" and applied it to bar recovery against contractors for the negligent installation of a faulty transformer. And, similar to *Giddings*, the court rejected the calamitous events exception in this new context. Only a few years later, however, another unpublished opinion of the Kentucky Court of Appeals, *D.W. Wilburn, Inc. v. K. Norman Berry Assocs., Architects, PLLC*, No. 2015–CA–001254–MR, 2016 WL 7405774 (Ky. Ct. App. Dec. 22, 2016) (unpublished) appeared highly critical of the *Staggs & Fisher* decision—even noting its lack of precedential value—though it did not have cause to directly conclude that the economic loss rule does not apply to construction contracts.

Recent Developments

Giddings does not seem to have been the last word for the economic loss rule in Kentucky, at least for now. In *Rehkamp v. Drees Co.*, 715 S.W.3d 551 (Ky. Ct. App. 2025) the Kentucky Court of Appeals seemed to breathe new life into *Franz*, resurrecting it—at least in part—while still providing plaintiffs a new (old) way around the economic loss rule in consumer transactions. The *Rehkamp* decision explained that *Giddings* had cabined itself to the commercial transactions context in its adoption of the economic loss rule. To answer the case before it, the *Rehkamp* court dug up *Franz* and applied the economic loss rule to consumer transactions. Importantly, this revivification of *Franz*kenstein seemingly brought with it *Franz*'s apparent carveout to the economic loss rule—the calamitous event exception. Unfortunately for the Rehkamps, the plumbing issues and sewage backups they experienced did not rise to the level of a calamitous event and they were barred from recovering plumbing costs expended to repair their home.

An open question is how calamitous a calamity must be before this exception is applicable. While fact intensive, the obvious instances where the calamitous event exception would likely apply are those destructive events that would otherwise have caused serious harm—fires, explosions and bears (oh my). For not-quite-so-destructive events, it may be worth invoking the exception, but is certainly not worth hanging one's hat on it.

There is the distinct possibility that *Rehkamp*'s resurrection of the calamitous events exception to the economic loss rule will swiftly be put to the torch, as *Giddings*' logic rejecting the calamitous events exception for commercial transactions appears equally applicable to consumer transactions. Indeed, the majority approach to the economic loss rule generally is to apply it in both the commercial and consumer contexts. However, the Sixth Circuit, in predicting Kentucky's approach to the economic loss rule in consumer transactions, provided several reasons why the Kentucky Supreme Court may decide otherwise (contrary to *Rehkamp*) and not even extend the rule to the consumer context at all: first, Kentucky has drawn the dividing line between tort and contract law differently in commercial and consumer contexts; second, consumers are less able to allocate the risk via contract; third, the producer is better situated to insure against loss; and fourth, various and sundry tea leaves in the *Giddings* decision imply otherwise. *State Farm Mut. Auto. Ins. Co. v. Norcold, Inc.*, 849 F.3d 328, 332-35 (6th Cir. 2017).

In the meantime, plaintiffs and defendants should be on the lookout for ways to apply or circumvent the economic loss rule, be that in the commercial, consumer or construction context. For commercial products, that means no economic loss recovery in tort, no exceptions, no way, no how. For consumer products, that means likely no economic loss recovery in tort, but maybe there is room to argue or suggest the calamitous event exception applies. For construction contracts, the application of the rule is even murkier, but there are grounds to assert it. And for any case, try to identify (or undermine) independent duties that would support negligence claims, just to be safe.

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