

## Drawing the Line: In Tennessee, the Economic Loss Doctrine Does Not Apply to Contracts for Services

Gus Sara

*The Subrogation Strategist*

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In *Commercial Painting Co. v. Weitz Co. LLC*, No. W2019-02089-SC-R11-CV, 2023 Tenn. LEXIS 39 (*Weitz*), the Supreme Court of Tennessee (Supreme Court) considered whether the economic loss doctrine barred the plaintiff's claims for fraud, negligent misrepresentation and punitive damages arising out of a contract with the defendant for construction services. The court held that the economic loss doctrine only applies to product liability cases and does not apply to claims arising from contracts for services. This case establishes that, in Tennessee, the economic loss doctrine does not bar tort claims in disputes arising from service contracts.

In *Weitz*, defendant, Weitz Co. LLC (*Weitz*), was the general contractor for a construction project and hired plaintiff Commercial Painting Co. (Commercial) as a drywall subcontractor. Weitz refused to pay Commercial for several of its payment applications, claiming that the applications were submitted untimely and contained improper change order requests. Commercial filed a lawsuit against Weitz seeking over \$1.9 million in damages, alleging breach of contract, unjust enrichment, enforcement of a mechanic's lien, and interest and attorney's fees under the Prompt Pay Act of 1991. Weitz filed a counterclaim for \$500,000 for costs allegedly incurred due to Commercial's delay and defective workmanship. In response, Commercial amended its complaint to add claims for fraud, intentional and negligent misrepresentation, rescission of the contract and \$10 million in punitive damages. Commercial alleged that Weitz received an extension of the construction schedule but fraudulently withheld this information from Commercial and continued to impose unrealistic deadlines.

Weitz filed a motion for summary judgment, arguing that the claims for fraud, intentional and negligent misrepresentation, rescission of the contract and punitive damages were barred by the economic loss doctrine. The trial court granted partial summary judgment to Weitz. After a bench trial, the trial court awarded Commercial over \$400,000. The Court of Appeals vacated the trial court's summary judgment ruling, finding that there were genuine issues of material fact regarding the intentional and negligent misrepresentation claims and remanded the case. Commercial then amended its complaint again to increase its punitive damages claim to \$200 million.

The second trial was heard by a jury, which awarded Commercial more than \$1.7 million on its claims and \$3.9 million in punitive damages. The trial court also awarded Commercial pre-judgment interest, litigation costs and attorney's fees in excess of \$3 million. Weitz appealed, and the Court of Appeals held that the economic loss doctrine applied outside of the products liability context when the contract was between sophisticated commercial entities. The Court of Appeals affirmed the trial court's judgment for compensatory damages for breach of contract, but dismissed the tort claim for intentional misrepresentation and reversed the punitive damages award based on the economic loss doctrine. The Court of Appeals also reversed the award for interest and attorney's fees since they were not available remedies under the contract.

The Supreme Court acknowledged that the economic loss doctrine is a judicially created rule intended to prevent contracting parties from pursuing tort recovery for purely economic or commercial losses associated with a contractual relationship. The Supreme Court noted that it adopted the economic loss doctrine in 2009 in a case involving product liability claims, noting that the doctrine is implicated when a defective product damages itself without causing personal injury or damage to other property. The court also noted that the doctrine has been described as one of the most confusing doctrines in tort law, partly because most states have extended the doctrine beyond the products cases in which it originated. The court expressed concern with extending the reach of the doctrine beyond product liability cases, as doing so would "threaten contracting parties for services, who are not covered by the significant

protections afforded by the Uniform Commercial Code.” The expansion of the doctrine, the court explained, would also threaten to extinguish tort claims that have long existed for people entering into contracts for services.

Weitz argued that allowing a contracting party to bring tort claims would frustrate the ability of contracting parties to reliably allocate risks and costs during their bargaining and to then build cost considerations into their contracts. In response, the Supreme Court stated that a party should not have to rationally calculate the possibility that the other party will deliberately misrepresent critical terms of the contract. The court further noted that one party need not have to consider another party’s fraud among the potential risks of negotiating a contract in good faith.

After an extensive analysis, including considering approaches taken by various states, the court held that the economic loss doctrine only applied to products cases and, thus, did not bar Commercial’s tort claims for fraud and misrepresentation. The court explained that these claims were not predicated merely on a breach of the contract but also on the fact that Weitz allegedly made false representations about the timing and amount of work involved in order to mislead Commercial to obtain an unfair advantage.

The *Weitz* case establishes that, in Tennessee, the economic loss doctrine only applies to products cases and does not apply to contracts for services. This decision serves as a reminder that the economic loss doctrine does not necessarily apply to every contract between commercial entities. Subrogation professionals practicing in Tennessee should consider this decision when determining whether the economic loss doctrine poses challenges to a subrogation claim.

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