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Recent Indiana Economic Loss Rule Cases Address ‘Other Property’ Damage Vs. ‘Failed Commercial Expectations’

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The economic loss rule generally bars tort claims for recovery of economic losses, therefore limiting recoverable damages to those provided under contract or warranty. While different states’ applications of the rule may vary, it often serves as an effective shield for defendants in commercial litigation involving product liability or construction defect claims, especially where the transaction at issue involves limited remedy provisions. A look at how Indiana and other state courts treat the rule and some recent federal court decisions sets up an interesting dichotomy.

In 2005, the Indiana Supreme Court provided its first extensive analysis of the rule:

In sum, Indiana law under the Products Liability Act and under general negligence law is that damage from a defective product or service may be recoverable under a tort theory **if the defect causes personal injury or damage to other property**, but contract law governs **damage to the product or service itself and purely economic loss arising from the failure of the product or service to perform as expected**.

Gunkel v. Renovations, Inc., 822 N.E.2d 150, 153-54 (Ind. 2005) (emphasis added).

- The dichotomy between the “other property” damage exception to the economic loss doctrine and “failed commercial expectations”

If a product or service causes damage to property other than “the product or service itself” (*Gunkel, supra*), i.e., beyond the product or service purchased by the plaintiff, such property damage generally is viewed as beyond the scope of the economic loss rule and recoverable in tort. Even so, many courts outside of Indiana have held that where such “other property” damage is inextricably tied to failed commercial expectations, it is still subject to the economic loss rule. See, e.g., *Selzer v. Brunsell Bros., Ltd.*, 652 N.W.2d 806, 817 (Wis. App. 2002), that the economic loss rule barred tort claims that defective windows resulted in damage to

RELATED PEOPLE



William E. Padgett

Partner
Indianapolis

P 317-231-7353

F 317-231-7433

william.padgett@btlaw.com

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house siding because such “other property” damage was merely the result of failed commercial expectations; “had the windows resisted rot but spontaneously shattered, spewing shards of glass into an adjacent Picasso,” such “other property” damage may be recoverable in tort.

Aside from one unpublished decision, *Rollander Enterprises, Inc., v. H.C. Nutting Co.*, 2011 WL 2671929 (Ind. Ct. App. July 8, 2011), Indiana case law largely contradicts this line of authority. For example, relying primarily on *Gunkel*, two recent economic loss rule decisions from the U.S. District Court for the Northern District of Indiana focused exclusively on whether there was damage to “other property” outside of the product/service transaction at issue, without addressing the fact that the damage essentially resulted from failed commercial expectations. See *Constructora Mi Casita S De RL De CV v. NIBCO Inc.*, 2017 WL 3438182 (N.D. Ind. Aug. 9, 2017); *City of Whiting v. Whitney, Bailey, Cox & Magnani, LLC*, 2018 WL 1400890 (N.D. Ind. Mar. 20, 2018).

Preliminarily, *Gunkel* arguably is contrary to the premise that “other property” damage can be the result of failed expectations and still subject to the economic loss rule. In *Gunkel*, the plaintiff homeowner asserted a negligence claim against a contractor whose construction of a façade resulted in water intrusion and extensive damage to other, pre-existing parts of the home. While prevention of water intrusion would seem to be a core commercial expectation of such a construction project, the Indiana Supreme Court held that because the “product/service” at issue purchased by the plaintiff was only the façade itself, repair costs for other water-damaged parts of the home constituted “other property” damage recoverable in tort. See *id.* at 154-56.

In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010), however, the Indiana Supreme Court held that since the “product/service” purchased by the plaintiff was a single, massive library renovation construction project, the economic loss rule barred all tort claims against the defendant contractors for repairs and damages related to various portions of the project, despite the plaintiff’s claims that “physical damages” to “other property” resulted from the construction work. See *id.* at 725-32.

Soon thereafter, in *Rollander Enterprises*, 2011 WL 2671929, the Indiana Court of Appeals addressed an “other property” damage/commercial expectations scenario. Relying primarily on *Indianapolis-Marion County Library*, the court held – in an unpublished decision – that the economic loss rule barred recovery in tort for damage to “other property” caused by allegedly defective retention walls because a fundamental commercial expectation for the walls was prevention of the earth movement that resulted in such damage, even if that damage included property outside of the construction contract at issue. See *id.* at *4-9, distinguishing *Gunkel* because the façade in that case was purely “aesthetic.”

- ***Constructora Mi Casita* and *City of Whiting* and the “other property” damage/commercial expectations dichotomy**

Two Indiana federal District Court cases decided within the past year, *Constructora Mi Casita*, *supra*, and *City of Whiting*, *supra*, both seem to allow tort claims under Indiana law if the defective product or service

resulted in damage to “other property,” regardless of whether such damages are the result of failed commercial expectations. In *Constructora Mi Casita*, the plaintiff construction company used defendant’s plumbing products to construct a condominium building. Plaintiff alleged that defects in the plumbing products caused widespread leaks and water damage to the condominium units and common areas, and obtained assignments of any related claims from the condominium owners and homeowner association. 2017 WL 3438182, at *1-2. The District Court held that the “other property” damages to the condominium units and common areas were recoverable under negligence and negligent misrepresentation theories, while the costs of the plumbing products, relocating residents, and lost profits were “purely economic loss[es]” not recoverable in tort. *Id* at *6. While it would seem that a fundamental commercial expectation for plumbing products is that they will not leak and cause widespread water damage, the *Constructora Mi Casita* court’s analysis relied heavily on *Gunkel*, along with that fact that the “other property” damaged was owned by parties other than the plaintiff construction company. *See id.*

The *City of Whiting* case likewise conflicts with the premise that “other property” damage that is the result of failed commercial expectations still may be subject to the economic loss rule, and is certainly at odds with *Rollander, supra*. *City of Whiting*, like *Rollander*, involved a construction project that included a retention wall, specifically a rock revetment intended for shoreline protection. 2018 WL 1400890, at *1-2. And, as in *Rollander*, the revetment failed, resulting in damage to “other property” separate from the construction project, including a numerous existing trees and a building. While the court held that the economic loss doctrine did preclude tort claims for repairs to property that was part of the construction project, it allowed recovery in tort for damage to property outside of the project caused by the revetment’s failure, such as the pre-existing trees and building. *See id.* at *3-4.

Until the Indiana Supreme Court instructs otherwise, the lesson from *Gunkel* and recent cases such as *Constructora Mi Casita* and *City of Whiting* is that damage to “other property” resulting from a defective product or service likely is beyond the reach of the economic loss rule and still recoverable in tort, as long as such “other property” is outside the transaction for the product/service at issue. This is true even if such “other property” damage is the natural result of failed commercial expectations concerning the performance of the product/service, e.g., a retention wall that fails to prevent water or earth from damaging property it was intended to protect when it was constructed.

William E. Padgett is a partner in the Indianapolis office and a member of the Litigation Department. Bill has a broad-based litigation practice, representing clients in matters involving product liability, toxic torts, premises, liability, and a variety of commercial claims. Bill can be reached at 317-231-7353 or william.padgett@btlaw.com.

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