Wisconsin Court of Appeals Clarifies Applicability of Economic Loss Doctrine in Cases Involving Damage to “Other Property”

The Wisconsin Court of Appeals recently addressed the application of an often misapplied exception to the economic loss doctrine in Wisconsin. In Secura Ins. v. Super Prods. LLC, 2018AP1600, 2019 WL 3432520, the court clarified that the “other property” exception does not swallow the rule and allow a party to recover in tort damages that would otherwise be subject to the doctrine simply by establishing damage to other property. In cases with both types of damages, “only recovery for harm to property other than the product itself is available.” Id. at ¶ 30.

In Secura, an excavator purchased from Super Products started a fire that damaged not only the excavator itself but also various items, including stepladders, a trash can, a wheelbarrow, boots, hoses, tools, and other equipment, stored in or around the excavator. The owner’s insurer covered the damage and then filed a subrogation action against Super Products, asserting a claim for negligence.

Super Products moved for partial summary judgment contending that the economic loss doctrine precluded recovery in tort for any damage to the excavator itself. The circuit court disagreed, holding that when there is damage to both the product and other property, the doctrine does not apply. The court of appeals reversed and recommended its decision for publication, presumably because of the confusion over the scope of the “other property” exception.

The court of appeals began by acknowledging that “[g]enerally, when an alleged product defect causes physical injury to ‘other property,’ tort remedies are available to seek recovery for damage to property other than the product itself.” Id. at ¶ 15. The court also recognized that although not at issue in the case before it, the “other property” exception has been limited by two concepts where damage to “other property” is damage which is within the contemplation of the parties to a contract. Id. at ¶ 16. First, when the product at issue is a component in a larger “system,” the entire “integrated system” is considered the product for purposes of the economic loss doctrine. Id. Second, the “disappointed expectations” limitation applies when the other property damage could have been the subject of negotiations between the parties—i.e., it was anticipated at the time of contracting. Id. at ¶¶ 17-18.

The court then turned to the application of the “other property” exception. Since the parties did not dispute that the damage to the excavator would on its own be subject to the economic loss doctrine or that the damage to the items stored around the excavator would not, the sole dispute before the court was over the effect of the damage to “other property” on the applicability of the doctrine. After overviewing Wisconsin case law on the issue, the court of appeals
concluded that “[t]here is no support for [the insurer’s] attempt to eviscerate the distinction between tort and contract law by precluding the economic loss doctrine’s application any time a party can allege damage to ‘other property.’” Id. at ¶ 31. The court reasoned, “Allowing tort recovery for damage to, or loss in value of, the defective product under these circumstances “would render contractual protections a nullity and destroy any freedom to allocate economic risk by contract.” Id.

In sum, in cases involving damage to “other property” and to a defective product itself, a party can pursue a recovery in tort for the damage to “other property” but not for the damage to the product itself.

Given the prior confusion over the issue, it will be interesting to see if the insurer petitions for further review of the court of appeals decision and whether the supreme court will take it. But, for now, the court of appeals decision provides some much needed clarity to Wisconsin’s economic loss doctrine jurisprudence. In addition to traditional product cases such as Secura, we deal with the economic loss doctrine frequently in construction and insurance-coverage disputes in Wisconsin. Accordingly, if you have any questions regarding the court of appeals’ decision or the economic loss doctrine in general please contact Lance Meyer at 952.831.6544.