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Court Effects Contraction of Contract Claims and Expansion of Economic Loss Doctrine

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Plaintiff client entered into a design-build contract with defendant design-build firm for a resort and conference center. The contract also stated that the design-build firm would provide architectural, engineering and construction services. Almost 10 years after substantial completion of the project, the client sued, alleging that the design-build firm "defectively designed and/or defectively installed" portions of the project, leading the client to incur significant costs for inspection and repair.

The complaint stated two claims, for breach of contract and for professional negligence related to architectural and construction services provided under the contract. The Circuit Court for Sauk County dismissed both claims on summary judgment. The court found that the contract claim was time-barred by a six-year statute of limitations and that the claim of negligence was barred by the "economic loss doctrine" based upon the "predominant purpose test" and the court's conclusion that the mixed products and services contract was for a "product," a final structure. The Court of Appeals of Wisconsin affirmed.

Questions Before the Court

Was the client's contract claim against the design-build firm time-barred?
Yes. A Wisconsin statute provides that persons involved in improvements to real property may not be sued more than 10 years after substantial completion of a project. However, the statute of limitations is limited in scope, and is not applicable to all causes of action. Its purpose is to provide protection from long-term liability for those involved in the improvement to real property and it imposes a time limit on lawsuits relating to real property that are not otherwise time-barred. The appellate court concluded that when an action is one for contract damages, the Wisconsin statute directs the court to compare the 10-year time limit with the time limit applicable to contractual actions to see which is shorter, and then apply the shorter of the two limits. Here, the statute of limitations on contractual actions was six years, and the claim was therefore time-barred.

Was the client's claim of professional negligence barred by the economic loss doctrine?
Yes. The appellate court noted that, from the start, the client acknowledged that when a contract covers both products and services, the economic loss doctrine serves as a bar to negligence claims, so long as the predominant purpose of the contract was to provide a product. The Supreme Court of Wisconsin has

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held that courts should use the predominant purpose test—which evaluates the totality of the circumstances—in order to determine whether a contract for both products and services is predominantly: (1) for the sale of a product, and therefore subject to the economic loss doctrine; or (2) a contract for services, allowing a tort claim to survive. The client argued that there were material facts in dispute as to whether the predominant purpose of the contract was to provide a product or to provide a service. In the alternative, the client contended that the predominant purpose test was inapplicable to negligence claims based on professional services.

Here, the contract contained three components: (1) to provide architectural and engineering services; (2) to provide other services necessary for construction, including supervision and labor; and (3) to provide construction materials. The Supreme Court of Wisconsin has previously addressed construction contracts involving both construction services and materials, and concluded that they were predominantly for a "product," the final structure.

The appellate court was not convinced by the client's argument that architectural and engineering services should be distinguished from construction or construction management services, services which the Supreme Court of Wisconsin had previously examined. Only $1.1 million of a total budget of $26.2 million—approximately 4 percent—was for architectural and engineering services.

The Supreme Court of Wisconsin has declined to treat some types of services differently from other types of services for purposes of applying the economic loss doctrine. The appellate court relied upon *Insurance Co. of North America v. Cease Electric Inc.,*2004 WI 139, 276 Wis.2d 361, 688 N.W.2d 462, which states that when determining whether to apply the economic loss doctrine, and therefore bar a tort claim, a court must first determine if a contract is for a product or a service. If the contract is for a service, then the economic loss doctrine's bar will not apply to a tort claim. The court refused to distinguish between a professional and nonprofessional service. If a mixed contract is predominantly a contract for a service, then the economic loss doctrine would not bar a tort claim. Here, however, the court determined that the contract was for a product, the structure itself, and therefore, that the economic loss doctrine barred the tort claim.

What the Court's Decision Means for Practitioners

The Court of Appeals of Wisconsin has reaffirmed that architectural and engineering services are indistinguishable from other types of "nonprofessional" services in evaluating application of the Wisconsin economic loss doctrine. In addition, the court reaffirmed that budgets can be utilized to determine whether a contract pertained primarily to products or services. As to the limitations, the 10-year statute acted as a "repose" period even though not referred to as such by the court. This case illustrates a reasonably broad application of the economic loss doctrine, albeit using a word test (*e.g.*, "product") differently than other states apply the doctrine (*e.g.*, in the state of Illinois, *See 2314 Lincoln Park West Condominium Association v. Mann,*555 N.E.2d 346 (1990)).

Kalahari Development, LLC v. Iconica, Inc., 2012 WL 569368 (Wis. App. Feb. 23, 2012)

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