AALA Presentation
Understanding the Essentials of Agricultural Market Loss Litigation:
Duty, the Economic Loss Doctrine and Damage

ECONOMIC LOSS DOCTRINE
WHAT IS IT AND WHY DO WE CARE?

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I. ECONOMIC LOSS DOCTRINE – WHAT IS IT?

A. General

The phrase "economic loss doctrine" ("ELD") is used generically to describe what in reality are several bases for limiting tort recovery when a plaintiff has suffered financial but not personal injury. As described by one court, "[t]he term 'economic loss rule' has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad." *Eastwood v. Horse Harbor Foundation, Inc.*, 241 P.3d 1256, 1261 (Wash. 2010); *see also Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc*., 223 P.3d 664, 667 (Ariz. 2010) ("Courts and commentators have defined the [ELD] in varying ways, which itself has created some confusion in the law … Some courts have stated that the economic loss doctrine 'bars a party from recovering economic damages in tort unless accompanied by physical harm' … This formulation of the doctrine, however, is overly broad."); Jim Wren, Applying the Economic Loss Rule in Texas, 64 Baylor L. Rev. 204, 205 (2012) ("courts often reference 'the economic loss rule' as if there were one unitary rule applicable to tort actions generally. The over-simplification misleads."); Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts (2d ed.)

("Dobbs on Torts") at § 607 ("the implication of references to 'the' economic loss rule that there is but a single overarching economic loss rule is misleading. Several discrete rules dominate the decisions, not a single rule.").

In short, the ELD is not a single uniform rule. There are three general variations – one applicable to products that fail or damage only themselves; one more generally drawing a line between contract and tort claims; and the broadest form most commonly applied in federal maritime and state "access" cases involving disruption of some public utility or thoroughfare.

A brief history of the ELD's development is helpful in understanding its current forms.

B. History

1. *East River*

The ELD began at the intersection between warranty and strict products liability. Often cited as a seminal case, *Seely v. White Motor Co.,* 403 P.2d 145, 149 (Cal. 1965) was a suit against the manufacturer of a defective truck. The plaintiff sought recovery of the purchase price, repair costs, and lost profits. The court rejected strict liability for what, in essence, were warranty claims, explaining:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort [*i.e.*, liability without negligence] indicates that it was designed, not to undermine the warranty provisions of the sales act or of the [UCC] but, rather, to govern the distinct problem of physical injuries.

Id. at 149. The rules of warranty, the court said, "function well in a commercial setting … [to] determine the quality of the product the manufacturer … must deliver." *Id.* at 150. When a product subject to the UCC bargaining process malfunctions, the "carefully articulated" law of sales should govern expectations between buyer and seller, as distinguished from personal injury remedied through strict (no-fault) liability.

The Supreme Court adopted this reasoning in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), involving malfunction of a supertanker turbine. The Court considered "whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts." *Id.* at 859. It observed that no-fault liability grew from the policy "that people need more protection from dangerous products" than afforded by warranty, but that extending strict liability too far would "drown [contract] in a sea of tort." *Id.* at 866. "[F]ailure of the product to function properly [ ] is the essence of a warranty action[.]" *Id.* at 868. Further, "[d]amage to a product itself is most naturally understood as a warranty claim … mean[ing] simply that the product has not met the customer's expectations." *Id.* at 872. In the court's view, the UCC "is well suited" to such controversies, allowing a manufacturer, within limits, "to disclaim[] warranties or limit[] remedies," in exchange for which, "the purchaser pays less for the product." *Id.* at 873.

States following *East River* decline tort recovery for "disappointed commercial expectations" in a product's performance. *See, e.g.*, 3 Owen & David on Prod. Liab. § 25:14 (4th ed.) (ELD precludes tort recovery for "economic losses from the failure of a product to meet a contracting party's expectations. With well developed contractual remedies, such as those in the [UCC], courts have concluded that there is no need for a tort remedy which would be duplicative and undermine contract law."). Some states extend the ELD to deficient services and some do not where, for example, the conduct is not within the scope of the contract or the claim is based on duties independent of the contract.

This "contractual" branch of the ELD itself has two versions – the traditional product-liability version and a broader contract version. Some states apply one but not the other. *See Walker v. Williamson*, 131 F. Supp. 3d 580, 588 (S.D. Miss. 2015) ("Mississippi applies the [ELD] only in the area of products liability"); *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan*

Cos., Inc., 110 So. 3d 399, 406-07 (Fla. 2013) ("Having reviewed the origin and original purpose of the [ELD], and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the [ELD] applies only in the products liability context."). Some states apply both. *See, e.g., Lesiak v. Cent. Valley Ag Co-op, Inc.*, 808 N.W.2d 67, 81 (Neb. 2012) ("After reviewing our own case law, the case law from other jurisdictions, and the scholarly work done on the subject, we hold that the [ELD] precludes tort remedies only where . . . (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties."). In either event, it can be argued that "the policy behind the doctrine has remained the same … to prevent a party from asserting a tort remedy in circumstance governed by the law of contracts." *In re Bryant Manor, LLC*, 434 B.R. 629, 635 (D. Kan. 2010) (quotations and citations omitted); *see also David v. Hett*, 270 P.3d 1102 (Kan. 2011) (overview of contract-based ELD).

2. *Robins Dry Dock*

The second theoretical branch of the ELD has its roots in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), a maritime case in which plaintiffs were time-charterers of a vessel owned by a third party. While the vessel was docked for scheduled inspection, the defendant (who contracted with the owner to service it) carelessly damaged the propeller, requiring repairs and delaying the vessel's return to service. Plaintiffs sustained lost profits because of the delay. The Court held that "tort to the person or property of one man does not make the tort-feasor liable to another *merely because* the injured person was under a contract with that other *unknown to the doer of the wrong*." *Id.* at 309 (emphasis added).

The case is easily read to hold only that absent some other basis for liability, Party A cannot sue Party B merely for Party B's negligent performance of a contract with Party C. From a policy perspective, it can be said that the "purpose of the [*Robins*] rule is to prevent the

tortfeasor from being held liable, not only to the victim, but to everyone who has a contract with the victim when the tortfeasor was unaware of the contract." *In re Genetically Modified Rice Litig*., 2010 WL 2326036, at *3 n.6 (E.D. Mo. June 7, 2010)

Robins, however, has been read quite expansively by some courts. Maritime cases began adopting a so called "bright-line" rule that there is no tort liability absent physical injury to the plaintiff's person or property. Seminal cases include *State of La. Ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) and *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985). These have been criticized for an overly expansive reading of *Robins*. *See* Wren, *supra*, 64 Baylor L. Rev. at 229 ("In actuality, [*Robins*] only supports the proposition that a stranger to a contract has no standing to sue in negligence for breach of a duty that exists only pursuant to a contract with someone else … in the absence of any independent duty otherwise existing outside of the contract. Nevertheless, the case is often cited for the far more expansive rule of barring all negligence actions for pure economic loss, presumably to add the imprimatur of Supreme Court authority.").

The *Testbank* court itself struggled with its decision as illustrated by three separate concurring opinions and strong dissents, one of which called *Robins* the "Tar Baby of tort law" 752 F.2d at 1035.[1] The Fifth Circuit also has not applied a physical-harm rule consistently. *See Catalyst Old River Hydroelectric Ltd. P'ship v. Ingram Barge Co*., 639 F.3d 207, 212 (5th Cir. 2011) (in case involving tug boat collision in which barges drifted down river blocking intake channel, court allowed tort claims of hydroelectric station without physical injury, based on mere

[1] *See also id*. at 1035 ("This Court's application of *Robins* is out of step with contemporary tort doctrine, works substantial injustice on innocent victims, and is unsupported by the considerations that justified the Supreme Court's 1927 decision. *Robins* was a tort case grounded on a contract. Whatever the justification for the original holding, this Court's requirement of physical injury as a condition to recovery is an unwarranted step backwards in torts jurisprudence. The resulting bar for claims of economic loss unaccompanied by any physical damage conflicts with conventional tort principles of foreseeability and proximate cause.") (WISDOM, J., joined by RUBIN, J., POLITZ, J., TATE, and JOHNSON, J., dissenting).

presence of the barge obstructing flow of water that "invaded and harmed" plaintiff's "proprietary interest in its facility").

Some circuits rejected the "bright-line" maritime rule altogether. In *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), for example, the Ninth Circuit allowed claims by fishermen against oil companies for damage resulting from an oil spill. It eschewed a "bright-line" rule citing the "prevailing view" that duty "is measured by the scope of the risk which negligent conduct foreseeably entails." *Id*. at 568 (quoting 2 Harper & James, The Law of Torts, at 1018). Taking care to state that was not opening the door to everyone, the court recognized that in the case before it, "[b]oth the plaintiffs and defendants conduct their business operations away from land and in, on and Under The sea … Neither should be permitted negligently to inflict commercial injury on the other." *Id*. at 570-71.

3. "Access" cases

At the state level, a *Robins* variant emerged, most characteristically in cases where persons suffer financial harm resulting from damage to property they do not own, for example, a bridge, which restricts access and causes business disruption. These also have been dubbed "stranger" cases. Two examples are *In re Chicago Flood Litig*., 680 N.E.2d 265 (Ill. 1997) and *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp*., 345 N.W.2d 124 (Iowa 1984).

In *Neb. Innkeepers*, businesses and individuals sued the contractor and seller of defective steel used in constructing a bridge. 345 N.W.2d at 125. The steel cracked, causing closure of the bridge, impairing access of patrons to their businesses. The court denied plaintiffs' negligence claim, confining analysis to cases in which the defendant "negligently caused the closing of a public bridge or river." *Id.* at 128. The issue was one of policy, the central concern being "open[ing] the door to virtually limitless suits, often of a highly speculative and remote nature." *Id.* at 127.

In *Chicago Flood*, a dredging company breached a tunnel wall, flooding from the Chicago River ensued, causing evacuation, road and bridge closures. As in *Neb. Innkeepers*, plaintiffs did not own the tunnel, and used the roadways and bridges under privilege no different than any other member of the public. The court disallowed a negligence claim in order to prevent "open-ended" tort liability. 680 N.E.2d at 274.

These situations comprise their own class of cases raising their own considerations, reflecting a policy-driven limit on ordinary tort principles. This variant of the ELD also is not a one-size-fits-all rule. *See* Dan B. Dobbs, "An Introduction to Non-Statutory Economic Loss Claims," 48 Ariz. L. Rev. 713, 717 (2006) ("the rule against economic loss recovery from strangers cannot be universal"); Restatement (Third) of Torts: Liab. For Econ. Harm (TD No.1) (April 4, 2012) §3, cmt. a ("majority" version of ELD is the contract form, and "a minority [of courts] have used [the phrase] to mean that there is, in general, no liability in tort for causing pure economic loss to another. This Restatement does not endorse that formulation because its breadth is potentially misleading") (emphasis added); *PPG Indus. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984) (Louisiana rejects any *per se* rule barring tort recovery for "purely economic" losses); *In re Facebook, Inc., IPO Sec. & Derivative Litig*., 986 F. Supp. 2d 428, 483 (S.D.N.Y. 2013) (rejecting argument that tort liability requires physical harm).

The Third Restatement (TD) sets out an economic loss "rule" precluding tort liability for loss caused by negligent "performance or negotiation of a contract between the parties." Restatement (Third) of Torts: Liab. For Econ. Harm (TD No.1) (April 4, 2012) § 3. According to the comments, this "hews closer than the broader one to the rationale that courts state for the rule in any of its forms: the need to separate matters best left to contract from those properly resolved by the law of tort," and "[t]he narrower scope of the rule stated here also ties it more clearly to its origins in cases that involve products liability." *Id*. cmt. a. Under the Third

Restatement, "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another." Restatement (Third) of Torts: Liab. for Econ. Harm § 1(a) TD No 1 (2012). "Economic loss" is defined to mean "pecuniary damage not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." *Id*. §2. In versions of the ELD actually adopted by various states, what is meant by "economic loss" depends on the context.

II. ECONOMIC LOSS DOCTRINE - WHY DO WE CARE?

We care about the hydra-headed ELD because financial injury does occur without physical harm in any number of situations, products often fail, and numerous situations entail contracts. What then is the defendant's tort exposure? What is the plaintiff's remedy?

The answer: It depends on what ELD version a state has adopted – and it *should* depend on the policy underlying it. Careful study of the applicable ELD thus becomes critical.

***Example*:** The price of commodity corn falls when a foreign country rejects further imports after finding a genetically modified trait, not yet approved in that country, in corn shipments. Can farmers sue for negligence even if there is no physical damage to the corn they owed?

> *In re Syngenta AG MIR 162 Corn Litig*., 131 F. Supp. 3d 1177 (D. Kan. 2015) (rejecting application of ELD and allowing tort claims although rejecting allegations of physical injury to corn)
>
> *See also In re genetically Modified Rice Litig*., 2009 WL 4801399 (E.D. Mo. Dec. 9, 2009) (rejecting MDL for reasons including allegations of physical harm to conventional rice contaminated by GMO trait)

***Example*:** Farmer grows certified and registered winter wheat seed. He purchases fertilizer from Co-op contaminated with rye, which contaminates the wheat, which Farmer then cannot sell as certified seed. Co-op settles with Farmer, but brings its own third-party claim against other defendants, one of whom sold Co-op a chemical used in mixing the fertilizer, which might have been the source of contamination. That transaction was governed by the UCC but Co-op did not notify seller of a breach of warranty, precluding warranty claims. Can Co-op bring a negligence claim?

> *Jorgensen Farms, Inc. v. County Pride Coop, Inc*., 824 N.W.2d 410 (S.D. 2012). Held: "In UCC cases, [the court] has adopted the [ELD] which provides that 'economic losses are not recoverable under tort theories.'" *Id*. at 418 (quoting

Diamond Surface, Inc. v. State Cement Plant Comm'n, 583 N.W.2d 155, 161 (S.D. 1998)). Further held that the chemical "was a component part" of the fertilizer purchased as well as the wheat (which Co-op did not produce but with regard to which it settled). No tort claim allowed.

***Example*:** Farmer contracts with ACME Co. to design and install a new dairy parlor, which includes a water system. After installation, the water becomes contaminated with bacillus, the cows are affected, and milk production declines. Can Farmer sue for negligence?

Rozeboom Dairy, Inc. v. Valley Dairy Farm Automation, Inc., 2011 WL 662338 (Iowa App. 2011). Held: court refused application of the EDL to the negligence claim, finding that the injuries were "peripheral to the sale" of the water system and damaging to plaintiff's own property. "This was not a case where a product simply failed to do what it was supposed do," and such injuries "support damages in tort." *Id.* at *7.

***Example*:** Subcontractor supplies defective components used in constructing a grain storage building, which partially collapsed, injuring itself and the grain inside. Is this a breach of warranty or a tort?

Corsica Coop. Ass'n v. Behlen Mfg. Co., 967 F. Supp. 382 (D.S.D. 1997). Held: The "first question" was "whether the [UCC] applie[d]." *Id.* at 384. It did, but warranty claims were time barred. South Dakota's ELD did not apply "when the damage is to 'other property' as opposed to the goods that were the basis of the bargain between the parties." *Id.* at 385. Concluding that damage to grain inside the "defective building" was not "other property." *Id.* No tort relief.

Example: Farmer seeks recovery for losses caused by a defective silo that should have limited oxygen from reaching feed to prevent spoilage. Silo failed, feed spoiled, and caused reproductive and production problems with dairy cattle. Does Farmer have a tort claim?

Agristor Leasing v. Spindler, 656 F.Supp. 653 (D.S.D.1987). Held: because the losses stemmed from the silo's failure to perform its intended function, the loss was economic and the remedy "lies in the [UCC]." *Id*. at 658.

III. ECONOMIC LOSS VARIANTS - WHAT THEY REALLY MEAN.

Each version of the EDL is based on its own rationales. *See* Dobbs, *supra*, 48 Ariz. L. Rev. at 714 ("The contractual versions of the [ELD] are different" than the "stranger" version); *In re StarLink Corn Prods. Liab. Litig*., 212 F. Supp. 2d 828, 840 (N.D. Ill. 2002) ("there are really some different policy issues driving the doctrine in access cases"). Even drilling down into the three primary variations, there are variations within the variations. The first thing to recognize is that courts (and even commentators) use the phrase "economic loss" too loosely to imply that it means monetary loss. As recognized by one court, one of the difficulties in understanding and applying the ELD "is that many courts have stated in overly broad terms that purely economic losses cannot be recovered in tort." *Giles v. Gen. Motors Acceptance Corp*., 494 F.3d 865, 874 (9th Cir. 2007). "Such broad statements are not accurate. Tort law has traditionally protected individuals from a host of wrongs that cause only monetary damage." *Id.* at 875 (citing cases). The phrase "economic loss" is better considered a term of art when used within the ELD. And it has different meanings depending on the version under consideration.

A. Product Liability Version

Under the product-liability version of the ELD, "economic loss" confined to warranty generally refers to "failure of the product to function properly." *East River*, 476 U.S. at 868. Stated another way, it is "loss in a product's value which occurs because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Ins. Co. of NA v. Cease Elect. Inc*., 688 N.W.2d 462 (Wis. 2004); *see also, e.g., Corsica Coop. Ass'n v. Behlen Mfg. Co*., 967 F. Supp. 382, 384 (D.S.D. 1997) (referring to "results expected" in terms of fitness of product supplied to plaintiff); *Dixie-Portland Flour Mills, Inc. v. Nation Enterprises, Inc*., 613 F. Supp. 985, 988 (N.D. Ill. 1985) ("if the 'nature of the defect' is a 'qualitative' one, such that at core it merely injures a purchaser's expectations, the UCC provides

the remedies"). The kind of recovery sought might be return of purchase price, costs of repair, and/or loss of income while the damaged product is out of service for repairs.

The ELD may be applied, for example, to situations in which the purchaser could have obtained a warranty from someone upstream in the supply chain or because there was a purchase by plaintiff directly from defendant. As to secondary purchasers, some courts explain that the ELD preserves the role of contract by disallowing a tort recovery "that will allow a purchaser to reach back up the product and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions compromising that chain." *Hininger v. Case Corp*., 23 F.3d 124, 127 (5th Cir. 1994); *see also Daanen & Janssen, Inc. v. Cedarapids, Inc*., 573 N.W.2d 842, 848 (Wis. 1998) (allowing a purchaser to "reach all the way back through intervening transactions, contracts, and warranties to sue the original manufacturer in tort [when a product fails] … would grant a commercial purchaser more than the benefit of the bargain to which it and the seller or manufacturer agreed and on which the purchase price was negotiated and paid.").

There are a number of issues within this category of cases. Below are just two.

1. Was the damage caused by a product defect?

The foremost question is whether the harm was caused by a defective product. For states following the *East River* version of the ELD, that may well make a difference. *See, e.g.*:

> *Vesta Fire Ins.Corp. v. Milam & Co. Const*., 901 So. 2d 84, 107 (Ala. 2004)
>
> Rejecting ELD absent determination that damage was caused by a "product" within ambit of product liability statutes

> *NS Transp. Brokerage Corp. v. Louisville Sealcoat Ventures, LLC*, 2015 WL 1020598 (W.D. Ky. Mar. 9, 2015)
>
> Where "negligence claim does not arise from the sale of a defective product in a commercial transaction … under the controlling authority of Kentucky's highest court, the [ELD] does not apply." *Id*. at *3.

> *American United Life Ins. Co. v. Douglas*, 808 N.E.2d 690 (Ind. App. 2004)
>
> ELD inapplicable to case "not … seeking recovery for losses caused to the product by the product." *Id*. at 705.

2. Did the product damage only itself?

Under the *East River* version of the ELD, a product that damages only itself presents a "failed expectation" warranty situation. The harm is contractual because it lies in what the plaintiff bargained to receive and UCC remedies are sufficient. If the defective product damages *other* property, however, the ELD does not apply. This sounds straightforward, but it often is not. For example, questions frequently arise: What is the product and what is property "other" than the product? Courts have built up elaborate analyses to resolve such questions.

For example, in *Lexington Ins. Co. v. W. Roofing Co., Inc*., 316 F.Supp.2d 1142 (D. Kan. 2004), the insurer subrogee of the manager of an office warehouse sued a roofing company that installed mesh screens over the top ends of downspouts. The screens kept out pigeons but trapped debris. The roof partially collapsed when the downspouts became clogged during a heavy rainstorm. *Id.* at 1144-45. The court employed the *East River* ELD, preventing tort claims for the "buyer of a defective product … where the injury consists only of damage to the goods themselves." *Id.* at 1147. It considered the wire screens the defective product and used an "integrated system" approach to determine whether there was damage to other property. *See id.* at 1148 ("the court must define the scope of the 'integrated system' of which the wire mesh screens were a part"). It held that the screens became part of an integrated "roof drainage system" and denied the tort claim. *Id.* at 1148-49.

In *Albers v. Deere & Co*., 599 F. Supp. 2d 1142 (D.N.D. 2008), a combine ignited, destroying both the combine and a header. The owner argued that the fire was caused by a defective bearing in the combine. After extended discussion of the ELD, the Court held that under a "foreseeability approach," damage to the header was foreseeable "and something that could have been addressed at the time of the combine's purchase." Thus, the tort claims were dismissed. *Id.* at 1152.

Iterations of the product-defect ELD are too numerous for this summary. It must suffice to say that it behooves counsel to study the version in effect and the facts at hand in order to determine how best to proceed. What is "the product" versus "other" property can be tricky. *See Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp*., 324 F. Supp. 2d 731, 741-42 (W.D. Pa. 2004) (if blades were part of generator so as to be considered part of the bargain and subject to warranty provisions, defendant wins; if blades were other property (because generator was the "product") but defective and caused the generator failure, defendant wins).

B. Contract Version

In simplest terms, the broader contract version of the ELD "marks the dividing line between tort claims and breach of contract claims." *Lifevantage Corp. v. Domingo*, 208 F. Supp. 3d 1202, 1223 (D. Utah 2016). "[W]hen a conflict arises between parties to a contract regarding the subject matter of that contract, the contractual relationship controls, and parties are not permitted to assert actions in tort in an attempt to circumvent the bargain they agreed upon." *Id*. (internal quotations and citation omitted). The ELD here is more or less based "on the belief that the law of contracts is usually better suited to resolve an issue of purely economic loss between parties to a contract (or between parties in a contractual-type relationship, such as the sale of a product), because the parties have had the opportunity to allocate between them the risks of pure economic harm." Wren, *supra*, 64 Baylor L. Rev. at 215; *see also Web Innovations & Tech. Services, Inc. v. Bridges to Digital Excellence, Inc*., 69 F. Supp. 3d 928, 932 (E.D. Mo. 2014) (ELD bars tort recovery "where the injury results from a breach of a contractual duty" and "exists to protect the integrity of the bargaining process, through which the parties have allocated the costs and risks"). What is included within "economic loss" depends on the circumstances but generally derives from someone's contract breach.

1. Is there a contract between the parties?

Whether the presence of a contract between the parties matters to the ELD depends on the state law in play. Many courts consider the ELD to lose force in the absence of a contract. As observed: "[W]here parties are linked to each other by contract, the [ELD] may be invoked to avoid drowning contract law in a sea of tort." *Walker v. Ranger Ins. Co.*, 711 N.W.2d 683, 687 (Wis. App. 2006) (quotation and citation omitted). "However, when no contractual relationship exists, it is equally important to prevent an allegedly damaged party from "fall[ing] between the stools of tort and contract." *Id.* "The [ELD] exists to compel parties bound by a contractual relationship to pursue damages via contract, not to prevent an injured party from bringing a potentially viable negligence claim when no contract exists." *Id*. at 687. *See also, e.g.*:

> *Total Renal Care, Inc. v. Childers Oil Co*., 743 F. Supp. 2d 609 (E.D. Ky. 2010)
>
> > "The crux of the doctrine is … the premise that economic interests are protected, if at all, by contract principles, rather than tort principles' … But this central rationale … loses its force when there is no contractual relationship between the parties." *Id*. at 618 (quoting *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 583-84 (Ky. 2004) (Keller, J., concurring)).
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> *KB Home Indiana Inc. v. Rockville TBD Corp*., 928 N.E.2d 297, 305 (Ind. App. 2010)
>
> > Rejecting ELD where plaintiff did not contract with defendant to purchase property or a product and was not seeking to circumvent contract
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> *Brew City Redevel. Grp., LLC v. Ferchill Grp*., 724 N.W.2d 879 (Wis. 2006)
>
> > "An injury is not 'economic' [for purposes of the ELD] simply because it is monetary"' court saw "no reason why" ELD should bar a tort claim "that does not depend on a contract in order to lie." *Id*. at 887.
>
> *Sullivan v. Pulte Home Corp*., 306 P.3d 1 (Ariz. 2013)
>
> > "Arizona's [ELD] serves to encourage the private ordering of economic relationships, protect the expectations of contracting parties, ensure the adequacy of contractual remedies, and promote accident-deterrence and loss-spreading … Limiting the doctrine to contracting parties supports those policy considerations and aligns with the most recent draft of the Restatement," whose ELD "is limited to parties who have contracts." *Id.* at 3.

Other courts are more focused on the *concept* of private contractual ordering. For example, in *Annett Holdings, Inc. v. Kum & Go, L.C*., 801 N.W.2d 499, 503 (Iowa 2011), an employee of a

trucking company used the company credit card at a gas station to obtain cash, telling gas station personnel, falsely, that he was using it to purchase fuel. The gas station, truck company, and credit card company were linked through contracts under which fuel purchase were made. *See id*. at 502 (truck company "had entered into a contract with the card provider … which in turn had entered into a contract with [gas station]"). In its contract with the credit card company, plaintiff truck company assumed responsibility for fraudulent use of credit cards by its employees, which barred it from a breach of contract claim. *Id*. The court denied a tort claim against the gas station. It looked to the policy behind the ELD to "prevent the … tortification of contract law." *Id.* at 502. While plaintiff "did not have a direct contractual relationship with [the truck stop], it had a contract with [credit card company] which in turn had contracted with [truck stop] … tort law should not supplant a consensual network of contracts." *Id*. at 504.

This kind of reasoning has been applied in other settings where parties expect to operate within a chain of contractual relationships with defined roles and duties. One example is construction projects that "rel[y] on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons whose efforts are required – owner, architect, engineer, general contractor, subcontractor, materials supplier – and to allocate among them the risk of problems, delays, extra costs, unforeseen site conditions, and defects." *Indianapolis-Marion Cty. Pub. Lib. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 737 (Ind. 2010).

2. Is there a UCC remedy?

In addition to the presence of a contract or series of contracts, courts hewing close to *East River* look to whether there is a UCC remedy (available, not necessarily taken advantage of). If the subject of dispute is not within the UCC (sale of goods), some courts hold the ELD inapplicable for that reason as, for example, to services. *See Shister v. Patel*, 776 N.W.2d 632, 637 (Wis. App. 2009). *See also, e.g.*:

Kreisers Inc. v. First Dakota Title Ltd. P'ship, 852 N.W.2d 413 (S.D. 2014)

Refusing to extent ELD to professional services, which are not "commercial transactions." *Id.* at 421-22.

Quest Diagnostics, Inc. v. MCI WorldCom, Inc., 656 N.W.2d 858 (Mich. App. 2002)

"[T]his case does not involve a situation where the parties' economic expectations have been bargained for and established by agreement. Plaintiffs are consumers of water who allege that their access to the water supply was interrupted as a result of … negligence in damaging the water main. Because there is no underlying sale of goods, transaction, or contract between the parties or others closely related to them, plaintiffs have no recourse … under commercial or contract law. Utilizing the broadest interpretation of Michigan's [ELD], plaintiffs are not limited to remedies in contract or the UCC, but have a proper remedy in tort … a negligence claim may advance solely on a claim of economic loss[.]" *Id.* at 863-64.

Schuetta v. Aurora Nat. Life Assur. Co., 2013 WL 6199248 (E.D. Wis. Nov. 27, 2013)

"The genesis of the [ELD] lies in products liability cases," and UCC provision of warranties and remedies is one of "the critical rationales underlying the doctrine;" declining to apply ELD to annuity contract, which is not a "good" and based on "the general application of and policy behind the [ELD]." *Id.* at *5.

Stanley Black & Decker, Inc. v. Gulian, 70 F. Supp. 3d 719, 734-35 (D. Del. 2014)

Connecticut's ELD applies only to contracts for the sale of goods.

Hughes v. TD Bank, N.A., 856 F. Supp. 2d 673, 682 (D.N.J. 2012)

"To be barred by the economic loss doctrine, the claims must be duplicative of those provided for under the U.C.C." *Id.* at 682 (quoting *Arcand v. Brother Intern. Corp*., 673 F.Supp.2d 282, 308 (D.N.J.2009))

Galeana Telecoms. Invests., Inc. v. Amerifone Corp., 202 F. Supp. 3d 711 (E.D. Mich. 2016)

"Notably, the doctrine only applies to transactions involving the sale of goods." *Id.* at 724.

Ham v. Swift Transp. Co., Inc., 694 F. Supp. 2d 915 (W.D. Tenn. 2010)

"If the existence of UCC remedies provides the justification for not allowing the plaintiff to sue in tort, the absence of UCC remedies should counsel in favor of allowing tort recovery. Thus, the Court believes that … the Tennessee Supreme Court would rely on the fact that the [ELD] has its origins in the UCC to preclude application of the doctrine to suits not involving UCC remedies." *Id*. at 923

3. Is there a duty outside the contract?

Another question is whether a duty exists *outside* the contract. Many courts will hold the ELD inapplicable if so. *See, e.g.*:

A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862 (Colo. 2005)
Negligence action not barred where duty existed independent of contract

In re Genetically Modified Rice Litig., 666 F. Supp. 2d 1004 (E.D. Mo. 2009)
"Missouri courts have rejected the [ELD] … if the particular duty alleged to have been breached arose from the common law, as opposed to arising from the contract." *Id*. at 1016.

Fed. Ins. Co. v. Fredericks, 29 N.E.3d 313 (Ohio App. 2015)
"… the general approach [is] that the [ELD] 'does not apply – and the plaintiff who suffered only economic damages can proceed in tort – 'if the defendant breached a duty that did not arise solely from a contract." *Id*. at 321 n.2 (quoting *Mulch Mfg., Inc. v. Advanced Polymer Solutions, LLC*, 947 F.Supp.2d 841, 856 (S.D. Ohio 2013)).

MacDonald v. Old Republic Nat. Title Ins. Co., 882 F. Supp. 2d 236 (D. Mass. 2012)
ELD is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Id*. at 245 (quoting *Plourde Sand & Gravel v. JGI E., Inc*., 917 A.2d 1250, 1253 (N.H. 2007)). When a claim lies outside the contract terms … or is unrelated to the contract's performance, it is independent of the contract and thus is not barred by the economic loss doctrine." *Id.* at 246

Garcia v. U.S. Bank, 141 F. Supp. 3d 490 (E.D. Va. 2015)
Virginia ELD "is not implicated … if a defendant appears to have breached a duty imposed by law, not by contract, giving the plaintiff a genuine foundation for a tort claim." *Id.* at 497.

Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n, 771 F.3d 1230 (10th Cir. 2014)
Under Colorado law, "[w]hen claims arise from a non-contractual duty, the economic loss rule does not apply." *Id*. at 1242

C. Access/Stranger Version

The "stranger" ELD in states adopting is a means of limiting tort exposure because of a perception that liability goes too far under the circumstances. One commentator describes "[a]n unmitigated statement" of a *rule* barring tort recovery absent physical harm to be "a very broad

and general response to a narrow and particular problem," that being open-ended liability. This is described as a domino effect where one harm is derivative of another:

> If I suffer economic loss as a result of your negligence, I might not pay my credit card debt; the credit card company then … raises interest rates for others, who suffer economic loss as a result and cut down on the purchase of hamburgers from fast food vendors. And so on indefinitely.

Dobbs, *supra*, 48 Ariz. L.Rev. at 715; *see also* Dobbs on Torts, *supra*, § 612 ("In some cases, A's economic loss is likely to cause a new economic loss to B, and B's loss likely to cause one to C, with no predictable end in sight.").

Prototype cases involving interrupted access to a public utility, waterway, or roadway[2] are those in which anyone without ownership of damaged property could assert a claim for economic loss, leading to fears of remote, indeterminate liability disproportionate to the tortfeasor's culpability. *See Chicago Flood*, 680 N.E.2d at 274 (liability too "open-ended" and "far out of proportion" with defendant's culpability); *Leadfree Enters., Inc. v. U.S. Steel Corp*., 711 F.2d 805, 807 (7th Cir. 1983) (injury "too remote" or "wholly out of proportion" to culpability); *Petitions of Kinsman Transit Co.*, 388 F.2d 821, 824-25 (2d Cir. 1968) (damages "too tenuous and remote"); *Gen. Foods Corp. v. United States*, 448 F. Supp. 111, 114 (D. Md. 1978) (tort recovery for disruption to plaintiff's usual route to manufacturing plant when vessel collided with bridge would invoke "open-ended liability"). If the injured party *does* have ownership interest in property damaged, however, that changes the dynamic and the "stranger'

[2] *E.g., Barber Lines*, 764 F.2d at 50-51 (maritime: oil spill from ship into harbor prevented another ship from docking at nearby berth); *M/V Testbank*, 752 F.2d at 1020-21 (maritime: collision causing chemical spill resulting in closure of outlet suspending navigation); *In re Chi. Flood Litig*., 680 N.E.2d 265 (Ill. 1997) (dredging company breached tunnel wall, flooding from river ensued, causing evacuation and road closures); *Am. Petroleum & Transp., Inc. v. City of New York*, 737 F.3d 185 (2d Cir. 2013) (maritime: city failed to open bridge resulting in delay in traverse on river); *Reserve Mooring Inc. v. Am. Commercial Barge Line, LLC*, 251 F.3d 1069 (5th Cir. 2001) (maritime: barge sank causing blockage during salvage operations); *see also Stevenson v. East Ohio Gas Co*., 73 N.E.2d 200 (Ohio App. 1946) (fire closed factory); *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 982-83 (D.C. 2014) (businesses shut down in harbor area after flood); *Aikens v. Balt. & Ohio R.R.*, 501 A.2d 277 (Pa. Super. Ct. 1985) (train derailment damaged factory).

version of the ELD should not apply. This version of the ELD also should not apply where the policy reasons for its existence are absent. *See, e.g., Lone Star Nat. Bank, N.A. v. Heartland Payment Sys., Inc*., 729 F.3d 421, 424 (5th Cir. 2013) (under New Jersey law, ELD "does not bar tort recovery where the defendant causes an identifiable class of plaintiffs to which it owes a duty of care to suffer economic loss that does not result in boundless liability."); *see also infra*.

D. Policy, Policy, Policy.

The first question is always what version of the ELD the particular state has adopted. The second question is whether that ELD (or some other version) should apply based on the facts and the policy it was designed to achieve. "All of [the economic loss rules] must be understood as general rules, subject to conditions or exceptions and to be applied with a reasonable sense of their purpose." Dobbs on Torts, *supra,* § 607. One court summed up the two general ELD branches as "intended to prevent the 'tortification of contract law' and "to protect parties from being responsible for remote economic losses." *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 351 (Iowa 2013).

When the rationale animating the rule is absent, so too should be the rule. *See LAN/STV v. Martin K. Eby Const. Co., Inc*., 435 S.W.3d 234, 241 (Tex. 2014) (duty may exist when the rationales for limiting recovery are "weak or absent"); *see also id*. at 241 n.31 ("When the reason of the law ceases, the law itself also ceases.") (quoting Black's Law Dictionary 1622 (7th ed.1999)); *accord McCaig v. Wells Fargo Bank (Texas), N.A*., 788 F.3d 463, 474 (5th Cir. 2015) (ELD "is not generally applicable in every situation; it allows recovery of economic damages in tort, or not, according to its underlying principles" and accordingly, its application "depends on an analysis of its rationales in a particular situation").

If a state has adopted only the contractual version of the ELD, the plaintiff can argue that injury was not the result of a product defect and/or that he is not relying on a contract for a duty.

Applicability of the ELD should depend on whether the case has "characteristics that bring it within the scope of the … rule." *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 98 n.4 (Iowa 2012). As one court put it:

> The purpose of the economic loss rule is not to leave injured persons remediless for economic losses but to ensure respect for private ordering by relegating a plaintiff to contract remedies in cases where there is an agreement between the parties allocating economic risks. If there is no contract between the parties to litigation, there is no boundary-line function to be performed by the economic loss rule.

Rinehart v. Morton Bldgs., Inc., 305 P.3d 622, 631-32 (Kan. 2013) (citing Johnson, "The Boundary–Line Function Of The Economic Loss Rule," 66 Wash. & Lee L. Rev. 523, 555 (2009)). *See also, e.g., Tyson v. Sterling Rental, Inc.*, 836 F.3d 571, 582 (6th Cir. 2016) (ELD "is classically used to bar recovery for product liability claims arising from a purchased good's failure to live up to the buyer's expectations;" tort claims are barred "only where the duty alleged to have been violated by the defendant is implicated by the relevant contract."); *Sullivan*, 306 P.3d at 2-3 ("Although some courts apply the doctrine to generally bar tort recovery of purely pecuniary losses, Arizona takes a narrower approach … In Arizona, the doctrine bars only the recovery of pecuniary or commercial damage, including any decreased value or repair costs for a product or property that is itself the subject of a contract between the plaintiff and defendant"); *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 415-19 (Tex. 2011) (ELD "does not swallow all claims between contractual and commercial strangers"); *Rinehart*, 305 P.3d at 632-33 (refusing to apply the ELD to negligent misrepresentation because "the duty at issue arises by operation of law and the doctrine's purposes are not furthered by its application under these circumstances").

As to the "stranger" version, tort claims should not be prohibited against a defendant "who is under a specific duty to use reasonable care, nor when the reasons behind the rule are

absent." Dobbs on Torts, *supra,* § 611. Going back to the *Robins* scenario, while a plaintiff might not be able point *merely* to breach of one person's duty to a third person as basis for tort liability, "the defendant might owe a second, independent duty to the plaintiff" that supplies that basis. *Id*. § 610. As to the access cases, these too should be viewed according to their facts and the policies underlying refusal to recognize tort liability.

In the *Syngenta* case, the court addressed the "stranger" version of the ELD. It found that the reasons courts apply that version were not present under the circumstances: (1) the case did not present a lack-of-access scenario, in which any member of the public could potentially assert a claim for economic loss; (2) liability would not be too remote as the defendant was alleged to have actually foreseen the very losses that occurred; (3) the scope of liability was not open-ended as plaintiffs represented "discrete classes of growers and sellers"; and (4) liability would not be disproportionate to the wrongful conduct alleged. *In re Syngenta AG MIR 162 Corn Litig*., 131 F. Supp. 3d 1177, 1196 (D. Kan. 2015). The court concluded:

> For these reasons, unless a particular state's law essentially requires application of the [stranger ELD] to bar plaintiffs' claims, the Court would predict, at this stage of the proceedings, that the relevant states would not bar these particular claims under the [stranger ELD].

Id. The court then went through 22 state laws and found that none would bar the tort claims based on an absolute bar and without consideration of circumstance, holding:

> … in none of these 22 states does the law provide a basis to predict that the state would apply the [stranger ELD] in this case in the absence of circumstances in which application of the doctrine would further its rationales. Accordingly, the Court rejects Syngenta's argument that the [stranger ELD] bars plaintiffs' claims ….

Id. at 1206-07.

V. RESOURCES / RESEARCH

There are many treatises and commentaries on the ELD. Some are listed below as starting points. NOTE that in researching this topic, care must be taken in getting to the bottom of a state version of the ELD. Loose language often is used, which leads to confusion as does misperception of the ELD generally. Westlaw does a poor job of capturing cases falling within each ELD version. There indeed is a key-search heading entitled "economic loss doctrine" (under Torts, 379k118) but many cases will not be found under that heading. In fact, a case may never use the phrase "economic loss doctrine" to be employing some version of it.

Some key terms and suggested searches include:

"Economic loss" w/5 rule doctrine
"economic loss" w/30 duty remote
"economic loss" & "east river"
"economic loss" & "robins dry dock"

Resources:

Jim Wren, "Applying the Economic Loss Rule in Texas," 64 Baylor L. Rev. 204 (2012)

Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts (2d ed.), §§ 605-613, 646.

Dan B. Dobbs, "An Introduction to Non-Statutory Economic Loss Claims," 48 Ariz. L. Rev. 713 (2006)

Johnson, "The Boundary-Line Function Of The Economic Loss Rule," 66 Wash. & Lee L. Rev. 523 (2009)

James W. Shephard, "The Murky Waters of Robins Dry Dock: A Comparative Analysis of Economic Loss in Maritime Law," 60 Tul. L. Rev. 995, 1025-26 (1986)

Ward Farnsworth, "The Economic Loss Rule," 50 Val. U.L. Rev. 545 (2016)

Robert L. Rabin, "Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment," 37 Stan. L. Rev. 1513 (1985)

Restatement (Third) of Torts: Liab. for Econ. Harm § 1(a) (TD No 1) (2012)

Restatement (Third) of Torts: Liab. For Econ. Harm (TD No.2) (April 7, 2014)

Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965)

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)

In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177 (D. Kan. 2015)