The economic loss doctrine is a seemingly obscure doctrine that befuddles most lawyers and has been clumsily handled by courts for many years. Generally, the economic loss doctrine seeks to separate contract law from tort law. Thus, if two parties have a contract, the doctrine suggests that courts should not allow the negotiated contractual rights and obligations of the parties to be rewritten by tort standards, such as general negligence. For this reason, the doctrine can be extremely powerful in eliminating tort-type damages, such as lost profits, and defense lawyers frequently attempt to apply the doctrine to a wide range of cases. However, the question with which litigants and courts have long struggled is: What is the scope of the economic loss doctrine in Tennessee?

Over the years, Tennessee courts have provided confusing and sometimes contradictory rulings on the bounds of the economic loss doctrine, and until recently, the Tennessee Supreme Court had offered little clarity on this prominent open question. In 2009, the Tennessee Supreme Court held that the economic loss doctrine applies in the products liability context to preclude recovery in tort where the only damage is to the allegedly defective product itself. *See Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 492 (Tenn. 2009). Over a decade later, in *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.*, the Court expanded the doctrine's application to situations where "a fraud claim seeks recovery of only economic losses and is premised solely on misrepresentations or nondisclosures *about the quality of goods*

that are the subject of a contract between sophisticated commercial parties." 627 S.W.3d 125, 129 (Tenn. 2021) (emphasis added).[1]

Based upon the trend set by *Lincoln* and *Milan*, many lawyers felt that the economic loss doctrine should effectively prohibit tort claims in all cases where there was a contract in place defining the parties' relationship. Nevertheless, in the recent case of *Commercial Painting Co. Inc. v. Weitz Co. LLC*, 676 S.W.3d 527 (Tenn. 2023), the Tennessee Supreme Court placed some limitations on the types of contracts subject to the economic loss doctrine. In a case between a drywall subcontractor and a general contractor, the subcontractor attempted to argue that a large portion of the price to be paid under the contract was for materials and that the contract was therefore a contract for the sale of goods. The subcontractor asked the Court to apply the economic loss doctrine to bar the contractor's tort-based claims. The Court rejected the request, classifying the parties' agreement as a services contract and clarifying that the economic loss doctrine does not apply to contracts for services.

In *Commercial Painting Co. Inc.*, the Court repeatedly emphasized that the economic loss doctrine does not extend beyond the products liability context. Importantly, the Court does not seem to use that term in the same sense that it is used in the Tennessee Products Liability Act ("TPLA"). *Milan Supply Chain Solutions, Inc.* involved the provision of trucks with problematic engines that the plaintiff claimed required too-frequent repairs. The claims brought were for breach

[1] As many will remember from law school, fraud is almost always an exception to every rule. It is critical in *Milan* that the fraud was *about the quality of the goods*. Had the fraud been about something other than the quality of the goods, then the doctrine likely would have not applied.

of contract, breach of express and implied warranties, fraud, negligent misrepresentation, and violation of the Tennessee Consumer Protection Act. There was no TPLA claim. Yet, in *Commercial Painting Co. Inc.*, the Court described *Milan Supply Chain Solutions, Inc.* as a products liability case. It would thus appear that, for purposes of the economic loss doctrine, the Tennessee Supreme Court uses the term "products liability" in a broader sense than that term is often used in practice.

As it currently stands, the economic loss doctrine in Tennessee appears to be limited to "products liability actions," which appears to only encompass actions related to defects in physical goods. While there once was hope that parties could safely avoid tort law through contract regardless of the contractual relationship, it appears this will only be true in contracts for physical goods. In sum, those entering construction and service contracts should be aware that the economic loss doctrine does not apply, making "Limitations of Liability" provisions in contracts all the more important.