Lum, Drasco & Positan LLC
ATTORNEYS AT LAW SINCE 1870

Lum Law Notes

Summer Newsletter
July 2021

Lum, Drasco & Positan LLC
Attorneys At Law Since 1870

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FIRM NEWS

The Firm is pleased to announce that ten of our attorneys have been named to the 2021 New Jersey Super Lawyers list and one to the Rising Stars list:

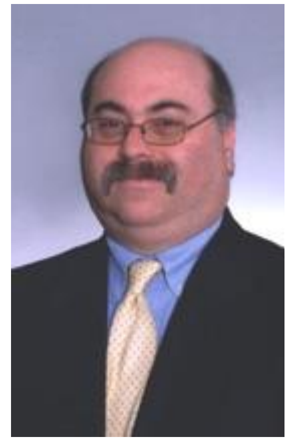
- **Dennis J. Drasco** for Business Litigation (Top 100 Lawyers)
- **Wayne J. Positan** for Employment and Labor (Top 100 Lawyers)
- **Paul A. Sandars, III** for Construction Litigation
- **Kevin F. Murphy** for Estate Planning and Probate (10th year)
- **Kevin J. O'Connor** for Business Litigation
- **Christina Silva** for Employment and Labor
- **Daniel M. Santarsiero** for Employment and Labor
- **Dennis J. Smith** for Business and Corporate Law
- **Edward M. Callahan, Jr.** for Construction Litigation
- **Arthur M. Owens** for Civil Litigation Defense
- **Alexandra Morgan** for Family Law

These selections were based on a statewide survey, an evaluation process and a peer review by a blue ribbon panel of attorneys. The methodology for selection can be found at http://www.superlawyers.com

PAUL A. SANDARS, III presented a lecture on the Economic Loss Doctrine at the New Jersey State Bar Construction Law Forum in June 2021.

KEVIN J. O’CONNOR has been appointed counsel to the Board of Trustees of Foundabilities, Inc., a charitable organization providing adults with disabilities a safe, secure and supportive environment that will promote a sense of self-worth and acceptance in the local community. This will be accomplished through social interaction, supervised events, and services through volunteer efforts.

CORPORATE TRANSPARENCY UPDATE
By: Steven J. Eisenstein, Esq.



On January 1, 2021 Congress enacted the National Defense Authorization Act overriding a Presidential veto. As part of this new law the Corporate Transparency Act was put into place. The CTA had failed several previous attempts at passage but as part of the annual Defense bill passage was assured. Ostensibly the rationale for including it was to ensure that foreign companies do not become unseen participants in our national defense. Whatever the rationale the law now exists and business owners must learn to deal with it.

Basically the CTA requires certain business to report the identity of their beneficial owners to the Financial Crimes Enforcement Network, a part of the Treasury Department. While there are still many open questions a brief examination of these three components seems to be in order.

What are the “Reporting Companies” which have these obligations? Any corporation, limited liability company or similar entity which is formed or registered to do business by the filing of a formation document with a state must comply unless they fall within one of 24 exceptions. Among the exceptions are publicly traded companies, public utilities, financial services companies and companies which employ 20 or more people in the U.S., filed a tax return in the prior year reporting at least $5,000,000 in gross revenue and have a physical presence in the United States. Since newly formed companies will not have filed a tax return yet is appears to be the intent of the law to require all newly formed private companies to supply the information.

Who is a beneficial owner? An individual who, directly or indirectly, either owns 25% or more of the equity of the company or exercises substantial control, an undefined term. Minors are not included nor are people who acquire their equity through inheritance. There will doubtless be substantial confusion over the issue of control but even the seemingly fixed standard of 25% equity may be in doubt when issues like options and warrants are considered. Close attention should be paid to further developments in this area.

What information needs to be reported? FINCEN is to receive the full legal name of each Beneficial Owner, the date of birth, the current business or residence street address and an ID number from a Governmental document such as a driver’s license or passport. A person who files the application for the formation may obtain a FINCEN ID number and that ID number may be supplied in lieu of anything else. The information is to be kept confidential by FINCEN but may be released to other Federal agencies in law enforcement, national security or intelligence, to local and state agencies pursuant to a court order or to financial institutions with the consent of the companies.

When will reporting begin? New companies must file reports upon formation or registration to do business. Existing companies have two years to file after the effective date of the anticipated regulations. Regulations have not yet been drafted and all reporting requirements are suspended until they are passed. The reported information will need to be kept current and changes reported within one year of the change.

Are penalties involved? Do you need to ask? Failure to comply may result in both civil and criminal penalties. Fines of up to $500 for each day of violation are possible and prison sentences of up to 2 years may be imposed. Criminal penalties for unauthorized disclosure or use of the violation can result in up to 5 years imprisonment and substantial fines.

Until regulations are drafted there is much that remains unknown. The issue of substantial control will be of great interest in the regulations. This will prove to be of interest to creditors who may be covered if they meet the definition of Beneficial Owner upon foreclosure of security interests. Anyone seeking to form a new company is advised to seek competent advice before doing so as getting it wrong can have serious consequences.

The Business Law Section of Lum, Drasco & Positan stands ready to assist. For more information please contact Steven J. Eisenstein, seisenstein@lumlaw.com; Kevin Murphy, kmurphy@lumlaw.com; Jack Baron, jbaron@lumlaw.com or Dennis Smith, dsmith@lumlaw.com

EXECUTIVE ORDERS 242 AND 243: NEW JERSEY LIFTS OR MODIFIES CERTAIN COVID-19 RESTRICTIONS IN INDOOR PUBLIC SPACES AND WORKPLACES

By: Christina Silva, Esq.

Governor Murphy signed Executive Order No. 242 on May 24, 2021, and Executive Order243 on May 26, 2021, as part of New Jersey's "multi-stage Road Back Plan for the methodical and strategic reopening of businesses and activities" based on the progress made within the state against the COVID-19 pandemic. A series of prior Executive Orders have recently allowed for thelifting of restrictions regarding masking and distancing in outdoor settings, and the lifting of restrictions on indoor and outdoor gathering limits in food and beverage establishments and other entertainment facilities. Executive Order 242 has now lifted masking and spacing restrictions for "indoor public spaces" that are open to the public "for purposes of the sale of goods, attendance atan event or activity, or provision of services" as of May 28, 2021.

In Executive Order 243, Governor Murphy has clarified his prior Order on "indoor publicspaces" and similarly lifted COVID-19 restrictions in certain circumstances for workplaces and businesses that are generally closed to the public and have limited visitors. More specifically, employers are advised of the following pursuant to Executive Order 243, which becomes **effectiveJune 4, 2021**:

- Paragraphs 10 and 11 of Executive Order 107 -- which stated that all businesses or non-profits whether closed or open to the public, must accommodate their workforce for telework or work-from-home arrangements -- have been rescinded, and employers are no longer required to permit employees to work remotely as was done during the pandemic;

- Employees who are fully vaccinated against COVID-19 (*the CDC considers an individual to be fully vaccinated 2 weeks after their second dose in a two-dose series, or 2 weeks after a single-dose vaccine)*, and provide their employer with proof of their full vaccination status *(completed vaccination card),* are not requiredto wear face masks or social distance at the worksite;

- Where an employer is unable to determine an employee's vaccination status, or the employee is not fully vaccinated, "employers must continue to require those employees to wear masks and practice social distancing" in the workplace, except when the employee is in their own office or work station;

- Employers are permitted to allow customers, visitors and other authorized individuals to enter the worksite without requiring the use of a mask or adherence to social distancing, regardless of their vaccination status;

- Regarding customers, visitors and other authorized individuals entering the worksite, employers have the option of establishing a policy that requires such individuals to wear a mask and/or social distance, provided that such policy on mask wearing complies with federal and state law regarding accommodations in the event of a disability that makes the individual unable to wear a mask.

Executive Order 243 also emphasizes the following points:

- An employer may impose stricter requirements regarding mask wearing and social distancing in indoor settings *(consistent with federal and state law on accommodationsin the event of a disability that makes an employee /individual unable to wear a mask)*;

- Employers cannot restrict employees, customers, visitors or other authorized individuals from wearing masks in the workplace setting for any reason;

- Employees, customers, visitors and other authorized individuals in the workplace shallnot in any way be penalized or retaliated against if they elect to wear a mask;

- Other health and safety standards applicable to all New Jersey employers as set forth in Executive Order No. 192, have not been superseded by Executive Order 243 and remain in full force and effect, including:

    - o Employers must take measures to ensure a "health screening" of employees on a regular basis, with such measures consisting of either: (1) temperature screenings, (2) visual symptom checking, (3) self-assessment checklists, and/or (4) health questionnaires;

    - o Employers must notify all employees if there is a known exposure to COVID-19 inthe workplace, consistent with employee confidentiality requirements under the Americans with Disabilities Act, and federal and state guidance;

    - o Employers must provide all employees, visitors, customers, and any other individuals who access to the work location, with access to sanitizing materials, atthe employer's expense;

    - o Employers must ensure high-access areas in the work location are routinely cleanedand disinfected, and provide all employees with break time throughout the day to wash their hands (unless gloves are provided to the employees);

    - o Penalties may be assessed for violations of the health and safety standards in Executive Order 192 which remain in effect.

Executive Order 242 further notes that its lifting of mask-wearing and social distancing restrictionsin "indoor public places" do not include child care centers, other child care facilities, youth summer camps, and public, private and parochial preschool program premises and elementary and secondary schools, including charter and renaissance schools, which continue to be governed byapplicable standards issued by the Department of Health.

Employers are encouraged to consider how these new standards will be implemented and communicated to employees, customers, visitors and authorized individuals entering the workplace. The Firm is available to assist in this regard and further address any questions or concerns regarding the new Executive Orders as employers continue to engage in the workplace reopening process.

To discuss any of this please contact one of the attorneys below:

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THE ECONOMIC LOSS DOCTRINE IN NEW JERSEY – APPLICATION AND EXCEPTIONS

By: Paul A. Sandars, III

I. Introduction

The Economic Loss Doctrine stands for the simple proposition that a party cannot recover for purely economic losses under tort theories where contractual remedies are available. Construction projects are comprised of numerous contracts between and among various parties. Thus, while a general contractor may have a contract with a project owner, the project architect or engineer is usually not a party to that contract subject instead to its own contractual arrangement with the project owner. Therefore, claims for money damages on a construction project must be made against a party with whom privity exists. This is the so-called "majority rule" which is adopted in New Jersey.

Since the Economic Loss Doctrine as it applies to construction projects is non-statutory, many reported and unreported decisions are seemingly contradictory and therefore analysis of the cases follows with the adage that perhaps the "exception swallows the rule".

It is well-settled that the Economic Loss Doctrine prevents a party from being able to collect in negligence for solely pecuniary harm that is unaccompanied by personal injury or damages to property. 6 *Bruner & O'Connor on Construction Law* § 19:10 ("BOCL"). As stated above, New Jersey follows the majority rule of the Economic Loss Doctrine that a plaintiff cannot recover purely economic damages in tort. Thus, damages consisting of personal injury or damages to property are excluded from the ambit of the Economic Loss Doctrines' claim preclusion. In addition, willful or malicious conduct causing damage is likewise not barred by the Doctrine.

In the construction law context, actions for recovery of damages from costs of repair or replacement of defective products, adequate value, consequential loss of profits, delay damages, and claims for differing site conditions are all considered purely economic and therefore are subject to the bar of the Doctrine. Alloway v. General Marine Insurance, 149 N.J. 620 at 627 (1997). The personal injury or property damage exclusions to the Economic Loss Doctrine do not appear to be at issue and are consistently applied.

While the second exception for lack of privity or a lack of contract is somewhat blurred, parties to construction projects are free to allocate risk by contract for reasonably foreseeable damages.

II. The Origins of the Economic Loss Doctrine in Commercial Transactions and Subsequent Application to Construction Projects

It is well settled that the Economic Loss Doctrine bars a tort remedy where an action arises from a contractual relationship. New Jersey courts have consistently held that contract law is better suited to resolve disputes which were within the contemplation of, or which could have been the subject of negotiation between parties to an agreement. Spring Motors Distribution v. Ford Motor Company, 98 N.J. 555, 489 A2d 660, 666, 670-71 (1985); Alloway v. General Marine Indus., 149 N.J. 620, 695 A.2d 264, 268, 275 (1997); Dean v. Barrett Homes, Inc., 406 N.J. Super. 453, 968 A.2d 192, 203-04 (App. Div. 2009); Menorah Chapels at Milburn v. Needle, 386 N.J. Super.100, 899 A.2d 316, 323-35 (App. Div. 2006).

In Spring Motors Distribution v. Ford Motor Company, 98 N.J. 555 (1985), the New Jersey Supreme Court considered whether a commercial buyer should be permitted to pursue a cause of action predicated upon principles of negligence and strict liability, solely for economic loss caused by the purchase of defective goods, or should instead be restricted to a cause of action under the Uniform Commercial Code. Id. at 560. The court held that "a commercial buyer seeking damages for economic loss resulting from the purchase of defective goods may recover from an immediate seller and a remote supplier in a distributive chain for breach of warranty under the UCC, but not in strict liability or negligence." Id. at 561. Critical to the Doctrine was the Court's rationale highlighting the distinctions between tort and contract duties and principles:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.
> [Id. at 579-80.]

Several years later, in Alloway v. General Marine Indus., 149 N.J. 620, 695 A.2d 264 (1997), where a purchaser of a boat sought to recover for economic losses from both the dealer and the manufacturer, the Court expanded upon the principles in Spring Motors, plainly disfavoring the application of tort law in what is an otherwise clearly contractual context. The Court in Alloway concluded that the purchaser's tort claims were barred by the Economic Loss Doctrine, and noted that: "[i]mplicit in the distinction" between tort and contract principles "is the Doctrine that a tort duty of care protects against the risk of accidental harm and a contractual duty preserves the satisfaction of consensual obligations". [Id. at 268]

Our Supreme Court has explained that, "economic loss encompasses actions for the recovery of damages for costs of repair, replacement of defective goods, inadequate value, and consequential loss of profits." Alloway v. Gen. Marine Indus., 149 N.J. 620, 627 (1997). In Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002), the Supreme Court emphasized that economic losses have no place in tort, because, "generally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." Saltiel at 310, quoting *Prosser & Keeton*.

The Doctrine enunciated in Spring Motors and Alloway has been specifically applied to transactions involving construction and design. In New Mea Construction Corp. v. Harper, 203 N.J. Super. 486 (App. Div. 1985), a builder sued a homeowner alleging that sums were due and owing for the construction of a single-family residence. Id. at 489. The homeowner's counterclaims for negligent supervision and negligent workmanship were dismissed because there was no personal injury or consequential property damages suffered. Id.

In Dean v. Barrett Homes, Inc., 204 N.J. 286 (2010) the Court summarized the history of the Economic Loss Doctrine in New Jersey, and discussed its application in determining whether a claim sounds in tort or contract. The Dean court affirmed the principles outlined in Spring Motors, namely that, "when addressing economic losses in commercial transactions, contract theories were better suited than were tort-based principles of strict liability". Id. at 296.

These principles were reiterated in Spectraserve, Inc. v. The Middlesex County Utilities Auth., et al., 2013 N.J. Super. Unpub. LEXIS 2173, (Law Div. 2013), which held that the Economic Loss Doctrine barred a plaintiff's negligence claim, finding that the plaintiff could have invoked remedies by virtue of its contract with another party in the case. Spectraserve outlined the particular policies underpinning the Economic Loss Doctrine which apply in litigation of construction disputes:

> In the context of larger construction projects, multiple parties are often involved. These parties typically rely on a network of contracts to allocate their risks, duties, and remedies.
>
> Construction projects are multiparty transactions, but it is rarely the case that all or most of the parties involved in the project will be parties to the same document or documents. In fact, most construction transactions are documented in a series of two-party contracts, such as owner/architect, owner/contractor, and contractor/subcontractor. Nevertheless, the conduct of most construction projects contemplates a complex set of interrelationships, and respective rights and obligations.
> [Spectraserve, at *26-27]

In Horizon Group of New England, Inc. v. New Jersey Schools Construction Corp., et al., 2011 N.J. Super. Unpub. LEXIS 2271 (App. Div. 2011), the court was faced with extra work and differing site conditions claims. The Horizon Group court held that:

> [A] plaintiff with a direct contractual relationship [and] with contractual remedies to address changes in the scope of work or unexpected conditions [cannot] jettison these remedies and procedures and proceed on a tort theory of recovery. Id. at 20.

The court affirmed that the Economic Loss Doctrine "bars resort to tort theories of liability when the relationship between the parties is based on a contractual relationship". Id. at 13, citing Dean v. Barrett Homes. Inc.

As stated above, New Jersey law has long recognized that purely economic loss, if reasonably foreseeable, is recoverable against the party in the absence of contractual privity. Conforti &

Eisele, Inc. v. John C. Morris Associates, 175 N.J. Super. 341 (Ch. Div. 1980) aff'd 199 N.J. Super. 498 (App. Div. 1985), and People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246 (1985).

In Conforti, the Superior Court held that a design professional was chargeable in tort to a contractor who has sustained purely economic damages as a result of the negligence of the design professional in the absence of privity of contract between the two entities. Conforti, at 344. The court held that denying the contractor the ability to bring a tort claim under these circumstances, "would in effect, be condoning a design professional's right to do his job negligently or with impunity as far as innocent third parties who suffer economic loss. Public policy dictates that this should not be the law. Design professionals, as are other professionals, should be held to a higher standard". Id.

In People Express, a commercial airline brought an action in tort against a railroad for economic damages it suffered due to the evacuation of its offices following a fire. People Express, at 249. The railroad moved for summary judgment arguing that the airlines purely economic losses were not recoverable. The Supreme Court of New Jersey denied the railroad's motion characterizing the "per se" rule against recovery in tort for economic losses as "hopelessly artificial". Id. at 261. The Court held that, "when the plaintiffs are reasonably foreseeable, the injuries directly and proximately caused by defendants' negligence, and liability can be limited fairly, courts have endeavored to create exceptions to allow recovery". Id. Notwithstanding the decisions in Conforti and People Express, many advocates on behalf of defendants seek application of the per se rule barring recovery of economic damages in tort in the form of the Economic Loss Doctrine. However, it has been observed that the Economic Loss Doctrine operates to bar tort claims only where plaintiff seeks to enhance the benefit of the bargain she contracted for". Saltiel v. GSI Consultants, Inc., 170 N.J. 297 (2002). In Saltiel, claims of negligent design and misrepresentation by a landscape architect against the turf grass corporation were dismissed as the landscape architect's claim for economic damages essentially involved a breach of contract claim arising from a contract between the parties. Thus, it is clear where a contract between the parties exists, the New Jersey Supreme Court has concluded that claims should sound in breach of contract rather than in negligence because the Economic Loss Doctrine helps to maintain the "distinctions between tort and contract actions" by precluding the parties' "negligence action in addition to a contract action unless the plaintiff can establish an independent duty of care. Saltiel, at 310.

The case of SRC Construction Corp. of Monroe v. Atlantic City Housing Authority, 935 F.Supp.2d 796 (D.N.J. 2013) stands for the proposition that the Doctrine does not bar a plaintiff from asserting a tort claim for economic damages against the defendant with whom it does not have a contract. In SRC Construction, the contractor, SRC which was involved in the construction of an assisted living facility sued the owner for breach of contract for unjust enrichment and wrongful termination of the contract and conversion. In a separate action, SRC sued the architect on a project with whom SRC did not have a contract. The architect moved for summary judgment seeking protection under the Economic Loss Doctrine.

The United States District Court Judge disagreed and analyzed the decision of the Superior Court of New Jersey, Giuliano v. Gastone, 187 N.J. Super. 491 (App. Div. 1982) where the Appellate Division refused to apply the Doctrine to the plaintiff homeowners "negligence claims against the subcontractors who participated in the construction of their home." In Giuliano, just like in SRC, there was no contract between the parties. Thus, the Giuliano court ruled that the negligence claims were not barred.

The SRC Construction court distinguished the two unreported decisions, Horizon Group of New England, supra and Spectraserve, supra observing that, "in both cases, the courts held that the Economic Loss Doctrine barred the plaintiff's negligence claim even in the absence of a direct, contractual relationship between the plaintiff and defendants. Moreover, both courts' decision seemed to turn on the finding that the plaintiffs could have invoked contractual remedies in their contract with another defendant in the case". SRC Construction, at 800 (citations omitted).

The SRC court stated as follows:

> "Horizon and Spectraserve, cannot be reconciled with Giuliano. Not only could the Giulianos have sued the homebuilder with whom they had a direct contract, they did sue the homebuilder in a separate suit and obtained a judgment. (citation omitted).

The SRC Construction court attempted to reconcile the tension between lack of privity cases, lack of contract cases and lack of available other remedies as follows:

> Leaving open an avenue of redress because no other exists is one thing but foreclosing an avenue of redress simply because another exists is quite another. … the reason for foreclosing a tort claim is not simply because a contract claim exists, but rather that the tort claim is not really a tort claim at all; it is a contract claim in tort claim clothing. … but whether there is no direct contractual relationship between the plaintiff and the defendant, frequently there can be no contract claim at all and therefore any tort claim asserted cannot possibly be a contract claim in tort clothing. SRC, at 801.

The SRC Construction court's analysis was followed in Bedwell Co. v. Camden County Improvement Authority, Civ. A.14-1531 JEI, 2014 WL 3499581 (DNJ 2014). The Bedwell court held that a general contractor's claim for negligent misrepresentation against an architect alleging that the architect provided defective designs was not barred under the Economic Loss Doctrine because there was no contract between the parties. The Bedwell court further recognized that even though there were third party agreements between (1) the general contractor and the owner and, (2) the owner and the architect, the third party agreements had no effect on the law on the ability to bring a tort claim because "a contract cannot define the legal obligation between two entities unless those two entities are party to the contract *3. Therefore, it may be that New Jersey is backing off from the per se application of the Economic Loss Doctrine.

III. Conclusion

Where a contract exists between the parties there is agreement that the Doctrine would bar tort claims. Where there is another party involved in a construction team with whom the plaintiff has a contract and thus another remedy is available seems to imply that tort claims will not survive the ambit of the Doctrine. It is only where there is no contract between the parties and there is no other available means of redress for the plaintiff that the tort claims will survive the application of the Doctrine. Nevertheless, plaintiff practitioners should be wary of the potential filing of dispositive Economic Loss Doctrine motions by defendants with whom no contract exists.

Paul A. Sandars, III is a Member of the Firm of Lum, Drasco & Positan LLC and practices in the Firm's Litigation Group.

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