

The Distinction of Duty

By Jovan Dragovic

Counsel representing litigants who are small or closely held business entities may have experienced the situation where a plaintiff serves an “everything but the kitchen sink” complaint. The dispute arises in the context of a contractual relationship between the parties. In addition to breach of contract claim(s), plaintiff also asserts tort claims that purport to arise out of the same facts and circumstances of the parties’ business relationship.

Consider the question: Can the defendant be liable for breach of contract and torts at the same time? The answer is...it depends.

In *Hart v. Ludwig*, the Michigan Supreme Court held that when an action arises merely from a breach of promise, the action is based in contract.¹ To sound in tort, there must be some breach of duty distinct from breach of contract.² *Hart* involved action by orchard owners against the defendant for failure to maintain the orchard. In declining to recognize a tort claim arising from a contractual relationship, the Court stated:

We have simply the violation of a promise to perform the agreement. The only duty, other than that voluntarily assumed in the contract to which the defendant was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which is not alleged. What we are left with is defendant’s failure to complete

his contracted-for performance. This is not a duty imposed by the law upon all, the violation of which gives rise to a tort action, but a duty arising out of the intentions of the parties themselves and owed only to those specific individuals to whom the promise runs. A tort action will not lie.³

So, the concept of duty is critical to the determination of whether a tort action can be maintained in the context of a relationship that is contractual in nature. However, subsequent cases reveal that it may not be the only consideration.

In *Rinaldo’s Construction Corporation v. Michigan Bell Telephone Company*, a business customer sued a local telephone exchange carrier based on a negligence theory of liability.⁴ The Michigan Supreme Court discussed the nature of the plaintiff’s claim in the context of granting leave to address the jurisdictional question of whether the case belonged in the Michigan Public Service Commission or the courts of general jurisdiction. The Court stated: “the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation.”⁵ However, the Court went on to say:

This duty, however, does not extend to “intangible economic losses.” For this

type of loss, “the manifested intent of the parties should ordinarily control the nature and extent of the obligations of the parties”...In addition to acknowledging this distinction at least as far back as *Hart*, the distinction has more recently been applied to sales contracts under the UCC under the rubric of the “economic loss doctrine.”⁶

Of significance is that although the Court focused on duty, it nevertheless also paid tribute to the type of harm alleged to have been caused. The Court implied that if the harm is strictly economic in character, it cannot be the subject of a tort claim. If the harm involved injury to person or property, a tort claim may be viable. The Court continued:

[t]here is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship.⁷

The question arises whether both the alleged contract duties and economic harm are necessary to preclude a claim of tort in the context of a contract between the plaintiff and defendant. Or, is one sufficient without the other?

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Huron Tool and Engineering Company v. Precision Consulting involved a dispute over a software sales agreement and was strictly based on the economic loss doctrine under the Uniform Commercial Code.⁸ The Michigan Court of Appeals relied heavily on *Neibarger v. Universal Cooperatives*, applying the economic loss doctrine to bar claims for nonintentional torts arising from a contractual relationship between the plaintiff and defendant.⁹ In declining to adopt the defendant's position that the economic loss doctrine precludes any claim of fraud, the Court of Appeals stated:

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.

Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiff's contract claim... [It] is undergirded by factual allegations identical to those supporting their breach of contract counts... This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract...¹⁰

Again, the concepts of both duty and harm are at play.

Federal cases applying Michigan law in this context are consistent. In *Sudden Service v. Brockman Forklifts*, the U.S. District Court for the Eastern District of Michigan relied on the contract duty/tort duty distinction to dismiss the plaintiff's claims for conversion and fraud.¹¹ The court primarily cited *Brock v. Consolidated Biomedical Labs* for the proposition that Michigan law "is well-settled that an action in tort requires a breach of duty separate and distinct from a breach of contract."¹² In addition, it cited *Brewster v. Martin Marietta Aluminum Sales, Inc* — which was not cited by either *Rinaldo's* or *Huron Tool* — for the proposition that "plaintiff's cause of action was in contract, not in tort because '[a] relationship did not exist... which would give rise to a legal duty without enforcement of the contract promise itself.'"¹³ In passing, the court referenced *Hart* supporting the same proposition. Interestingly, in concluding the plaintiff's fraud claim must be dismissed, the court stated:

This duty, however, arises out of the contract that is the subject of the breach of contract claim. Similarly, the damage done by the alleged non-disclosure is simply the monetary damage from Plaintiff's breach of the contract. Because this claim involves no legal duty separate from the contract, summary judgment on the silent fraud claim is granted.¹⁴

Even though the court focused primarily on the concept of duty, it nevertheless buttressed its conclusion with reference to the nature of the harm arising from the duty allegedly breached.

More recently, in *Llewellyn-Jones v. Metro Property Group, LLC*, the court addressed

the contract/tort duty distinction squarely within the confines of the economic loss doctrine.¹⁵ Citing *Neibarger*, the court stated:

The doctrine draws a line between breach of contract claims arising from commercial transactions, where commercial and contract law protect the parties' economic expectations, and tort actions intended to remedy unanticipated injuries as a result of conduct that violates a separate legal duty apart from the contract.¹⁶

The court asserted that the economic loss doctrine traces its origin to *Hart* and relied on the duty aspect to dismiss the plaintiffs' conversion claim. The court stated:

[t]he defendants are correct that a conversion claim "cannot be brought where the property right alleged to have been converted arises entirely from the [plaintiff's] contractual rights." However, "[a] conversion claim and contract claim are not always incompatible." "It is possible for a party's conduct to result in both a breach of contract and a tort for common law conversion[,] so long as the defendant's conduct constituted a breach of duty separate and distinct from the breach of contract."¹⁷

These distinctions may not always be obvious or easy to draw. Counsel representing litigants engaged in business disputes can improve their ability to assess the relative positions in a controversy with knowledge and some understanding of the law described above.

As counsel for a defendant, the foregoing provides fertile ground for developing significant legal defenses to tort claims in a complaint based on a dispute arising from one or more contractual arrangements:

- Attack the underlying factual assertions to the extent they are the same in support of both breach of contract and tort claims asserted in a complaint.
- Address whether the plaintiff has alleged any duty independent of the contractual relationship that could support a tort claim.

- Assess the damages alleged and whether they are strictly economic in nature and pertain to the parties' bargained-for exchange.

If a defendant eliminates tort claims, it serves to focus and simplify defenses in a likely already complex action, as well as dishearten the plaintiff by early dismantling of a complaint.

Conversely, when representing a plaintiff, awareness of how Michigan law addresses the distinction of contract and tort claims arising between parties to contractual arrangements is critical in a plaintiff's formulation of pleadings. Analysis should begin with determining whether the facts underpinning the dispute can support allegations of breach of a contractual duty between the parties as well as the existence and violation of a broader legal duty that can form the basis for one or more tort claims. Sufficient factual allegations supporting the existence of a broader legal duty

and the breach thereof will protect a plaintiff's tort claims from the prospect of dismissal or summary disposition. Finally, do not forget to address the harm element in pleading damages as this may bolster the distinction between tort and contract claims if the harm alleged from the tort(s) is not strictly economic in nature. ■



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ENDNOTES

1. *Hart v Ludwig*, 347 Mich 559, 564; 79 NW2d 895 (1956).
2. *Id.*
3. *Id.* at 565–566.
4. *Rinaldo's Const Corp v Mich Bell Telephone Co*, 454 Mich 65, 85; 559 NW2d 647 (1997).
5. *Id.* at 84.
6. *Id.* at 84–85.
7. *Id.* at 85.
8. *Huron Tool and Engineering v Precision Consulting Svcs*, 209 Mich App 365; 532 NW2d 541 (1995).
9. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992).
10. *Huron Tool*, 209 Mich App at 373, quoting *Public Svc Enterprise Group, Inc v Philadelphia Electric Co*, 722 F Supp 184, 201 (D N.J., 1989).
11. *Sudden Service, Inc v Brockman Forklifts, Inc*, 647 F Supp 2d 811 (ED Mich, 2008).
12. *Id.* at 815, citing *Brock Consolidated Biomedical Laboratories*, 817 F2d 24, 25 (CA 6, 1987).
13. *Id.*, citing *Brewster v Martin Marietta Aluminum Sales, Inc*, 145 Mich App 641, 667; 378 NW2d 558 (1984).
14. *Id.* at 816.
15. *Llewellyn-Jones v Metro Property Group, LLC*, 22 F Supp 3d 760 (ED Mich, 2014).
16. *Id.* at 778.
17. *Id.* at 788.