

[Products Liability Law Daily Wrap Up, DAMAGES—HOUSEHOLD PRODUCTS—E.D. Ky.: Economic loss doctrine did not bar negligent repair claim in RV fire case, \(Nov. 9, 2015\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

In an action arising out of an RV fire allegedly caused by a refrigerator in the RV, a federal district court in Kentucky ruled that even if the economic loss doctrine applied to the sale of consumer products in Kentucky, it did not bar a post-warranty claim of negligent repair. The court also held that the RV owner's insurer was entitled to prejudgment interest on the amount it paid the RV owner for the value of the RV, and that the RV owner was entitled to interest on the value of his personal property and his travel expenses ([\*State Farm Mutual Automobile Ins. Co. v. Norcold, Inc.\*](#), November 6, 2015, Bertelsman, W.).

**Background.** An RV owner had his vehicle insured by State Farm Mutual Automobile Insurance Company. The RV was destroyed on September 20, 2013, by a fire allegedly caused by a refrigerator in the RV that was manufactured by Norcold, Inc. The RV and its contents were a total loss, and State Farm paid the RV owner \$145,193.20 for the loss of the RV. State Farm and the RV owner (collectively, State Farm or insurer) brought suit in state court and the case was removed to the current federal district court in Kentucky. Norcold subsequently moved for partial summary judgment on the basis that the RV owner's claim for the value of the RV was barred by the "economic loss rule" (ELR).

In a [prior decision](#) by the court, the refrigerator manufacturer's argument was rejected and the court predicted that the Supreme Court of Kentucky would not apply the ELR to consumer transactions. Subsequently, the district court declined to permit an interlocutory appeal and also declined to certify the issue to the Kentucky high court. To expedite the case, Norcold has admitted liability for the property damage caused by the fire, subject to its right to appeal the district court's ruling on the ELR. The admission states: "Defendant Norcold, Inc. hereby admits it would be liable for all property damage caused by the subject fire if the economic loss rule does not apply." The manufacturer also stipulated that State Farm properly paid the amount of \$145,193.20 for the total loss of the RV, and that State Farm would be entitled to recover that amount if the ELR does not apply. However, Norcold has denied that the RV owner would be entitled to recover consequential damages.

In addition, the parties entered into a joint stipulation relating to the RV owner's damages claim, stipulating: (1) the RV owner sustained the loss of personal property inside the RV in the amount of \$18,320.06, and Norcold agreed that the owner was entitled to recover that amount; (2) the RV owner incurred expenses of \$1,744.21 to return home to Florida from Kentucky after the fire, and Norcold agreed that these expenses were reasonable and necessary but denied that they were recoverable if the ELR applied; and (3) the RV owner purchased a replacement RV about five or six months after the fire, but, in the interim, he did not rent an RV or otherwise pay to use an RV on a temporary basis. If he had rented an RV during the period of time he was without one due to the fire, the parties agreed that the reasonable cost to rent a comparable RV would have been \$2,500 per week, and the loss of use value would have been \$25,000 (or \$2,500 times ten weeks). However, Norcold denied that the RV owner was entitled to any damages for loss of use. State Farm and the RV owner moved for summary judgment addressing three remaining issues for the district court's resolution before final judgment, allowing Norcold to appeal.

**Negligent service or repair.** In addition to the product liability claim asserted in the case, the insurer also asserted a claim for negligence based on the refrigerator maker's implementation and oversight of its own refrigerator recall and repair program. The recall occurred in February 2011, almost a year after the three-year warranty on the refrigerator expired and several months before the RV owner purchased the RV from its first

owner. In the court's prior decision, the court did not address the question of whether, if the ELR applied to consumer transactions in Kentucky, it would also extend to post-warranty negligence claims based on service and repair activities. The parties asked the court to address the question in order for the Sixth Circuit to consider it when the manufacturer appeals. Norcold appealed.

The court noted the relevant policies underlying the ELR: maintaining the distinction between contract and tort law; protecting parties' freedom to allocate economic risk by contract; and encouraging the purchaser to insure against the risk of economic loss. These policies did not seem to be implicated by a claim for damages based on services performed on a product after any warranty has expired, when there was no contract in effect governing the seller's liability for damage to the product. Federal courts in Kentucky have held that the ELR does not apply to the provision of services or service contracts. One of those courts noted that the Restatement (Third) of Torts, Product Liability, specifically states that "[s]ervices, even when provided commercially, are not products." While the refrigerator manufacturer cited two cases from other circuits holding that post-sale negligence claims were not excepted from the ELR, those cases were not binding on the district court, which had to predict what the Kentucky Supreme Court would do. Therefore, the court held that even if the ELR applied to the sale of consumer products in Kentucky, it would not bar a post-warranty claim of negligent repair.

**Prejudgment interest.** The court also held that the insurer was entitled to prejudgment interest on the amount it paid the RV owner for the value of the RV, and that the RV owner was entitled to interest on the value of his personal property and his travel expenses. According to the court, interest should run from October 13, 2013 to the date of entry of a final judgment in the case. Under Kentucky law, "prejudgment interest is awarded as a matter of right on a liquidated demand." The refrigerator maker conceded that the RV owner was entitled to prejudgment interest on the value of his lost personal property at the applicable statutory rate of 8 percent, but it argued that prejudgment interest was not warranted on the other elements of the insurer's (and owner's) damages because the manufacturer disputed its liability for those claims. However, the court found that long-standing precedent from the Kentucky Supreme Court indicated that a denial of liability would not affect the right to prejudgment interest on a liquidated claim.

**Loss of use damages.** Finally, because the plain language of the applicable Kentucky statute requires that any loss of use expense be "necessary," and by definition, the RV owner had no "necessary" expense because did not incur any, he was not entitled to damages under the statute.

The case is No. [2014-132 \(WOB-JGW\)](#).

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Companies: State Farm Mutual Automobile Insurance Co.; Norcold, Inc.

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