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SOURCE OF DUTY RULE AND THE ECONOMIC LOSS DOCTRINE

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INTRODUCTION

When a layperson walks into a law office needing to sue someone or needing to defend a lawsuit, he or she may not know or understand the difference between contract law and tort law. But no worries, we as licensees know, right? Back in law school we spent at least one semester-length class learning contracts, at least one semester-length class learning torts, and then took a variety of courses that are predicated on knowing and understanding this cardinal difference.

We are further emboldened if we attended law school in Virginia, because we derived our law straight from England, the First General Assembly of Virginia enacted laws in 1619, and we were taught in law school to cite the oldest case for a proposition that remained good law. Surely something as fundamental as the difference between contract law and tort law was sorted out well before the first Code of Virginia was published in 1819, or by the end of the Civil War, or by the middle of the twentieth century.

Then why did it take until 1987 for the Supreme Court of Virginia to grapple with a concept called the economic loss doctrine that purportedly arose directly from this most fundamental of distinctions? Why is the economic loss doctrine so difficult for Circuit Court opinions to follow? Why does there appear to be inconsistent language in Supreme Court of Virginia cases? And what are the implications for professional liability cases that are torts that arise from a contractual relationship?

We will take a brief tour in three parts. First, we will review the source of duty rule. Second, we will try to wrap our heads around the economic loss doctrine, which is more frequently referred to as the economic loss rule. Third, we will explore the implications of the economic loss rule for professional liability cases.

FUN FACT: Of the Virginia Circuit Court opinions that reference either the "economic loss rule" or the "economic loss doctrine" Fairfax County Circuit Court (29), Norfolk County Circuit Court (17), and Loudoun County Circuit Court (11) have published the most opinions by far.

FUN FACT: The Fourth Circuit had to predict in 1985 what the Supreme Court of Virginia would decide "whether there exists a cause of action in tort under Virginia law for a contractor to recover against an engineer for economic loss in the absence of privity" because "[u]nfortunately, the Supreme Court of Virginia has not yet addressed this specific issue." *Bryant Electric Co. v. Fredericksburg*, 762 F.2d 1192, 1193 (1985). Yet the Fourth Circuit was aware of and expressly referenced a pending case, *Blake Construction Co., Inc*., that in 1987 would in turn reference and rely upon *Bryant Electric Co.* when articulating its rulings.

SOURCE OF DUTY RULE

A. Why the Rule is Important

If a duty is breached and the defendant is liable for damages, why does it matter whether the duty arose in tort or in contract? The answer to this question is crucial to understanding the importance of what is known as the source of duty rule. There are a few answers to this question:

Statute of Limitations: Although it is obvious that tort and contract claims have different statutes of limitation, the consequence of that difference can play out in various and surprising ways. For example, the statute of limitations for fraud is two years, but the statute of limitations for the breach of a written contract is five years. This would suggest that a plaintiff has more time to file a breach of contract claim. However, in cases of fraud, that period may be extended under the so-called "discovery rule":

> In actions for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence, when such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered.

Code of Virginia §8.01-249. In fact, the seminal case regarding the source of duty rule involved a situation in which the statute of limitations for breach of contract had passed, but a claim for fraud (if it was viable) would have provided for a longer

period of time based on the discovery rule. *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 507 S.E.2d 344 (1998).

Furthermore, some contractual terms are implied by statute, the provisions of which will identify a different statute of limitations than would otherwise be applicable to a breach of contract. A good example of this is the implied warranty that applies to contracts for the sale of new homes. Code of Virginia §55.1-357. Moreover, as discussed below, in cases where the relief available is solely equitable, the claim will not be governed by any statute of limitations.

The Type of Relief Available: In some cases, the nature of the claim will dictate the type of relief available. If the source of duty arises from a contract, a plaintiff will normally only be entitled to money damages. However, in the case of the sale of real estate, both the buyer and seller could be entitled to specific performance. *Allen v. Lindstrom*, 237 Va. 489, 497 (1989)(granting specific performance against a *seller*); *Yamada v. McLeod*, 243 Va. 426, 433 (1992) (affirming the grant of specific performance against a *purchaser* "for two reasons: first, to give the seller the complete relief of a vendor's lien which otherwise would not be recognized in a court of law; and, second, to comply with the principle of mutuality that compels courts of equity to give the real estate purchaser the same relief as that afforded the seller.")

There are also cases in which tort claims will provide for equitable relief where it would not otherwise be available. For example, rescission is an available remedy in cases of fraud, and injunctive relief is available regarding real property claims such as trespass or nuisance. Although exceeding the scope of these materials, it must be noted that statutes of limitation do not apply to claims in which solely equitable relief is sought:

> In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, . . . except where the relief sought is solely equitable.

Therefore, as set forth in the statute, the limitation period does not accrue in cases where solely equitable relief is being sought. In a recent case involving injunctive relief being sought in a claim of trespass, the Virginia Court of Appeals confirmed that the statute means exactly what it says:

> Here, the appellants pled that no sufficient remedy existed at law and were therefore seeking equitable remedies based on their claims of trespass and nuisance regarding the bamboo. Hence, by the plain terms of Code § 8.01-230, the right of action was not deemed to have accrued at the time the injury began and the five-year statute of limitations does not apply to their claims.

Willems v. Batcheller, 78 Va. App. 199, 221 (2023). Although this result is dictated by the express statutory language, the Court appeared to recognize that further explanation was appropriate:

> The appellees further contend that applying the plain meaning of Code § 8.01-230 leads to absurd results. Although we agree that it is an established principle of statutory interpretation that "statutes are to be construed so as to avoid an absurd result," *Eastlack v. Commonwealth*, 282 Va. 120, 126, 710 S.E.2d 723 (2011) (citing *Commonwealth v. Doe*, 278 Va. 223, 230, 682 S.E.2d 906 (2009)), the absurdity alleged by the appellees to flow from this interpretation of Code § 8.01-230 is that a party may wait many years longer than the statute of limitations would allow before bringing an action so long as they limit their prayer for relief to equitable remedies, requiring a defendant to bear the burden of asserting laches. We find no absurdity here. The General Assembly has made the policy decision that simply time alone will not bar a party from bringing a request seeking equitable relief. This does not limit the viability of the doctrine of laches. Instead, where prejudice accrues to a defendant occasioned by the plaintiff's failure to assert their rights, the laches doctrine ensures that the defendant will not be disadvantaged. Therefore, the circuit court correctly concluded that the statute of limitations did not preclude the appellants' claims.

Willems, 78 Va. App. at 222-23. Therefore, the source of duty may determine not only what statute of limitations applicable, but whether a statute of limitation is applicable at all.

The Measure of Damages: The proper damages model for a specific cause of action is often overlooked at the time a claim is filed, and the legal reality may only set in later in the litigation. Although it is essential to any successful claim, the proper measure of damages often takes a backseat to questions of liability. One of the primary ways this oversight is manifested is in the misunderstanding about the difference between the measure of damages for breach of contract and for the breach of tort duty implied at law. This fundamental difference was explained by the Supreme Court of Virginia:

> [T]he measure of damages for breach of contract or breach of warranty is not necessarily limited to the same measure of damages applicable to fraud torts or statutory false advertising. Under certain circumstances, a party seeking to restore the benefit of a bargain or to enforce a warranty is permitted to show that the cost of remedying the breach is the appropriate measure of damages. The cost measure is calculated on the basis of the cost to complete the contract according to its terms or the cost to repair what has been done so that the contract terms are met. The cost measure is appropriate unless the cost to repair would be grossly disproportionate to the results to be obtained, or would involve unreasonable economic waste.

Klaiber v. Freemason Assocs., 266 Va. 478, 487-88 (2003) (citations and quotations omitted). Essentially, a party in privity of contract with the defendant is entitled to the benefit of their bargain, unless that relief would grossly exceed their "actual damages" as measured by a loss of value (such as in cases of fraud, property damage, loss of use, etc.) This is yet another reason why the source of duty underlying a specific claim can be crucial.

B. An Explanation of the Rule

The first complete articulation of the source of duty rule is found in *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553 (1998). The facts in *McDevitt St.* are particularly compelling and illustrative. In that case, the defendant construction company ("McDevitt") was accused of committing fraud in its performance of a contract to construct a stadium for the Richmond Metropolitan Authority ("RMA"). Specifically, RMA alleged that the construction company had failed to fill in with

concrete certain hollow support pilings as required by its contract with the municipal authority, inside of which metal support components had corroded.

In addition, the construction company had sealed with grout the fill-tubes of the hollow supports, making it appear that the hollow supports had in fact been properly filled. In keeping with the contract, the construction company certified that it had fulfilled its contractual duties to properly finish the support structures in order to receive progress payments. RMA based its allegations of fraud on McDevitt's misrepresentations in the construction documents submitted to RMA and on McDevitt's physical concealment of its noncompliance with the design criteria.

In many ways, these facts appear to satisfy the elements of fraud. The contractor made a false representation of existing fact upon which it intended RMA to rely, and upon which RMA did rely to its detriment. Furthermore, given intentional concealment of the condition that was being misrepresented, reliance would no doubt be legally justified. RMA's contract claims were time-barred, but because the condition had been concealed, the statute of limitations might not bar RMA's fraud claim under the discovery rule. The source of duty breached by McDevitt was therefore an existential question for RMA's claim.

The Court began by stating that in order to determine whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained. *McDevitt St.*, 256 Va. at 558. The Court then stated:

> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort.

Id. Since any obligation that the construction company had to RMA regarding performance of the construction was found in the parties' contract, RMA could not maintain an action for fraud.

The Court has subsequently attempted to clarify and delineate the contours of this rule. In discussing the policy considerations in play, the Court has observed:

> [L]osses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts. The rationale for this rule lies in the distinctly different policy considerations distinguishing the law of torts from the law of contracts.
>
> The primary consideration underlying tort law is the protection of persons and property from injury, while the major consideration underlying contract law is the protection of bargained for expectations. Thus, when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses.

Filak v. George, 267 Va. 612, 618 (2004)(citations omitted).

In a subsequent case with facts similar to *McDevitt St.*, the Court applied the rule similarly, and further commented on the distinction between a fraud committed to induce a contract and a misrepresentation about subsequent performance under a contract:

> Under the contract, Dunn had a duty to construct the foundation wall "in a workmanlike manner according to standard practices." Clearly, the original wall was not constructed in accord with this duty, and Dunn was required to make repairs to bring the wall in compliance with the applicable building code under that same duty. Dunn's false representation that he had made adequate repairs thus related to a duty that arose under the contract. The fact that the representation was made in order to obtain payment from Cloney does not take the fraud outside of the contract relationship, because the payment obtained was also due under the original terms of the contract. In this respect, the present case is indistinguishable from *Richmond Metropolitan Authority*.

Dunn Constr. Co. v. Cloney, 278 Va. 260, 268 (2009). Ten years later the Court would further attempt to refine the boundaries of the rule and its application in *Tingler v. Graystone Homes, Inc*., 298 Va. 63 (2019).

C. Tingler v. Graystone Homes, Inc.

In *Tingler*, the court applied the source of duty rule to negligence claims made by owners of a newly constructed home against the homebuilder ("Graystone") based upon both its failure to properly weatherproof the house during the original construction and its failure to properly remedy that condition after the house was delivered to the owners. At the outset, the Court wryly noted the inherent difficulty in applying the rule:

> Professor Costello once described the source-of-duty rule as "charmingly simple." Critics of the rule say that the charm wears off as soon as one tries to apply it. Yet, apply it we must. And in this application, as in so many areas of jurisprudence, we cannot be stymied "by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." To be sure, the truism that a particular outcome often "depends upon differences of degree" is no

> great discovery because "[t]he whole law does so as soon as it is civilized."

Tingler, 298 Va. at 83 (citations omitted). The first step in that analysis involves identifying the nature of the tort:

> The word "tort" has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act (not involving a breach of contract) for which an action will lie. "Tort" is also defined as the violation of some duty owing to the plaintiff imposed by the general law or otherwise. Generally, the duty must arise by operation of law and not by mere agreement of the parties. Stated differently, a "tort" is a legal wrong committed upon the person or property independent of contract.

Id. at 63.

In distinguishing tort from contract, the Court observed that "[b]y its very nature, tort law imposes duties upon the otherwise unwilling," but that "[c]onsent concepts that are inherent in contract law offer no solace to tortfeasors." *Id.* at 81. The Court then sought to use a nonfeasance/misfeasance model for determining when a given duty might arise:

> This first premise of the source-of-duty rule — distinguishing between nonfeasance and misfeasance or malfeasance — is a conceptual "line of division," and it is fair to generalize that, despite notable exceptions, "the courts have adhered to the line thus drawn" in most cases. Drawing the line there leads to liability in a host of tortious malfeasance and misfeasance scenarios, like when a home builder swings a hammer and hits someone visiting the site. That act would be malfeasance if the home builder had intended to strike the visitor and misfeasance if he had merely been reckless. In either scenario, it would be no defense to a tort action against the builder to point out that the construction contract required him to carefully swing his hammer and that he simply had failed to do so.

Id. at 84.

After a somewhat dense analysis of the nonfeasance-misfeasance distinction, the Court attempted a more direct formulation of the application of this distinction in the context of claims involving contracts, stating that "whether the defendant's performance, as distinct from his promise or his preparation, has gone so far that it has begun to affect the interests of the plaintiff beyond the expected benefits of the contract itself," *Id.* at 92.

Applying this analysis to the case at hand, the Court distinguished between claims of "negligence in weatherproofing the home during the original-construction process" and later attempts to remedy such inadequate performance. In the former case, the Court stated that claims related to the original performance of the contract were claims of nonfeasance that sounded only in contract. In the latter case, the Court opined that "these allegations could support a tort claim, but only to the extent that the complaints allege that the failed repairs made the original condition worse and, by doing so, caused new personal injuries or aggravated preexisting injuries." *Id.* at 93. The Court elaborated:

> These allegations of misfeasance, along with the reasonable inferences therefrom, assert viable claims for negligent repairs because they reasonably suggest that Graystone either increased the level of mold exposure to the home's inhabitants or extended the duration of the mold's presence and, by doing either, aggravated preexisting mold-exposure injuries suffered by the Tingler family. Graystone could be liable, if the evidence substantiates these inferences, for this aggravation — but not for any preexisting injuries resulting from

> conditions created by Graystone's nonfeasance during the construction phase of the contract, as we explained earlier.

Id. at 98.

THE ECONOMIC LOSS DOCTRINE / RULE

Defendants regularly file demurrers arguing that the economic loss rule bars a cause of action pled in a complaint. As typically argued, the economic loss rule exists to preclude plaintiffs from turning every contract action into a tort claim. To pursue relief in tort "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241 (1991). Accordingly, when a plaintiff "alleges... nothing more than disappointed economic expectations the law of contracts, not the law of torts, provides the remedy for such economic losses." *Filak v. George*, 267 Va. 612, 618 (2004).

A search on LEXIS in February of 2024 in Virginia state courts reflects 38 cases referencing the "economic loss doctrine," of which of which 31 are Circuit Court opinions, and 99 cases referencing the "economic loss rule," of which 92 are Circuit Court opinions. Of course, this fails to capture the countless unpublished opinions and unwritten rulings discussing the doctrine.

Yet it was less than 5 years ago the Supreme Court of Virginia articulated that the economic loss doctrine "serves as a remedy-specific application of the source-of-duty rule." *Tingler v. Graystone Homes, Inc*., 298 Va. 63, 98 (2019).

Three seminal cases set the stage for the economic loss doctrine in Virginia, and their history is convoluted. A case in the Circuit Court of the City of Richmond had confronted an odd fact pattern. Seeking to construct an office building, the Commonwealth contracted separately with a construction company (later the plaintiff) and an architectural firm (later the defendant). There was no privity of contract between the plaintiff and the defendant, as each had contracted with the Commonwealth. The plaintiff claimed that the defendant had a duty to provide the plaintiff with all the plans and modifications for the building. In the suit the plaintiff sought to recover in excess of $3.8 million from the defendant for economic loss that the plaintiff allegedly sustained as a result of defendant's negligent performance of these duties.

The defendant demurred on the common law rule "that a party not in privity may not recover damages where there is no physical injury to person or property." *Blake Constr. Co. v. Alley*, 233 Va. 31, 33 (1987). The trial court agreed, sustained the demurrers, and dismissed the case in 1983. *Id*.

While the *Blake Constr. Co.* case was making its way to resolution in the Supreme Court of Virginia in 1987, the Fourth Circuit was confronted with a very similar fact pattern in *Bryant Electric Co. v. Fredericksburg*, 762 F.2d 1192 (1985), a case filed in the Eastern District of Virginia as a diversity action. A contracting company hired by the City of Fredericksburg had sued a second company that had

been hired by the City to provide architectural and engineering services for the same project. The claim was that this second company had caused significant delay to the project and additional expense to the first company, costing extra work of more than half a million dollars. The claim was negligence (and no claim was made that the first company was a third-party beneficiary).

The Fourth Circuit was aware of the *Blake* case, and the lower court's ruling, but did not wait to see what the Supreme Court of Virginia would decide. Instead, it considered old Virginia trial court decisions, plus a handful of cases from outside Virginia, and affirmed the district court's dismissal of the case.

> In sustaining the architect's demurrer with prejudice, the Circuit Court for the City of Richmond stated the following: There is no duty owed by an architect to a subcontractor, unless a contractual duty exists; and there is no contractual duty alleged in this case. The architect's duty runs to the owner, not to the contractor or subcontractor. *J. West Construction Co. v. Beeson, Lusk, Jones, Inc.*, LE-1095 (Circuit Court, City of Richmond, April 16, 1982).

Bryant at 1194 (1985).

When the Supreme Court of Virginia ultimately decided *Blake*, they employed this exact reasoning. "The architect's duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss." *Blake* at 34. And *Blake* was the first Virginia state case to formally apply the "economic loss doctrine" by name.

But better known and far more cited (339 times to *Blake's* 135 citations), is *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc*., 236 Va. 419, 421 (1988). *Sensenbrenner* was a case certified to the Supreme Court of Virginia by the Fourth Circuit, and the first Virginia state case to formally apply the "economic loss rule" by name. The relevant certified question was:

> Does Virginia law permit recovery by a home purchaser against the pool installer and the architect for damages to the indoor swimming pool and to the foundation of the house caused by a leaking pool, where the pool installer and the architect were not in privity of contract with the home purchaser, on the basis that the damages were injuries to property and not economic losses?

Id. at 421.

The Supreme Court of Virginia marched through a review of *Blake, Bryant*, and caselaw from outside of Virginia. The posture in *Sensenbrenner*, which is crucial to understand the reasoning, was that the plaintiffs:

> argue that they are not seeking to recover for the loss of use and enjoyment of the pool or diminution in its value. Rather, they say, they seek to recover for the cost of repairing the damage done to their home caused by the pool "as well as the cost of placing the pool in a condition where it will cause no further damage to their home." The architect and the pool contractor contend that the plaintiffs seek to recover purely economic losses, notwithstanding the language they employ.

Id. at 423. "Many courts have been confronted with the problem of determining when a claim for damages crosses the line dividing purely economic losses from injuries to persons or property. Most jurisdictions equate economic losses, for which no action in tort will lie, with disappointed economic expectations." *Id*. 423.

The Supreme Court of Virginia curiously cited to and discussed a then new United States Supreme Court case, *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986), which applied product liability concepts in an admiralty case. Ultimately the United States Supreme Court had held that purely economic loss occurs where a product injures itself as a result of a defective component. The remedy should not be tort recovery.

> In *East River*, the Supreme Court observed that if, in product-liability cases, no-privity concepts were "allowed to progress too far, contract law would drown in a sea of tort." 476 U.S. at 866. To similar effect, we observed in *Kamlar Corp.* v. *Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983), that the limitations which apply to contract damages "have led to the 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort'" (quoting W. Prosser, Handbook of the Law of Torts § 92 at 614 (4th Ed. 1971)).

Sensenbrenner at 424.

This led to the Supreme Court of Virginia ultimately articulating how economic losses are different from other types of damages, and justifying why they should be treated differently:

> The controlling policy consideration underlying tort law is the safety of persons and property -- the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.

Id. at 425.

Specific Application of the Rule in Cases of Fraud

The economic loss doctrine in the source of duty rule can have particular applicability in fraud claims. For example, in *Filak v. George*, 267 Va. 612 (2004), the Court barred a constructive fraud claim where the parties were in privity. Once again, the Court reaffirmed that "when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses." *Id.* at 618.

Notably, claims for fraudulent inducement are not susceptible to a defense under the source of duty rule since the duty being breached arises prior to the entry into the contract. *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 363 (2010). However, the rule does apply to false representations made during the course of performance of a contract for the purpose of inducing a party to make payment. In *Dunn Constr. Co. v. Cloney*, 278 Va. 260, 268 (2009), the Court reaffirmed the *McDevitt St.* holding, and applied it to a post-contract fraudulent inducement.

In fact, in a case where the plaintiff attempted to characterize the defendant's conduct as either fraud in the inducement or promissory fraud in order to avoid the application of *McDevitt St.*, the Court proclaimed its continuing "commitment to 'safeguard against turning every breach of contract into an actionable claim for fraud.'" *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 208 (2007).

WHAT ARE THE IMPLICATIONS OF THE ECONOMIC LOSS DOCTRINE ON PROFESSIONAL LIABILITY CASES?

Properly pleading negligence in Virginia requires the plaintiff to allege facts in support of a recognized duty, breach of that duty, causation, and damages. *See e.g. Jordan v. Jordan,* 220 Va. 160 (1979). Unlike contractual duties, only assumed by agreement, people have common law duties to one another because we live in a society. When driving one has a duty to maintain an open lookout, to maintain a reasonable speed, and to follow posted signs. These are duties owed broadly to everyone else for fundamental reasons of safety.

Professional negligence substitutes "standard of care" for duty and "breach of standard of care" for breach of duty. These concepts are particularly well developed in Virginia jurisprudence with respect to medical malpractice and legal malpractice. Standard of care is generally proven through testimony of a qualified expert witness.

Professionals generally do not owe duties to those they pass on the street, but rather to their own clients. All professional tort claims arise from a contractual relationship. For example, in a legal malpractice case, "[w]hatever duties O'Connell owed Bean arose from their attorney-client relationship, which was created by their contract." *O'Connell v. Bean*, 263 Va. 176, 180 (2002).

Similarly, breach of fiduciary duty can arise from a contractual relationship but is treated like a tort for most purposes. The Supreme Court of Virginia recognized and discussed professional negligence claims more than 20 years ago:

> We need not formulate a bright line rule applicable to all cases involving the alleged negligence of realtors. We have held that expert testimony is unnecessary when the alleged negligent acts or omissions of certain professionals clearly lie within the range of the common knowledge and experience of the trier of fact. *See*, *e.g.*, *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); *Commercial Distributors, Inc. v. Blankenship*, 240 Va. 382, 390, 397 S.E.2d 840, 845 (1990); *Richmond Newspapers v. Lipscomb*, 234 Va. 277, 296, 362 S.E.2d 32, 42 (1987). We are of the opinion that this case-by-case approach to the requirement for expert testimony is appropriate in cases involving the alleged negligence of realtors.

Polyzos v. Cotrupi, 264 Va. 116, 122 (2002). Real estate licensees enter contracts with buyers or sellers, and have contractual duties. But they also can be sued for professional negligence and other torts. The existence of the contract not only does not preclude the professional tort claims, it is a predicate for them. Nevertheless, defendants regularly attempt to invoke the economic loss rule to argue that plaintiffs are precluded from making professional liability claims.

If the Supreme Court of Virginia ultimately accepted such a restrictive view of the economic loss rule, all professional liability claims could cease to exist in Virginia. Clients pay doctors, directly or indirectly. Clients pay lawyers, directly or indirectly. Clients pay real estate licensees, directly or indirectly. Once the contractual relationship is established, professional duties are owed, and are measured by the appropriate standard of care. They are not classic contract claims in the sense of specific provisions agreed to but then breached. For example, your engagement agreement does not specify which litigation deadlines you will meet.

Representative Demurrer Arguing the Economic Loss Doctrine in the Professional Malpractice Context

In a representative case in City of Alexandria Circuit Court, insurance professionals licensed by the Commonwealth of Virginia were alleged to have professional duties to Plaintiff. Plaintiff intended to put on standard of care testimony by a qualified expert in the same field as Defendants to testify that they breached the standard of care.

Defendants were insurance brokers who had worked with Plaintiff to advise about and then procure insurance, and in particular an umbrella policy in the amount $5 million. However, Defendants did not add the available endorsement for the Uninsured Motorist and Under Insured Motorist coverage to the umbrella policy or otherwise advise Plaintiff of the necessity of purchasing Uninsured Motorist and Under Insured Motorist coverage beyond what was available under his automobile policy. As a result, Plaintiff accepted Defendants' proposed coverage plan without understanding or appreciating that the $5 million umbrella policy procured, and which otherwise applied to his auto policy, did not extend coverage to the Uninsured Motorist and Under Insured Motorist, leaving a significant gap in coverage.

Plaintiff's minor son was then injured in a catastrophic car collision. The medical bills exceeded $800,000. His life care plan was approximately $1.3 million. Plaintiff then learned that his insurance coverage was, in fact, limited to only $250,000.

In addition to two counts of Breach of Implied Contract, Plaintiff pled two counts of Professional Malpractice (failure to advise, and failure to procure), and one count of Breach of Fiduciary Duty. Defendants filed a demurrer citing the economic loss rule.

Argued in 2021, Defendants relied heavily on *Filak v. George*, where the Court held that "plaintiffs did not assert a valid claim of constructive fraud against George because whatever duties George may have assumed arose solely from the parties' alleged oral contract." *Filak v. George*, 267 Va. 612, 618-19 (2004). In this example, the Complaint did not allege constructive fraud. Conversely, there was no professional negligence claim pled in *Filak*, nor any count for breach of fiduciary duty. In the view of Plaintiff, *Filak* should not have represented an obstacle to either professional malpractice claim or the breach of fiduciary duty claim.

Plaintiff argued that another case from the Supreme Court of Virginia expressly held that, because privity existed, a defendant insurance agency *could* be held liable for professional negligence without running afoul of the economic loss rule. In *Acordia of Va. Ins. Agency v. Genito Glenn, L.P.*, 263 Va. 377 (2002), Genito alleged that Acordia had negligently failed to name Genito as an insured on an insurance policy. Genito sought damages both under theories of negligence and breach of contract. At the close of evidence, Genito nonsuited the breach of contract count and went to the jury only on negligence.

After a careful analysis of privity principles, the Court affirmed the jury's significant award for negligence. "Accordingly, the trial court did not err in upholding the jury verdict awarding economic loss damages to Genito for Acordia's negligent performance of its contractual obligations." *Id. at* 386.

Defendants strongly disagreed. At the most, Defendants argued that the opinion indicated that the plaintiff there elected to proceed on a negligence theory at trial, but nothing in the opinion suggested that the plaintiff's election was ever challenged. *Id.* at 382.

Plaintiffs argued that the Supreme Court of Virginia acknowledged in *Standard Prods. Co. v. Wooldridge & Co.*, 214 Va. 476, 482 (1974) that a plaintiff "had an option to proceed against the two defendants for the damages it sustained as a result of such alleged misrepresentations and negligence of Finnegan, acting as the agent, servant and employee of Wooldridge; or to proceed against the defendants for breach of the contract allegedly made by Finnegan on behalf of Wooldridge to procure the insurance coverage." Plaintiff could thus proceed in contract or tort.

Defendant again disagreed, arguing that in *Standard Prods. Co. v. Wooldridge & Co.,* the plaintiff proceeded to judgment on a contract claim and was held to have waived the tort claim. *Id*. at 476. Defendant argued that nothing in the opinion suggested that the viability of a tort claim was challenged, and that the case also predated the economic loss rule as articulated in 1987 and 1988 in Virginia.

Plaintiff cited to *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1470 n.15 (4th Cir. 1996), where the Fourth Circuit reviewed a professional malpractice claim for "damages proximately caused by the insurance professionals' negligent failure to procure" insurance. *Id*. at 1471.

> The claim is a sub-species of the general cause of action for professional malpractice, which may be brought against any professional who fails to exercise the knowledge, skill and care ordinarily employed by members of his profession. W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts* § 32 (5th ed. 1984); *see, e.g.*, *H.C. Boone v. C. Arthur Weaver Co., Inc.*, 235 Va. 157, 365 S.E.2d 764 (Va. 1988) (malpractice claim against an accountant for giving erroneous advice); *Comptroller of Virginia v. King*, 217 Va. 751, 232 S.E.2d 895 (Va. 1977) (malpractice claim against an architect for a negligent design).

Plaintiff argued that this fact pattern was the same as the instant case. Defendants vigorously rejected that conclusion.

The Circuit Court judge ultimately indicated at length that there should be a professional malpractice claim against the insurance brokers for failure to advise and for failure to procure. But because the judge was the very same one affirmed in 1988 in *Sensenbrenner*, the Circuit Court sustained the demurrer as to all three tort counts and encouraged Plaintiff to appeal.

Was the Court correct? Were the damages sought pure economic loss that should only be the province of contract? Where the insurance broker Defendants were alleged to have a contractual relationship, and where Defendants admitted as much, should the economic loss doctrine have been applied at all?

SUMMARY OF KEY VIRGINIA CASES
(in chronological order)

Blake Constr. Co. v. Alley, 233 Va. 31 (1987)

- **Facts:** Seeking to construct an office building, the Commonwealth contracted separately with a construction company (Plaintiff) and an architect and engineering firm (Defendant). There was no privity of contract between Plaintiff and Defendant. Plaintiff claims that Defendant had a duty to provide Plaintiff with all the plans and modifications for the building. Plaintiff sought to recover in excess of $3.8 million from Defendant for economic loss Plaintiff allegedly sustained as a result of Defendant's negligent performance of these duties.

- **Cause of Action:** Whether a cause of action exists in Virginia for a contractor to recover from an architect or engineer for economic loss in the absence of privity.

- **Discussion of Source of Duty / Economic Loss Rule:** At common law, a party not in privity of contract may not recover damages where there is no physical injury to person or property. Code of Virginia § 8.01-223 provides that lack of privity is no longer a defense in actions for damages for injury to person or to property that result from negligence.

- **Holding:** No recovery in tort for only economic loss can be had in absence of privity. Plaintiff argues that Code of Virginia § 8.01-223 expands the economic loss remedy by removing the privity requirement in negligence actions seeking only economic loss. However, Code of Virginia § 8.01-223 expressly limits its application to cases involving injury of person or property. "There can be no actionable negligence where there is no breach of a duty 'to take care for the safety of the person or property of another.'" Parties involved in a construction project protect their economic interests by contracts. Since there was no contract between Plaintiff and Defendant, Defendant had no duty to protect Plaintiff's economic interests.

Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419 (1988)

- **Facts:** Plaintiffs (homeowners) contracted with O'Hara (construction company) to build Plaintiffs a new construction home with an indoor pool. O'Hara contracted with Defendant (architect) to design Plaintiffs' home, including the pool and enclosure. Plaintiffs and Defendant were not in privity of contract.

- **Cause of Action:** Does Virginia law permit recovery by a home purchaser against the pool installer and the architect for damages to the indoor swimming pool and to the foundation of the house caused by a leaking pool, where the pool installer and the architect were not in privity of contract with the home purchaser, on the basis that the damages were injuries to property and not economic losses?

- **Discussion of Source of Duty / Economic Loss Rule:** Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.

    i. Test for the classification of the character of loss. The controlling policy consideration underlying tort law is the safety of persons and property — the protection of persons and property from losses resulting from injury. Whereas the controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.

- **Holding:** The law of contracts provides the sole remedy for pure economic loss. The architect and the pool contractor assumed no such duty to the plaintiffs by contract, and the complaint alleges no facts showing a breach of any such duty imposed by law.

Copenhaver v. Rogers, 238 Va. 361 (1989)

- **Facts:** Plaintiff is the beneficiary of a will which Defendant created for Plaintiff's grandparents. Defendant prepared a faulty will, resulting in a void trust. The trust was supposed to benefit Plaintiff. Because of the void trust, Plaintiff lost their remainder interest in the residual share that had been intended for Plaintiff's mother. Plaintiff sued Defendant in tort.

- **Cause of Action:** Can a third party beneficiary of a will and estate plan sue for pure economic loss despite privity of contract?

- **Discussion of Source of Duty / Economic Loss Rule:** Regarding the tort issue, the trial court wrote "that the common law requirement of privity was applicable and was a prerequisite to a finding that the defendant law firm owed a duty to the plaintiffs." The trial court concluded that the Copenhavers had "no claim in tort for the negligent performance of legal services for the grandparents."

- **Holding:** No, Plaintiff could not sue Defendant in tort on a theory of economic loss absent privity of contract. The common law requires privity as a prerequisite to a finding that the defendant law firm owed a duty to Plaintiff. Plaintiff has no claim in tort for the negligent performance of legal services for Plaintiff's grandparents because Plaintiff has no privity of contract with Defendant.

Ward v. Ernst & Young, 246 Va. 317 (1993)

- **Facts:** Plaintiff was selling their company to Chem Waste. Plaintiff hired EY to audit and review the financial papers of Plaintiff's company. Plaintiff covenanted to "indemnify and hold the PURCHASER harmless" for any breach of that warranty and to deposit one million dollars of the purchase price in an escrow account "for the purpose of providing a fund from which ... the Seller's obligations to indemnify the Purchaser are to be satisfied." Chem Waste found discrepancies with Plaintiff's balances and made a claim against the escrow deposit. Plaintiff thus paid Chem Waste 600K from the escrow account and filed suit against EY for damages of 600K.

- **Cause of Action:** Did Plaintiff sustain property losses and not economic losses such that privity is not required?

- **Discussion of Source of Duty / Economic Loss Rule:** Corporate stock is recognized as personal property. The interest represented by a stock certificate is indeed an intangible personal property right. However, the amount received from the sale of stock is not a personal property loss. His liability was "measured by" the "diminution in the value of the whole" stock package, i.e., the difference between the sale price of his stock fixed in reliance upon the bargained-for services and the value determined by a correct accounting formula. In effect, Plaintiff "allege[s] nothing more than disappointed economic expectations." His loss, then, was "a purely economic loss."

- **Holding:** Plaintiff has no claim to recover damages for economic loss under negligence principles lacking privity of contract with EY.

Gerald M. Moore & Son, Inc. v. Drewry, 251 Va. 277 (1996)

- **Facts:** Gerald M. Moore and Son, Inc. (Moore) owned and operated an industrial plant in Nassawadox, Virginia. In 1990, Moore entered into a contract with an engineering firm, Drewry and Associates, Inc. (D & A), to engineer, design, and furnish a reduction furnace for Moore's use in the process of thermal remediation of petroleum contaminated soil. The contract was signed by Joseph S. Drewry, Jr., as president of D & A. Drewry performed all the engineering work required by the contract. Moore filed breach of contract suit against D & A. Moore added Drewry as a defendant in the negligence count.

- **Cause of Action:** Whether Drewry, the president of D & A, as the engineer who performed the work for which the contract between D & A and Moore called, is liable for the purely economic losses resulting from the negligent performance of that contract. Drewry was not a party to the contract between Moore and D & A. Therefore, there is no privity between Drewry and Moore.

- **Discussion of Source of Duty / Economic Loss Rule:** Under Virginia law, an agent can be held liable for negligent performance of a contract to which he is not a party, but to which his principal is a party. However, even if the agent's negligence is established, absent privity of contract, Virginia's economic loss doctrine precludes the recovery of damages based on economic loss alone.

- **Holding:** In the absence of privity, a person cannot be held liable for economic loss damages caused by his negligent performance of a contract.

Richmond Metro. Auth. v. McDevitt St. Bovis, 256 Va. 553 (1998)

- **Facts:** A municipality contracted with the defendant to build a baseball stadium. Part of the agreement was that in order to get paid the contractor would certify that it had completed work on the project according to the agreed upon specifications. The municipality sued after discovering that the work had been inadequately performed. The lower court found that there had been tortious fraud, relying on cases finding fraud in the inducement.

- **Cause of Action:** Breach of Contract, Actual Fraud, and Constructive Fraud

- **Discussion of Source of Duty / Economic Loss Rule:** The source of the duty sounded in contract because the duty arose out of the contractual relationship, not one that would have existed in common law. The court noted that there was no proof that the contractor had intended to defraud at the creation of the contract, so therefore arguments there was fraud in the inducement failed.

- **Holding:** The appropriate remedy was breach of contract, and not fraud because the duty breached existed only because of the contractual relationship.

Burner v. Ford Motor Co., 52 Va. Cir. 301 (2000)

- **Facts:** A Ford Mustang's engine spontaneously combusted. There was no damage besides to the car itself. The owner sued Ford.

- **Cause of Action:** Negligence, Breach of Implied Warranty, and Breach of Express Warranty

- **Discussion of Source of Duty/Economic Loss Rule:** The court initially determined that the economic loss rule would preclude recovery in tort if all the harms were economic. The court did not accept the plaintiff's argument that because there was privity between the parties, the economic loss rule did not apply. They argued that in most economic loss analyses the parties would likely be in privity. The court looked to a U.S. Supreme Court case in finding that when a product fails, destroying itself but harming nothing else, the loss

is purely economic. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

- **Holding:** Privity of contract is not a requisite element of the economic loss doctrine; therefore, the existence of privity between the parties does not preclude the application of the economic loss doctrine for a negligence claim.

Stoney v. Franklin, 54 Va. Cir. 591 (2001)

- **Facts:** Defendants were multiple building companies, manufacturers, and contractors who helped construct a house for the plaintiffs. Later, after the Plaintiffs moved in, they noticed that the house leaked. Plaintiffs alleged that several of the defendants performed poor work. They also alleged multiple claims against the manufacturer of their roofing system, who the Plaintiffs believed knowingly sold a nonfunctioning product.

- **Cause of Action:** Negligence, Constructive Fraud, and Breach of Implied Warranty.

- **Discussion of Source of Duty / Economic Loss Rule:** Relying on *Sensenbrenner* the court noted that the Plaintiffs' injuries were economic losses involving disappointing economic expectations. The court argued that the parties entered into a contract for the construction of a house, in which the Defendants warranted to correct any damage due to faulty workmanship or materials. As these warranties covered all the damages claimed by the Plaintiffs, the loss was economic.

    i. The court reasoned that constructive fraud was equivalent to negligence and was not severe enough to implicate the larger social protections that tort is designed to protect. Addressing whether UCC warranties should be considered a form of contract or tort, the court looked to a U.S. Supreme Court case in finding that they more like contracts. *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

    ii. The court then analyzed the UCC and Virginia's anti-privity statute to determine that the plaintiffs' implied warranty claims seeking direct damages from the defendants, however, survive scrutiny under the economic loss rule as well as the UCC principle limiting implied warranties to transactions in goods. They based this on the

reasoning that the building contract's inclusion of materials did not preclude UCC warranty claims "upstream" in the chain of manufacturing. The defendant manufacturers could have anticipated that home buyers such as the Plaintiffs would be impacted by the faulty materials.

- **Holding:** The economic loss doctrine prevented action in tort for the failures in workmanship of the house because all the losses were a part of the contract. The economic loss doctrine did not preclude damages against the manufacturers of the faulty goods.

Pulte Home Corp. v. Parex, Inc., 265 Va. 518 (2003)

- **Facts:** A homeowner sued both their homebuilder, Pulte, and the manufacturer of the stucco used on their home, Parex. Pulte then brought a cross-claim against Parex to recover any damages that Pulte might owe the homeowner. The circuit court sustained Parex's demurrers to homeowners and Pulte's claims. Pulte then settled with homeowner and appealed.

- **Cause of Action:** Breach of express warranty, breach of implied warranty, indemnification, and contribution.

- **Discussion of Source of Duty / Economic Loss Rule:** The court addressed when economic loss damages could be awarded in the case of a breach of warranty. The court looked at if the damages the contractor would face based on the manufacturer's breach of warranty, would be direct or consequential. It was necessary to answer that question because consequential damages would require a showing of privity.

    i. The Court referenced a previous case, to connect economic loss to breach of warranty. "Because § 8.2–715(2)(a) contained the language, "'at the time of contracting,' " the statute "requires a contract between the parties for the recovery of consequential economic loss damages incurred as a result of a breach of warranty by the seller." *Beard Plumbing*, 254 Va. at 245, 491 S.E.2d at 733–34."

- **Holding:** Damages do not arise out of contract when such damages result from a cross-claim, because the action of the third-party interrupts the privity of contract. When C's breach of warranty, causes B to owe A damages, the damages C owes B are not economic loss derived from a contract. This is because C would not owe B damages if A had not sued.

Gonella v. Lumbermens Mut. Cas. Co., 64 Va. Cir. 229 (2004)

- **Facts:** A homeowner sued both their home insurance company and the contractor engaged by the home insurance company to make repairs. The homeowner sued each of the Defendants on both breach of contract and negligence. The homeowner sought to recover for both property and personal damage, because of exposure to mold from a wet basement. Defendants argued that the economic loss rule protected them from the negligence claims because all the harms arose out of the contract.

- **Cause of Action:** Breach of contract, negligence, bad faith denial of an insurance claim.

- **Discussion of Source of Duty / Economic Loss Rule:** According to the court the issues were "whether Plaintiffs have stated a valid claim for breach of contract; 2) whether Plaintiffs are barred from recovery pursuant to the economic loss rule; and 3) whether Plaintiffs' claims for property damage and personal injury sounding in negligence are barred because the underlying relationship between the parties is rooted in contract."

    i. The court found that the homeowners' claim for breach of contract was sufficient, based on all the alleged failures by the contractor.

    ii. The court did not agree with the Defendants' argument that they were protected by the economic loss rule. The court overruled the demurrer because the Plaintiffs' claim of personal injuries and damages were beyond the economic expectations of the contract.

    iii. Accordingly, the court declined "to preclude a personal injury claim by someone claiming serious injury arising from a contracting party's creation of an unreasonably dangerous condition."

- **Holding:** A personal injury can sound in tort, even when that injury occurred due to a breach of contract.

Filak v. George, 267 Va. 612 (2004)

- **Facts:** Plaintiffs were building a house themselves. While the house was still under construction, they contacted a fire insurance company, which assigned one of its agents to meet with the plaintiffs. The agent informed the plaintiffs that they could obtain an insurance policy that would provide "total replacement" costs for their new house and its contents in the event that the house was destroyed by fire.

    i. The plaintiffs purchased the policy. Unbeknownst to them, they could only receive the replacement cost coverage if they rebuilt their house if/when it burned down.

    ii. Later, before the house was completed, it burned down, but the plaintiffs did not rebuild it. The plaintiffs settled with the insurance company for less than the full cost.

    iii. After the settlement with Farm Bureau, the plaintiffs filed an amended motion for judgment against the insurance agent alleging breach of contract and constructive fraud.

    iv. The circuit court struck the constructive fraud claim based on the plaintiffs' "inability to clearly allege the existence of a common law duty." Citing the "economic loss rule," the circuit court held that a claim for constructive fraud is not actionable when such a claim essentially alleges negligent performance of contractual duties.

- **Cause of Action:** Constructive Fraud

- **Discussion of Source of Duty / Economic Loss Rule:** In reviewing the case *de novo*, the Supreme Court of Virginia came to the same conclusion. The economic loss rule barred the plaintiff's claim for constructive fraud because the agent had a duty to the plaintiff that only existed because it had been assumed by contract.

i. The court also ruled against their breach of contract claim because the plaintiff had not sufficiently provided enough support for the need for additional damages.

- **Holding:** The representations made by an insurance agent prior to signing a contract do not give rise to a common law duty that would sound in tort, when those representations create only an economic loss.

McGlen v. Barrett, 78 Va. Cir. 90 (2009)

- **Facts:** The plaintiff buyer claimed that the defendants, the sellers and both real estate agents, actively concealed the Resource Protection Area designation of the property. The disclaimer provided by the defendants failed to include statutory language concerning the Chesapeake Bay Preservation Act. The plaintiff claims that the building restrictions on the property severely limited their ability to build a new home and improve the property as planned. The property was listed on MRIS by the defendants.

- **Cause of Action:** Breach of the representation agreement, negligence per se, fraud, and professional negligence.

    - The motions at issue included various defense demurrers and plea in bars to the amended complaint.

- **Discussion of Source of Duty / Economic Loss Rule:** "Although sales of real estate in Virginia are not controlled by product liability concepts, the economic loss rule does apply to sales of real property alleged to be qualitatively defective. The rationale of the rule is that tort law was not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Id.* at 99-100.

- **Holding:** The Court:
    - sustains the plea in bar of the defendant, dismissing the violation of Virginia Real Property Disclosure due to the statute of limitations
    - sustains all demurrers pertaining to the award of attorney's fees and punitive damages;
    - sustains the demurrers of Defendants to the counts of actual and constructive fraud;
    - sustains the demurrer to Plaintiff's claims of professional negligence.

Dunn Constr. Co. v. Cloney, 278 Va. 260 (2009)

- **Facts:** The Plaintiff claimed that the defendant contractor made fraudulent representations concerning certain repairs it made to the foundation wall of the house. A jury awarded the owner compensatory damages and punitive damages. Defendant contended that the award of punitive damages was impermissible because any misrepresentation arose out of contract, not tort.

- **Cause of Action:** Breach of contract, negligence, and fraud

- **Discussion of Source of Duty / Economic Loss Rule:** Under the parties' agreement, the contractor had a duty to construct the foundation wall in a workmanlike manner according to standard practices. The original wall was not constructed according to that duty, and the contractor was required to make repairs to bring the wall in compliance with the applicable building code under that same duty. Therefore, the contractor's false representation that he had made adequate repairs related to a duty that arose under the contract. The economic loss rule was not applicable.

- **Holding:** The Supreme Court of Virginia reversed the judgment awarding the owner punitive damages for fraud and entered a final judgment for the owner, which was limited to the award of compensatory damages with interest.

Abi-Najm v. Concord Condominium, LLC, 280 Va. 350 (2010)

- **Facts:** There were issues about the type of flooring set forth in Schedule A compared to the ones installed, and the change was allegedly intentionally false and misleading information that constituted misrepresentations of a material fact and fraudulent acts in violation of the VCPA. On appeal, the court considered whether the trial court erred when it sustained the defendant company's demurrers to the complaints of plaintiffs, residential condominium purchasers, on the grounds that the claims were barred by the merger and economic loss doctrines.

- **Cause of Action:** Breach of contract, fraud in the inducement, and violation of the VCPA

- **Discussion of Source of Duty / Economic Loss Rule:** To apply the economic loss rule, the breach of duties or violation must come from common law or statutory duties, not contractual obligations.

- **Holding:** The trial court erred when it sustained the company's demurrers. The trial court's judgments were reversed and remanded for further proceedings consistent with the opinion.

Foster v. Wintergreen Real Estate Co., 81 Va. Cir. 353 (2010)

- **Facts:** The plaintiffs filed an action against the defendants, a real estate company, realtors, and others, alleging misrepresentation of facts that induced the plaintiffs to purchase and sell real estate through the defendants' firm together with the intention not to perform the representations at the time they were made. The case was before the court on the defendants' demurrer and motion to dismiss.

- **Cause of Action:** Fraud in the inducement, breach of professional duties, breach of fiduciary duty, statutory conspiracy, common law conspiracy, false advertising, tortious interference, respondeat superior, and punitive damages

- **Discussion of Source of Duty / Economic Loss Rule:** "A civil claim for fraud does not equate to an unlawful act or unlawful purpose. Further, the duties of real estate agents to their clients are defined by statute and incorporated into the brokerage contract as discussed above. Thus, in the context of the brokerage relationship between the parties alleged in the amended complaint, any misstatement of facts alleged to constitute statutory conspiracy are merely contractual issues. Accordingly, the economic loss doctrine applies and the demurrer is sustained." *Id.* at 357.

- **Holding:** The demurrer was sustained, and the claim was dismissed as to the claims for breach of professional duties, breach of fiduciary duty, statutory conspiracy, and tortious interference. As to all other claims, the demurrer was overruled.

Fid. Nat'l Title Ins. Co. v. Wash. Settlement Group, LLC, 87 Va. Cir. 77 (2013)

- **Facts:** Plaintiff pled twelve causes of action regarding several purportedly fraudulent real estate transactions perpetrated by a terminated title insurance company and its agents. Plaintiff contends that the defendants misappropriated and mishandled escrowed funds of at least $4 million to enrich themselves and others in connection with a real estate closing where Defendants acted as Plaintiff's title agent. The Court focuses particular attention on two issues, which are raised in Defendants' demurrers: (1) whether Plaintiffs have properly pled causes of action arising in tort that are not preluded by the economic loss rule; and (2) whether Plaintiffs have properly pled facts sufficient to satisfy the elements of each surviving claim.

- **Cause of Action:** Intentional misrepresentation/fraud, negligent misrepresentation/constructive fraud, negligence, breach of contract/ indemnification, breach of contract/guarantees, breach of fiduciary duty, unjust enrichment, conversion, conspiracy, preliminary and permanent injunction, and attachment

- **Discussion of Source of Duty / Economic Loss Rule:** Claims of actual fraud and conversion, in the absence of privity of contract, are not precluded by the economic loss doctrine.

- **Holding:**
    - Breach of fiduciary duty - Sustained without prejudice as to one defendant, and the demurrer is overruled as to other defendant
    - Intentional Misrepresentation/Fraud - Demurrer sustained for one defendant and overruled for other defendants
    - Negligent Misrepresentation/Constructive Fraud - Precluded by the economic loss doctrine. Defendants' demurrers are sustained with prejudice.
    - Conversion - The economic loss doctrine does not bar the plaintiffs' conversion claim, and the defendant's demurrer is overruled
    - Breach of Contract - Defendants' demurrer is overruled
    - Conspiracy- Defendants' demurrer is overruled
    - Unjust Enrichment - Defendants' demurrer is overruled
    - Preliminary and Permanent Injunction – Plaintiffs' request for injunctive relief and Defendants' demurrer is overruled
    - Attachment - Defendants' demurrer is moot

Crosby v. ALG Tr., LLC, 296 Va. 561 (2018)

- **Facts:** Plaintiff asserted that Defendant breached its fiduciary duty as a trustee under a deed of trust during a foreclosure sale by failing to act impartially, failing to conduct a sale in a manner that would generate more money, and not timely responding to Plaintiff's request for the amount required to reinstate the loan.

- **Cause of Action:** Breach of fiduciary duties/ breach of contract

- **Discussion of Source of Duty / Economic Loss Rule:** Applied the source of duty rule to determine that the claim was based on contract law, not tort or common law negligence. "[T]he breach of contractually implied duties is still contractual in nature." *Id.* at 189.

- **Holding:** Reversed and remanded on judgment sustaining Defendant's demurrer.

Tingler v. Graystone Homes, Inc., 298 Va. 63 (2019)

- **Facts:** Plaintiff pursued claims for negligence, asserting that Defendant failed to construct the home with reasonable care and alleging that Defendant did not fulfill its contractual obligations to deliver a properly constructed home. The case stemmed from construction defects in a newly built home purchased by Plaintiff from Defendant that led to mold.

- **Cause of Action:** Negligence and breach of contract

- **Discussion of Source of Duty / Economic Loss Rule:** The economic loss doctrine does not cover damage caused during a construction phase but may cover damage due to a defendant's malfeasance during post-construction repairs.

- **Holding:**
    - The trial court properly dismissed the family's tort claims alleging personal injury caused by conditions created during the construction process because they were entwined with a breach of the contract and did not reasonably fall outside of the contract relationship with the home builder;

- The family's amended complaint asserted a viable tort claim to the extent that they sought personal-property damage allegedly caused by the home builder's misfeasance during the repair phase after the construction of the home was completed where the builder's allegedly negligent actions had resulted in damage to other than the home itself;
- The contractual claims survived given the allegations of an agency relationship between the family and property owner and the owner's status as a third-party beneficiary.