

# The Economic-Loss and Source-of-Duty Rules and the Wall between Tort and Contract in Virginia

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As the Supreme Court of Virginia has repeatedly observed, it is inevitable that lawyers representing aggrieved parties will try to find ways to make tort claims out of contractual disputes.<sup>1</sup> In response to these efforts, Virginia courts have developed a series of doctrines designed to maintain a wall of separation between the realms of contract and tort law. For example, Virginia law prohibits the recovery of punitive damages in contract cases<sup>2</sup> and makes the violation of the obligation of contracting parties to act in good faith a contract rather than a tort claim.<sup>3</sup>

This article explores the origin and development of two doctrines—the economic loss and source-of-duty rules—that help form the wall between the realms of tort and contract. Each of these rules has wide application in the construction industry. The economic loss rule developed in response to attempts to use negligence claims to recover from construction project participants with whom the plaintiff had no direct contractual relationship. The source of duty rule developed where project participants sued their contractual privies in tort instead of contract. Both rules are designed to keep contract disputes on the contract side of the contract-tort divide.

## Contract vs. Tort

Contract and tort law developed to serve different functions. The law of contracts developed to enforce the intent of contracting parties as reflected in their agreements.<sup>4</sup> Tort law, by contrast, generally deals with situations where there is no agreement between the parties. Specifically, the

negligence cause of action evolved to provide a remedy for personal injury and property damage caused by careless behavior and arises out of a duty imposed by society to act reasonably.<sup>5</sup>

Contract law is not based on what is objectively reasonable. Instead, contract disputes are governed by the terms agreed on by the parties. In the construction industry, these agreements are often extremely detailed. For example, construction industry contracts often include time limits for giving notice of claims,<sup>6</sup> limitations on damages,<sup>7</sup> and provisions defining the scope of the parties' obligations.<sup>8</sup>

Where such contract provisions threaten to limit or prohibit a contract claim, tort law can become very attractive to the claimant.

The damages available in tort claims also make them more attractive than contract claims. Consequential damages are always available in negligence actions, but are available in contract actions only if the special circumstances causing them were within the contemplation of both contracting parties at the time they executed the contract.<sup>9</sup> In addition, punitive damages are sometimes available in tort claims but, as mentioned above, are not available in contract actions.

## The Economic Loss Rule

Troublesome contract provisions (particularly a "no damage for delay" clause) provided the backdrop to *Blake Construction Co. Inc. v. Alley*,<sup>10</sup> in which the Supreme Court of Virginia first clearly articulated the economic loss rule. In *Blake Construction*, a general contractor asserted a claim for professional negligence against the project architect, with whom the contractor did not have a contract, claiming economic losses.<sup>11</sup> To prevail on a contract claim against the owner, the contractor would have had to overcome the "no damage for delay" clause, so the negligence claim seemed more promising. But the trial court granted the architect's demurrer, and, in affirming, the Supreme Court reasoned that

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. 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."<sup>12</sup>

The Court also emphasized the importance of enforcing the terms of the applicable contract, noting that those involved in construction projects "resort to contracts and contract law to protect their economic interests" and that the contracts they enter define their rights and duties.<sup>13</sup> The court added that the negligence law standard of care is out of place where the loss claimed must be "defined by reference to [the standard of quality] which the parties have agreed upon."<sup>14</sup> Based on this reasoning, the Court concluded that "[u]nder the common law there could be no recovery by [the contractor from the architect] in tort for only economic loss in the absence of privity."<sup>15</sup>

The Court returned to this theme in *Sensenbrenner v. Rust, Orling & Neale, Architects Inc.*, holding that homeowners could not recover their "purely economic losses" in negligence from an architect and a subcontractor, with whom the plaintiffs had no direct contractual relationship.<sup>16</sup> The Court observed that "[t]he controlling policy consideration underlying the law of contracts is the protection of expectations bargained for" and concluded that because the plaintiffs suffered only "disappointed economic expectations" (the failure of some of the work "to meet the bargained-for level of quality") contract law must govern the dispute.<sup>17</sup>

The lesson of *Blake Construction* and *Sensenbrenner* is that a plaintiff involved in a web of contractual relationships may not recover purely economic losses in a negligence claim against a party with whom it has not contracted. This is Virginia's economic loss rule.<sup>18</sup>

### The Limitations of the Economic Loss Rule

Despite the sweeping language in the early economic loss rule cases, the rule developed with significant limitations. The primary limitations are threefold. First, it has been unclear since the Supreme Court articulated the rule whether it applies where the plaintiff and defendant are in privity. Second, the rule has generally been inter-

preted to apply only to negligence and constructive (negligent or innocent) fraud. Third, as the name of the rule suggests, it is limited to claims for purely economic loss.

The privity question arises because a central issue in *Blake Construction* was whether the Virginia statute abolishing the lack of privity defense in some cases<sup>19</sup> applied to allow a claim by a general contractor against an architect for purely economic losses. The Court held that because the anti-privity statute refers only to "injury to person or to property," it did not eliminate the privity requirement in economic loss cases.<sup>20</sup> As observed above, the Court also emphasized broader themes of duty and the enforcement of contracts, but the lack of privity between the parties played a key role in the Court's decision.

In an accounting malpractice case,<sup>21</sup> the Supreme Court suggested that economic losses may be recovered in negligence as long as the parties are in privity.<sup>22</sup> The Court suggested, in other words, that the economic loss rule applies only where the parties are not in privity and that the rule is essentially just another name for what is left of the privity doctrine.

Subsequent opinions of the Court have not resolved the privity question. In *Acordia of Va. Ins. Agency Inc. v. Genito Green LP*, the Court held, by implication, that where a plaintiff and defendant are in privity, the plaintiff may recover purely eco-

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nomically for negligent performance of a contract.<sup>23</sup> The Court cited the early economic loss rule cases and a later case,<sup>24</sup> but did not explain why purely economic losses were recoverable under a negligence theory where the parties are in privity. Two years after deciding *Acordia*, the Court applied the economic loss rule in *Filak v. George* to bar a constructive fraud claim where the parties were in privity.<sup>25</sup> Citing *Blake Construction* and *Sensenbrenner*, but not *Acordia*, the Court explained that "when a plaintiff alleges and proves nothing more than disappointed eco-

conomic expectations assumed only by agreement, the law of contracts, not the law of torts, provides the remedy for such economic losses.”<sup>26</sup> Courts have continued to come down on both sides of the privity question since the court decided *Filak v. George*.<sup>27</sup>

Like the possible privity limitation, the rule’s inapplicability to intentional torts may arise out of the rule’s connection to Virginia’s anti-privity statute, which applies only to negligence claims.<sup>28</sup> Although courts often substitute the word “tort” for “negligence” when describing the economic

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loss rule,<sup>29</sup> it has been applied almost exclusively to negligence claims.<sup>30</sup> While the rule has been applied to dismiss constructive fraud claims, this is because such claims are for negligent or innocent misrepresentations.<sup>31</sup>

The limit on the economic loss rule’s application to claims for purely economic loss is suggested by the name of the rule. This limitation also owes its origin to the rule’s connection to the anti-privity statute, which only eliminates the privity requirement in personal injury and property damage claims.<sup>32</sup> As applied, this limitation excludes from the rule’s scope all claims involving personal injury, but not all claims involving physical damage to property.<sup>33</sup>

#### **Enter the Source of Duty Rule**

The unresolved privity issue and the economic loss rule’s limitation to negligence claims led to the evolution of another rule regarding the distinction between tort and contract claims. The Supreme Court first articulated the new rule in *Richmond Metropolitan Authority v. McDevitt Street Bovis Inc. (RMA)*,<sup>34</sup> which involved claims for actual and constructive fraud. In *RMA*, the owner entered into an agreement with a contractor for the construction of a baseball stadium. More than ten years after the completion of the stadium, the owner discovered that the contractor had failed to comply with various specifications set forth in the agreement and had physically con-

cealed the area in which the work should have been performed, despite having represented under oath in pay applications and a certificate of substantial completion that its work had been completed in accordance with the agreement.<sup>35</sup> The owner initiated suit against the contractor. When the case arrived at the Supreme Court, it involved only the owner’s claims for actual and constructive fraud.

The Court explained that to determine “whether a cause of action sounds in contract or tort, the source of the duty must be ascertained.”<sup>36</sup> To maintain a tort action, the Court continued, the duty breached “must be a common law duty, not one existing between the parties solely by virtue of the contract.”<sup>37</sup> The Court concluded that because a contract between the parties was the source of the duty allegedly breached by the general contractor in *RMA*, the claims for actual and constructive fraud were inappropriate.<sup>38</sup>

The Court’s decision in *RMA* is not based on the economic loss rule and cites none of the economic loss rule cases. Indeed, as support for its holding the court cites a decision involving personal injuries.<sup>39</sup> Moreover, the claims in *RMA* do not fit into the typical mold of many of the economic loss cases: instead of attempting to sue a remote party, the plaintiff asserted its fraud claims against the contractor, with whom it did have a contract. The source of duty rule, however, is related to the economic loss rule in that both rules reflect the Supreme Court’s often-stated interest in maintaining the wall between tort and contract principles.

#### **The Scope of the Source of Duty Rule**

Unlike Virginia’s economic loss rule, which addresses non-privity situations, the source of duty rule applies where the plaintiff and defendant are in direct contractual privity. As a result, the source of duty rule moots the question concerning privity and the economic loss rule. Thus, when a plaintiff asserts a negligence claim against its contractual privity for purely economic loss, if the court does not dismiss the claim under the economic loss rule, then it should do so under the source of duty rule. Indeed, the Court could have based its ruling in *Filak v. George* on the source of duty rule instead of, or in addition to, the economic loss rule.<sup>40</sup>

Moreover, the application of the source of duty rule is much broader than the application of the economic loss rule. In particular, unlike the economic loss rule, the source of duty rule is not

limited to negligence claims. Thus, although the source of duty rule applies to negligence claims,<sup>41</sup> it also applies to intentional tort claims and has been applied to claims for fraud,<sup>42</sup> breach of fiduciary duty,<sup>43</sup> conversion,<sup>44</sup> intentional interference with contractual relations,<sup>45</sup> and for an alleged violation of North Carolina's unfair and deceptive trade practices act.<sup>46</sup>

The source of duty rule generally does not apply to fraudulent inducement claims because such claims do not arise from the contract between the parties, but from representations made before contract formation.<sup>47</sup> Imaginative attorneys have attempted to extend the fraudulent inducement concept to include postcontract misrepresentations made specifically to induce payment for defective work, but the Supreme Court recently rejected this argument.<sup>48</sup>

The source of duty rule may apply to claims for property damages as long as the damage arises out of the breach of a duty assumed by contract. Indeed, application of the source of duty rule in such cases should eliminate the need for courts to attempt to fit claims involving property loss under the economic loss rule umbrella. So, for example, the Fourth Circuit would not have had to rely on the economic loss rule in holding that the owner of a coin collection could not recover in negligence for the loss of the collection, as the court did in *Redman v. John D. Brush and Company*.<sup>49</sup> In *Redman*, the owner asserted a negligence claim against the manufacturer of the safe in which he had stored the collection. The court cited *Sensenbrenner* in ruling that the theft of a coin collection from a home safe was a purely economic loss.<sup>50</sup> With the emergence of the source of duty rule, there is no need to try to fit claims involving the loss of or harm to property into the economic loss rule because the source of duty rule applies to such losses as long as they arise out of a duty created solely by virtue of a contract.<sup>51</sup>

It is unclear whether the source of duty rule applies to claims for personal injury. Well before the *RMA* decision, the Supreme Court affirmed the dismissal of negligence claims for personal injuries because the plaintiffs sought "to establish a tort action based solely on the negligent breach of a contractual duty with no corresponding common law duty."<sup>52</sup> Then, after the *RMA* decision, the Supreme Court cited *RMA* in affirming the dismissal of a claim for personal injuries allegedly caused by fraud.<sup>53</sup> There has not, however, been widespread application of the rule to bar personal injury claims.<sup>54</sup>

A recent Supreme Court opinion illustrates the broad application of the source of duty concept. In *Station #2 LLC v. Lynch*,<sup>55</sup> the Court relied on the source of duty idea and cited *RMA* and other source of duty cases in holding that a conspiracy to breach a contract cannot constitute the "unlawful act" required to support a claim under Virginia's business conspiracy statute.<sup>56</sup> In explaining its ruling, the Court observed that the duty to perform as promised "springs solely from the agreement; the duty is not imposed extrinsically by statute, whether criminal or civil, or independently by common law."<sup>57</sup>

### Conclusion

Virginia's economic-loss and source-of-duty rules help maintain the wall between tort and contract law. The economic loss rule applies where the claim asserted is negligence and the parties are not in privity. The source of duty rule applies to negligence and many other tort claims where the parties are in privity. Together, the two rules may be evolving into a more comprehensive rule simply requiring that claims arising out of agreements be resolved pursuant to contract rather than tort law. Such a rule might be called the "contract loss rule" and would apply whether the controlling agreement is between the plaintiff and the defendant or between the plaintiff and another party. ◊

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### Endnotes:

- 1 See e.g. *Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983). In *Kamlar*, the court commented that limitations on 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 ON THE LAW OF TORTS*, §92 at p. 614 (4th Ed. 1971).
- 2 Punitive damages are available in a contract action only if the plaintiff proves "an independent, willful tort, beyond the breach of a duty imposed by contract." *Kamlar*, 224 Va. at 706, 299 S.E.2d at 517.
- 3 See *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33, 466 S.E.2d 382, 385 (1996).
- 4 See *First Security Federal Savings Bank v. McQuilken*, 253 Va. 110, 113, 480 S.E.2d 485 (1997) ("The scope of a release agreement, like the terms of any contract, is generally governed by the

- expressed intention of the parties.”). This fundamental principle is reflected in many rules of contract construction.
- 5 Fowler v. Harper et al., THE LAW OF TORTS 110-114 (2d ed. 1986).
- 6 See e.g. *TC Midatlantic Development Inc. v. Commonwealth*, 280 Va. 204, 695 S.E.2d 543, 545 (2010).
- 7 See e.g. *Nichols Construction Corp. v. Virginia Machine Tool Co.*, 276 Va. 81, 661 S.E.2d 467 (2008) (consequential damages waiver) and *Blue Cross of Southwestern Virginia v. McDevitt & Street Co.*, 234 Va. 191, 360 S.E.2d 825 (1987) (waiver of subrogation rights).
- 8 See *D.C. McClain Inc. v. Arlington County*, 249 Va. 131, 136-41, 452 S.E.2d 659 (1995).
- 9 *NAJLA Associates Inc. v. William L. Griffith & Co.*, 253 Va. 83, 85, 480 S.E.2d 492 (1997).
- 10 233 Va. 31, 353 S.E.2d 724 (1987). The “no damage for delay” clause is not mentioned in the opinion, but one of the authors of this article was involved in the case and is familiar with the contract between Blake Construction and the owner.
- 11 *Id.* at 32-33, 353 S.E.2d at 725. Both the general contractor and the architect had contracted with the owner, the Commonwealth of Virginia, in a typical design-bid-build arrangement.
- 12 *Id.* at 34, 353 S.E.2d at 726.
- 13 *Id.* at 35, 353 S.E.2d at 727 (1987).
- 14 *Id.* (quoting *Crowder v. Vandendeaale*, 564 S.W.2d 879, 882 (Mo. 1978)).
- 15 233 Va. at 36, 353 S.E.2d at 727. The court held that Virginia’s “anti-privy” statute, Va. Code § 8.01-223, “did not eliminate the requirement of privity in a tort action for economic loss alone.”
- 16 236 Va. 419, 374 S.E.2d 55 (1988).
- 17 *Id.* at 425, 374 S.E.2d at 58.
- 18 As discussed in the next section of this article, the rule may extend to negligence claims against contractual privies. For a more extensive discussion of the rule see Edward E. Nicholas III, *The Economic Loss Rule in Virginia*, 12 J. OF CIV. LITIG. 391 (2000-01).
- 19 VA. CODE § 8.01-223 provides: “In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense.”
- 20 233 Va. at 34, 36.
- 21 *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 (1993).
- 22 *Id.* at 326, n. 3. After referring to comments in two of its previous cases, the court stated that “when privity exists, economic losses may be recovered under a negligence theory.”
- 23 263 Va. 377, 560 S.E.2d 246 (2002). Applying agency principles in holding that the parties were in privity, the court rejected the defendant insurance broker’s argument that the trial court erred in allowing the plaintiff “to recover economic losses in a tort action” where the broker and the plaintiff were not in privity. 263 at 377, 560 S.E.2d at 249.
- 24 *Gerald M. Moore & Son Inc. v. Drewry*, 251 Va. 277, 280, 467 S.E.2d 811, 813 (1996). The *Acordia* court cited the following sentence: “[I]n the absence of privity, a person cannot be held liable for economic loss damages caused by [the] negligent performance of contract.” The question raised in the *Acordia* opinion is whether the rule ought to be that, where there is privity and economic losses therefore are recoverable, they are recoverable only in a contract action.
- 25 267 Va. 612, 594 S.E.2d 610 (2004). Virginia courts generally treat constructive fraud claims as negligence claims when considering whether the economic loss rule applies to such claims. For a discussion of constructive fraud claims in the professional liability context, see David E. Boelzner & Edward E. Nicholas III, *Professional Negligence Claims and Constructive Fraud Principles Do Not Mix*, 10 J. OF CIV. LITIG. 3 (1998).
- 26 *Id.* at 618.
- 27 *Compare McGlen v. Barrett*, 2009 WL 1032932 (Fairfax County 2009) (in applying the economic loss rule to dismiss a negligence claim in a non-privy situation, the court stated that “[w]ithout privity of contract, Plaintiff may not recover her economic losses against [the non-privy defendants] based on a theory of tort.”) and *Waytec Electronics Corp. v. Rohm and Haas Electronic Materials, LLC*, 459 F.Supp.2d 480, 491-92 (W.D.Va. 2006) (the court cited *Filak* in dismissing constructive fraud claim based on the economic loss rule despite privity).
- 28 See n. 19, *supra*.
- 29 The use of the word “tort” instead of the word “negligence” goes back to *Blake Construction*, in which the court construed Virginia’s general anti-privy statute, Va. Code § 8.01-223. Then and now, however, the statute applies only to recovery sought “from negligence.” *Id.* The statute is set out in n. 19, *supra*. In *Ward*, 246 Va. at 326, 435 S.E.2d at 632, the court, in commenting on one of its sweeping statements about the economic loss rule, noted that the statement “cannot fairly be interpreted to mean that economic losses are never recoverable in tort” and mentioned, by way of example, fraud, business conspiracy, and tortious interference with contract as torts not precluded by the rule. *Accord Pre-Fab Steel Erectors Inc. v. Stephens*, WL 891828 (W.D.Va. 2009) (holding that the economic-loss rule does not apply to a claim that defendants defrauded plaintiff by concealing unauthorized distributions from plaintiff’s account while performing services pursuant to a contract).
- 30 See *Ward*, 246 Va. at 326, n. 2, 435 S.E.2d at 632, n. 2 (1993). For a discussion of this point and some of the intentional tort theories that have been asserted in the construction context, see Stan Barnhill, *Intentional Tort Liability and the Economic Loss Rule: Novel Theories to Recover Damages Incurred on the Construction Project*, VIRGINIA LAWYER, Oct. 1995, at 22.
- 31 See e.g. *RMA Lumber, Inc. v. Pioneer Machinery LLC*, 2009 WL 3172806 (W.D. Va. 2009) (dismissing a constructive fraud claim based on the rule and noting that allegations of constructive fraud will not support a fraudulent inducement claim).
- 32 See n. 19, *supra*.
- 33 For example, *Sensenbrenner* involved physical damage to property but the court concluded that the damage constituted “economic loss” because it arose out of “nothing more than disappointed expectations.” 236 Va. at 425, 374 S.E.2d at 58.
- 34 256 Va. 553, 507 S.E.2d 344 (1998).
- 35 *Id.* at 555-56, 507 S.E.2d at 345.
- 36 *Id.* at 558, 507 S.E.2d at 347.
- 37 *Id.* (quoting *Foreign Mission Board v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144 (1991)).
- 38 256 Va. at 558, 507 S.E.2d at 347.
- 39 *Id.*, citing *Foreign Mission Board*, 242 Va. at 241, 409 S.E.2d at 145. In *Foreign Mission Board*, a missionary, on behalf of her children, alleged that the board failed to fulfill its contractual obligation to provide for the health and welfare of her children. The plaintiff alleged that the board knew that her husband, another missionary, had molested one of their children and failed to secure medical care for the child to prevent further molestation. The court held that the terms of the contract did not extend to protection from the father’s criminal acts. The plaintiff also claimed that the board negligently failed to use ordinary care to protect the children from their father but the court rejected the claim, holding that it was “based solely on the negligent breach of a contractual duty, with no corresponding common law duty.” 242 Va. at 241.
- 40 The Court noted in *Filak v. George* that “whatever duties [the defendant] may have assumed arise solely from the parties’ alleged contract.” 267 Va. at 619, 594 S.E.2d at 614. This is source of duty rule language.
- 41 See e.g. *Rossmann v. Lazarus*, 2008 WL 4550791 at \*5 (E.D.Va. 2008), *VA Timberline LLC v. Land Management Group, Inc.*, 471

- F.Supp.2d 630, 633-34 (E.D.Va. 2006) (applying the source of duty rule to dismiss a claim for “professional negligence”).
- 42 As discussed above, RMA involved fraud claims. See also *Dunn Construction Co. v. Cloney*, 278 Va. 260, 682 S.E.2d 943 (2009). But cf. *Pre-Fab Steel Erectors Inc. v. Stephens*, WL 891828 (W.D.Va. 2009) (holding that the source of duty rule does not apply to a claim that defendants defrauded plaintiff by concealing unauthorized distributions from plaintiff’s account while performing services pursuant to a contract).
- 43 See *Augusta Mutual Ins. Co. v. Mason*, 274 Va. 199, 207-08, 645 S.E.2d 290, 295 (2007). But see *Combined Insurance Co. of America v. Wiest*, 578 F.Supp.2d 822 (W.D.Va. 2008) (ruling that the source of duty rule did not require dismissal of an employer’s breach of fiduciary duty claim against an ex-employee and asserting that the defendant in *Augusta Mutual* was an independent contractor rather than an employee). The real source of friction between these opinions may be differing ideas about the source of an employee or independent contractor’s fiduciary duty. In *Augusta Mutual*, the Supreme Court mentioned that the fiduciary obligation arises from the employment contract, 274 Va. at 206-07, 645 S.E.2d at 294-95, but the District Court in *Combined Insurance* emphasized that an employee’s fiduciary obligation arises from “the common law.” 578 F.Supp.2d at 832. See also *Williams v. Dominion Technology Partners, L.L.C.*, 265 Va. 280, 576 S.E.2d 752 (2003) (judgment for plaintiff for breach of employee’s fiduciary duty reversed without discussing the source of duty rule).
- 44 See e.g. *Wachovia Bank, N.A. v. Ranson Tyler Chevrolet LLC*, 73 Va. Cir. 143, 2007 WL 6013146 (Roanoke City 2007) (source of duty rule requires dismissal of claim for conversion of keys and paperwork from automobile dealership) and *McDougald v. Homecomings Financial Network Inc.*, 2005 WL 2009291 (E.D.Va. 2005) (dismissing borrowers’ claim against lender for allegedly withholding funds due borrowers after foreclosure sale). But cf. *Pre-Fab Steel Erectors Inc. v. Stephens*, 2009 WL 891828 (W.D.Va. 2009) (holding that the source of duty rule does not apply to a claim that defendants stole from plaintiff while performing services pursuant to a contract).
- 45 *Princeton Woods LLC v. PNC Bank N.A.*, 2009 WL 3614983 (E.D.Va. 2009). But cf. *Stone Castle Financial Inc. v. Friedman, Billings, Ramsey & Co.*, 191 F.Supp.2d 652, 660-61 (E.D.Va. 2002) (rejecting the source of duty defense to a claim for intentional interference with prospective business advantage in which the plaintiff alleged that an investment banker caused a potential merger to fail by revealing confidential business information).
- 46 See *Old Dominion Freight Inc. v. Standard Security Life Ins. Co. of New York*, 73 Va. Cir. 441, 445-46 (Richmond County 2007). But see *Abi-Najm v. Concord Condominium LLC*, No. 091546, slip op. at 13-14 (Va. Sept. 16, 2010) (reversing the trial court’s dismissal of plaintiffs’ Virginia Consumer Protection Act claims against a condominium developer and holding that a statutory duty under the act exists “independent of the Contracts entered into by the parties.”)
- 47 RMA, 256 Va. 561, 507 S.E.2d 348. See also *Abi-Najm v. Concord Condominium LLC*, No. 091546, slip op. at 17. (Va. Sept. 16, 2010) But see *Augusta Mutual*, 274 Va. at 206, 645 S.E.2d at 294, in which the court applied the source of duty rule in affirming the dismissal of a fraudulent inducement claim where the party who allegedly committed the fraud already had a contractual relationship with the plaintiff when he made the statement in question.
- 48 *Dunn Construction*, 278 Va. at 268, 682 S.E.2d at 947.
- 49 111 F.3d 1174, 1182-83 (4th Cir. 1997).
- 50 *Id.* at 1183.
- 51 Other opinions addressing claims for physical damage to property other than the subject of the contract include *Lovevde v. Building Management Inc.*, 71 Va. Cir. 204 (Fairfax County 2006), *Ratliff v. Se&ME Inc.*, 2005 WL 1923109 (W.D.Va. 2005) and *School Board of Norfolk v. International Truck and Engine Corp.*, 62 Va. Cir. 466 (Norfolk 2003). Each of these opinions discusses whether the economic loss rule applies to such claims, but the source of duty rule seems to supply what should have been the controlling principle: claims for losses arising out of a breach of a duty assumed by contract should be decided under contract law.
- 52 *Foreign Mission Board*, 242 Va. at 241, 409 S.E.2d at 148.
- 53 *Yuzefovsky v. St. John’s Wood Apartments*, 261 Va. 97, 540 S.E.2d 134 (2001). The plaintiff asserted negligence and fraud claims against his landlord seeking to recover for personal injuries he suffered while being criminally assaulted “by a third party” while at his apartment complex. The court affirmed the dismissal of the negligence claim on grounds unrelated to the source of duty rule. 242 Va. at 110, 409 S.E.2d at 141. Regarding the fraud claim, the court held that the alleged misrepresentations were made too long before the attack to have constituted a proximate cause of the attacks. 242 Va. at 111-12, 409 S.E.2d at 142-43. The court also quoted RMA and observed that “[i]t is clear that the duty to refrain from making these statements relates to the contract [the tenant] was induced to sign, and not from a common law duty.” 242 Va. at 112, 409 S.E.2d at 142. In *McKesson Medical-Surgical Inc. v. Kearney*, 271 F.Supp.2d 827 (E.D.Va. 2003), which did not involve a claim for personal injury, the court characterized the part of *Yuzefovsky* mentioned above as “musings” and “dicta ... apparently added as a *note bene* ... inasmuch as it reaches beyond the argument of trial counsel.” 271 F.Supp.2d at 829.
- 54 See *Meng v. The Drees Co.*, 77 Va. Cir. 442, 443-44 (Loudoun County 2009) (in rejecting a motion to set aside a jury verdict for personal injury and other damages, the court held that the homebuilder had a common law duty to exercise reasonable care in building plaintiffs’ home “to avoid physical harm to persons and tangible things.”), *Gonella v. Lumbermens Mutual Casualty Co.*, 64 Va. Cir. 229 (Fairfax County 2004) (rejecting the source of duty defense to a negligence claim for personal injuries and other damages allegedly suffered in connection with allegedly defective construction work on plaintiffs’ home) and *Haga v. L.A.P. Care Services, Inc.*, 2002 WL 1754485 at \*4 (W.D.Va. 2002) (rejecting defendant’s motion to dismiss wrongful death negligence claim against nursing home, holding that the defendant owed its residents a “separate legal duty ... to exercise ordinary care for the safety of its residents.”). But cf. *Wert v. Jefferds Corp.*, 325 Fed.Appx. 175 (4th Cir. 2009) (citing RMA, the Fourth Circuit affirmed the trial court’s dismissal of plaintiff’s claim that lessor of forklift negligently caused his personal injuries because the only duty possibly breached by the lessor arose from the contract between the lessor and the plaintiff’s employer and not from common law).
- 55 280 Va. 166, 695 S.E.2d 537 (2010).
- 56 280 Va. at 174, 695 S.E.2d at 541.
- 57 *Id.*