



## Supreme Court of Virginia Provides Clarity in Application of "Economic Loss Doctrine"

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Designed to distinguish causes of action arising under duties imposed by contract from those arising under duties imposed by law, the "economic loss doctrine" remains a malleable legal issue which Virginia courts continue to refine. The Virginia Supreme Court's latest opportunity for such refinement came by way of its holding in *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350 (Sept. 16, 2010), in which the court reiterated the purposes of the economic loss rule and applied it to causes of action purportedly arising under the Virginia Consumer Protection Act ("VCPA") and fraud in the inducement.

In *Concord Condominium*, several purchasers of residential condominiums in Arlington County filed causes of action for breach of contract, violation of VCPA, and fraud in the inducement in connection with purchase agreements that they entered into with the defendant in 2005 and 2006. In the purchase agreements, Concord promised that each purchaser's condominium would be furnished with "Bruce Oak hardwood, 3/4" flooring; but, the agreements also stated that Concord could "substitute substantially equivalent materials and finishes for those specified" in the purchase agreement. *Id.* at 354-55. The purchasers claimed, however, that Concord used "prefabricated engineered hardwood, 3/8" [which was] not substantially equivalent to Bruce Oak hardwood, 3/4. Accordingly, the purchasers claimed that "Concord's intentionally false and misleading information concerning the flooring constituted misrepresentations of a material fact, and fraudulent acts in violation of the VCPA;" and, that "Concord knowingly misrepresented the quality of the flooring it would deliver . . . and absent those representations [the purchasers] would not have entered into the [purchase agreements]." *Id.* at 355-56. The purchasers sought compensatory damages in the amount of \$50,000 in relation to their contract and tort claims; and, sought \$350,000 in punitive damages, prejudgment interest, and costs, including attorney's fees, in connection with their tort claims. The trial court sustained demurrers to the purchasers' tort claims due to the economic loss rule, stating that the economic loss doctrine precluded those causes of action. The Supreme Court of Virginia reversed.

In its analysis, the Court stated that "the question whether the economic loss doctrine applies requires a court first to determine 'whether a cause of action sounds in contract or tort,'

ultimately by ascertaining ‘the source of the duty violated.’” *Id.* at 361. With respect to the VCPA, the Court stated that in making it unlawful for a supplier in connection with a consumer transaction to misrepresent the standard, quality, grade, style, or model of goods or services, the statute was designed to promote ethical dealings between suppliers and the consuming public. Therefore, “[t]his duty not to misrepresent . . . is a statutory duty that exists independent of the [purchase agreements and] the duty is ‘not one existing between the parties solely by virtue of the contract.’” *Id.* at 361-62. Because the purchasers had alleged Concord breached a duty independent of the purchase agreements, the trial court erred in sustaining Concord’s demurrer.

With respect to the fraud claim, the Court recognized that where a promise is made with the present intention not to perform, the promisor makes a misrepresentation of a present, material fact, which can support a claim for fraud. *Id.* at 363. The Court further noted the important distinction between misrepresentations made pre-contract and misrepresentations made post-contract, finding the latter generally did not support a tort claim because the agreement was the source of the duty breached. See, e.g., *Dunn Construction Inc. v. Cloney*, 278 Va. 260, 268 (2009) (holding that a misrepresentation made in order to obtain payment due under a contract did not give rise to a separate tort claim); *Augusta Mutual Ins. Co. v. Mason*, 274 Va. 199, 206 (2007) (holding that the duties about which the defendant made fraudulent representations arose from the contract already entered). Unlike the latter class of cases, the Court concluded the facts in Concord demonstrated that “[t]he fraud alleged by the Purchasers was perpetrated by Concord before a contract between the two parties came into existence, therefore it cannot logically follow that the duty Concord allegedly breached was one that finds its source in the [purchase agreements].” *Id.*