THE ECONOMIC LOSS RULE

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Louis A. Bledsoe, III

Special Superior Court Judge for Complex Business Cases

The "economic loss rule" originally arose in the context of products liability and has since found broader application in commercial litigation. In its broadest sense, the rule prohibits recovery in tort for purely economic loss incurred under contract law.

I. Origins in Products Liability

The economic loss rule, when referred to by that name specifically, originated in products liability cases. Prior to any North Carolina court's adoption of the rule, the United States Supreme Court discussed the rule and its rationale in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 856 (1986). "Charting a course between products liability and contract law," the question before the Court was "whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts." *E. River S.S. Corp.*, 476 U.S. at 859. In that case, which arose under admiralty law, the plaintiffs sought to recover in both tort and contract for the failure of turbines on boats chartered by plaintiffs. After discussing traditional product liability claims where concern for public safety justifies imposing a greater duty on the manufacturer, the Court distinguished that scenario from one in which the failure of the product itself is the injury:

> Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." . . . Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.

Id. at 872. The Court ultimately held that "whether stated in negligence or strict liability, no products-liability claim lies . . . when the only injury claimed is economic loss." *Id.* at 876.

Around the same time, the principles driving the Supreme Court's decision in *East River* also permeated the decision of the Fourth Circuit Court of Appeals in *2000 Watermark Association, Inc. v. Celotex Corp.*, 784 F.2d 1183 (1986). In that case, the Fourth Circuit was called upon to decide under South Carolina law whether a plaintiff in a products-liability case could assert a negligence claim for purely economic injuries. In examining the difference between contract and tort law, the Fourth Circuit noted that while contract law gives parties the freedom to allocate risk through the negotiation process, "[n]o such freedom is available under tort law, which assigns risk as a matter of law. This lack of freedom seems harsh in the context of a commercial transaction, and thus the majority of courts have required that there be injury to person or property before imposing tort liability." *Id.* at 1185–86. The court continued on to note that the distinction between recovery in tort and recovery in contract "is hardly arbitrary." *Id.* The court determined that the gravity and cost of personal injury or property damage justifies holding manufacturers to a standard of care based upon the exercise of due care. But the court reasoned that holding manufacturers to such a standard in the event that some product fails to meet the business needs of customers would only shift higher costs to the customer and render meaningless the UCC and other sources of law governing buyer-seller relationships.

The North Carolina Court of Appeals expressly adopted the economic loss rule in products liability cases in its 1990 decision in *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211, *rev. denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). In that case, the plaintiff had purchased two drying ranges for use in its textile manufacturing plant; the drying ranges each contained a large number of "pressure vessels." After one of the pressure vessels exploded and caused property damage, an inspection revealed that many of the other pressure vessels had not been damaged but were nevertheless defective. In its negligence claim against the defendants, the plaintiff sought to recover not only for the property damage caused by the explosion but for the cost of replacing the undamaged but defective pressure vessels. The court noted that North Carolina courts "had not decided whether, in the context of a products liability suit, purely economic losses can be recovered in an action for negligence." *Id.* at 432. Expressly adopting the economic loss rule as laid out in *2000 Watermark*, the Court of Appeals affirmed the trial court's order that the plaintiff's recoverable damages on the negligence claim could not include "economic or pecuniary losses such as the costs to replace property not damaged by the explosion described in the complaint." *Id.* at 431–32.

II. The *Ports Authority* Line of Decisions

Separate from *Chicopee* and *2000 Watermark* and frequently without specifically referencing the economic loss rule, North Carolina courts have long relied on a similar principle distinguishing between tort and contract law. In *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, the plaintiff sought to recover damages arising from leaking roofs at two of its facilities. 294 N.C. 73, 240

S.E.2d 345 (1978). The plaintiff asserted claims for breach of the construction contract and for negligence in constructing and installing the roofs. *Id.* at 80–81, 240 S.E.2d at 350. The court noted that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* at 81, 240 S.E.2d at 350. After surveying relevant case law, the court held that a tort action does not lie "against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or skill." *Id.* at 83, 240 S.E.2d at 351.[1]

The Court of Appeals affirmed this principle in another case, citing *Ports Authority* to hold that a plaintiff could not maintain a negligence claim "premised upon the allegation that defendant's failure to properly perform the terms of the contract" damaged the property—here, a mobile home—which was the subject matter of the contract. *Spillman v. American Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741–42 (1992). Significantly, the court in *Spillman* reached this result without relying on *Chicopee* or any case subsequent to North Carolina's express adoption of the economic loss rule.

Therefore, it appears that North Carolina has recognized two distinct lines of case law holding that purely economic loss is not recoverable in tort where a party has an adequate remedy in contract.

III. Marrying the *Chicopee* and *Ports Authority* Lines of Cases

Over the past two decades, North Carolina appellate courts have increasingly cited the *Chicopee* and *Ports Authority* lines of cases together, effectively unifying these sources of the economic loss rule. In *Reece v. Homette Corp.*, a products liability action arising out of damage to a mobile home, which was the subject matter of the plaintiffs' contract with the defendant, the Court of Appeals applied the economic loss rule as set out in *2000 Watermark* and *Chicopee.* 110 N.C. App. 462, 466–67, 429 S.E.2d 768, 770 (1993). At the same time, the *Reece* court cited *Ports Authority* and *Spillman* in support of its ruling that the plaintiffs could not recover in tort for damage to the subject matter of their contract. Subsequent cases show that the *Chicopee* and the *Ports Authority* lines of case law have been relied upon as proper sources for the economic loss rule. *See Moore v. Coachmen Indus.*, 129 N.C.

[1] In reviewing past case law, the *Ports Authority* court identified four general scenarios where a breach of contract may give rise to a tort action: (1) the injury was to someone other than the promisee; (2) the injury was personal injury to the promisee or property damage to property other than the subject matter of the contract; (3) although the injury was to the subject matter of the contract, the promisor owed some additional duty to safeguard the property, as in the case of a common carrier or bailee; (4) the injury was willful injury or conversion of the property by the promisor. *Ports Auth.*, 294 N.C. at 82, 240 S.E.2d at 350–51. These non-exclusive exceptions are consistent with the economic loss rule and may still be relied upon as good law. *Beaufort Builders, Inc. v. White Plains Church Ministries, Inc.*, 783 S.E.2d 35, 40 (N.C. App. Mar. 1, 2016) (citing the four *Ports Authority* exceptions).

App. 389, 499 S.E.2d 772 (1998); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 602 S.E.2d 1 (2004); *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 643 S.E.2d 28 (2007). Indeed, some later cases even describe the *Ports Authority* decision as the original source of the economic loss rule. *Lord*, 182 N.C. App. at 640, 643 S.E.2d at 31; *Beaufort Builders*, 783 S.E.2d at 40.

IV. Modern Distillation of the Rule: Duty Beyond the Scope of the Contract

In the products liability context, the economic loss rule specifically "prohibits the purchaser of a defective product from bringing a negligence action against the manufacturer or seller of that product to recover purely economic losses sustained as a result of that product's failure to perform as expected. . . . Indeed, such claims are governed by contract law." *Wilson v. Dryvit Sys.*, 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002) (citing *Moore* and *Chicopee* in a case arising out of damage caused by defective stucco cladding installed on plaintiffs' house). Contract law remedies include remedies under the law of warranties and the Uniform Commercial Code. *See Moore*, 129 N.C. App. at 398–99, 499 S.E.2d at 778.

The most recent statement of the economic loss rule by a North Carolina appellate court comes from a construction case bringing claims for negligent performance of a construction contract. The court in *Beaufort Builders, Inc. v. White Plains Church Ministries, Inc.*, stated:

> The economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. . . . [A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such an action.

— N.C. App. —, —, 783 S.E.2d 35, 39 (2016) (quoting *Lord*, 182 N.C. App. at 639, 643 S.E.2d at 30–31). Despites its origins in those fields, the economic loss rule has found application beyond pure products liability and construction scenarios.

Courts now often state the rule not merely in terms of damage to the subject matter of the contract but instead in terms of the duty owed under the contract. "To pursue a tort claim and a breach of contract claim concerning the same conduct, a plaintiff must allege a duty owed him by the defendant separate and distinct from any duty owed under a contract." *Kelly v. Georgia-Pacific, LLC*, 671 F. Supp. 2d 785, 791 (E.D.N.C. 2009) (quotation omitted). *See also Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at *47–50 (N.C. Super. Ct. Nov. 3, 2011) (collecting

cases). In other words, a plaintiff must identify and allege an "independent duty" owed by the defendant outside the scope of the contract. *Strum v. Exxon Co., USA*, 15 F.3d 327, 331 (4th Cir. 1994) (applying North Carolina law and citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111–12, 229 S.E.2d 297, 301 (1976) and *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983)).

The statement of the economic loss rule as requiring an independent duty in order to sustain tort and contract claims for the same conduct is well-grounded in North Carolina law. In *Paine, Webber, Jackson & Curtis, Inc. v. Stanley*, which the *Kelly* case cites, the Court of Appeals held that "an omission to perform a contractual obligation is never a tort unless such omission is also the omission of a legal duty." 60 N.C. App. 511, 517, 299 S.E.2d 292, 295–96 (1983) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 689, 120 S.E.2d 82, 88 (1961) and citing *Ports Authority*). *See also Hobston Constr. Co. v. Holiday Inns, Inc.*, 14 N.C. App. 475, 477, 188 S.E.2d 617, 618 (1972) (quoting *Greene* for the same rule).

In sum, as now stated, the economic loss rule limits "recovery in tort when a contract exists between the parties that defines the standard of conduct and which the courts believe should set the measure of recovery." *Akzo Nobel*, 2011 NCBC LEXIS 42, at *47–48. To state a viable claim in tort for conduct that is also alleged to be a breach of contract, a party must allege an identifiable, independent duty owed to him by the defendant separate and distinct from any duty owed under a contract. *Id.* (quoting *Kelly*, 671 F. Supp. 2d at 791).

III. Recurring Issues in Economic Loss Rule Cases

a. Privity of Contract/Availability of Contract Remedy

At least in products liability cases, courts will look to the availability of a contract remedy in deciding whether the economic loss rule applies. Indeed, the relevant inquiry is not whether the parties expressly entered into a contract but whether the plaintiff has some available remedy based in contract law. Therefore, if the plaintiff has a remedy in warranty or under the Uniform Commercial Code, the economic loss rule may bar products liability claims to recover purely economic loss.

Moreover, a defendant has traditionally not been required to show privity of contract in order to invoke the economic loss rule.[2] For example, in *East River*, *2000*

[2] "Privity is still required in an action for breach of implied warranties that seeks recovery for economic loss. . . . The rationale for this exception is that an action seeking to recover damages for economic loss is not a product liability action governed by the [North Carolina Products Liability Act, N.C. Gen. Stat. § 99B-1 *et seq.*]," which has disposed of privity of contract as an element for statutory claims alleging personal injury or property damage. *Atl.*

Watermark, *Chicopee*, and *Moore*, the Court applied the economic loss rule to bar tort claims against defendants who were not in privity of contract with the plaintiffs. For example, in *Moore*, the Court of Appeals barred the plaintiffs from recovering in negligence against both a component part supplier and the manufacturer of the plaintiff's RV, even though the plaintiff was not in privity of contract with the component part supplier. 129 N.C. App. at 402, 499 S.E.2d at 780.

Despite that general rule, however, North Carolina courts have on occasion declined to apply the economic loss rule on the theory that the plaintiff was not in privity with the defendant. For example, in *Lord*, the plaintiffs sued the general contractor from which they purchased their home and the subcontractor who manufactured defective trusses in the home. After a jury found the general contractor not liable but found the subcontractor liable, the Court of Appeals affirmed, holding that the economic loss rule did not apply because the plaintiff did not have a contract with the subcontractor. 182 N.C. App. at 643, 643 S.E.2d at 33. The Court of Appeals later affirmed *Lord*, distinguishing the holding in *Lord* from the holding in *Moore*. *See Hospira Inc. v. AlphaGary Corp.*, 194 N.C. App. 695, 705, 671 S.E.2d 7, 14 (2009) (holding that the trial court should have reinstated plaintiff's negligence claim where plaintiff had no apparent contractual remedy and the parties agreed they were not in privity of contract). In light of the Court's reasoning and its reliance on both *Lord* and *Moore*, it is likely that *Hospira* stands for the proposition that the economic loss rule applies when the plaintiff and the defendant are not in privity of contract so long as the plaintiff has some contract or warranty remedy against a defendant. *See Kelly*, 671 F. Supp. 2d at 795 (construing *Hospira*).

As a result, it appears current law provides that when a party seeks dismissal under the economic loss rule, the court need not inquire whether the parties are in privity of contract unless plaintiff does not have a remedy available to it under contract law.

b. Component Parts

In the products liability cases applying the economic loss rule, North Carolina courts have repeatedly held that "when a defective component of a larger system causes damage to the rest of the system, only economic loss has occurred, and the economic loss rule still applies." *Kelly*, 671 F. Supp. 2d at 793 (collecting North Carolina cases).

A specific body of case law has developed around the question of what is a "component part" of a home. In a number of cases in which plaintiff homeowners sued defendant manufacturers and contractors over structural damage caused by the use of synthetic stucco on exterior walls, courts held that the cladding was an integral

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Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 175 N.C. App. 339, 346, 623 S.E.2d 334, 339 (2006) (citation omitted).

part of the homes such that resulting damage to the home was only economic loss recoverable under contract law. *See Wilson*, 206 F. Supp. 2d at *754 (holding that no "other" property had been damaged by the defective cladding, and so the economic loss rule barred plaintiff's tort claims); *Land*, 165 N.C. App. at 884–85, 602 S.E.2d at 4 (holding that damage caused by defective siding constitutes damage to the house itself and that plaintiffs have suffered only economic loss). North Carolina courts have applied the same rationale to other defective aspects of a home. *See Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 415 S.E.2d 574 (1992) (leaving undisturbed trial court finding that water damage to flooring resulting from defective doors was only economic loss).

c. Application beyond buyer-seller settings

State and federal courts in North Carolina have employed the economic loss rule in a number of instances where the contract in question was a restrictive covenant or a services contract[3].

In *Akzo Nobel Coatings*, the plaintiff alleged, *inter alia*, that former employees were liable for fraud, negligent misrepresentation, and tortious interference for acts committed in violation of non-competition and non-disclosure agreements. 2011 NCBC LEXIS 42, at *3. After denying a motion to dismiss the breach of contract claims on the basis that the restrictive covenants were not unreasonable as a matter of law, the court evaluated each of the tort claims in light of the economic loss rule. *Id.* at *47. The court dismissed the fraud and negligent misrepresentation claims, after determining that the plaintiff "failed to allege the existence of a duty, owed to it by [the defendant], separate and distinct form the duty owed under the [contract.]" *Id.* at *56. The court similarly dismissed the tortious interference claim, stating that while the plaintiff had sufficiently pleaded the elements of such a claim, the plaintiff had not identified any duty not to solicit its customers and employees other than the duty owed under the defendant's non-solicitation agreement. *Id.* at *59. Therefore, the court held that "any breach of that contractual duty is properly actionable in contract, without the potential for an open-ended tort damage award." *Id.*

In a case dealing with similar claims but different facts, the court held that the economic loss rule did not bar some tort claims arising out of the alleged breach of restrictive covenants. *See Artistic S., Inc. v. Lund*, 2015 NCBC LEXIS 113, at *25 (N.C. Super. Ct. Dec. 9, 2015). In that case, several of the contractual duties owed by the defendant had expired years before the conduct alleged in the tort claims occurred. Although the plaintiff asserted tort claims for the same conduct alleged to be in breach of the employment agreements, the economic loss rule did not bar all of

[3] It should be noted that North Carolina appellate courts have often applied the economic loss rule to service contracts in construction cases. For instance, in *Ports Authority*, the court applied the economic loss rule to bar tort claims for negligent roofing work done under a services contract. *Ports Authority*, 240 S.E.2d at 351.

plaintiff's tort claims. Because the policy behind the economic loss rule is that "the open-ended nature of tort damages should not distort bargained-for contractual terms," the court concluded that the rule's policy would not be served "by barring tort claims . . . when there is no present contractual duty at the time of the alleged conduct." *Id.* (*citing Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 346 (4th Cir. 1998)).

In *Forest2Market, Inc. v. Arcogent, Inc.*, 2016 NCBC LEXIS 3, at *7 (N.C. Super. Ct. Jan. 5, 2016), the court dismissed claims for fraud, negligent misrepresentation, and negligent supervision where the parties' relationship was governed by an extensive services contract. The parties had entered into a contract in which defendants agreed to develop a new software platform for plaintiff's business; when defendants failed to deliver under the contract, the plaintiff alleged that the defendants had fraudulently overbilled and failed to supervise its employees during the course of the project. *Id.* at *8–9. The parties' contract specifically discussed defendant's duties with regard to billing and day-to-day management of the project. *Id.* at *10. The plaintiff ultimately failed to identify a separate and distinct duty owed by the defendant apart from its contractual duties, and so the court dismissed plaintiff's tort claims under the economic loss rule. *Id.* at *12.

The economic loss rule has also been applied to evaluate the viability of tort claims in a suit alleging breach of a licensing agreement. In *Silicon Knights, Inc. v. Epic Games, Inc.*, the court analyzed plaintiff's tort claims for fraud, tortious interference, and UDTPA violations in the context of the economic loss rule. No. 5:07-CV-275-D, 2011 U.S. Dist. LEXIS 31039 (E.D.N.C. Jan. 25, 2011). After determining that the allegations and evidence established those torts as separate and distinct from the claims for breach of the licensing and publishing agreements between the two video-game developers, the court determined that the economic loss rule did not require dismissal of plaintiff's tort claims.

d. Intentional Torts

North Carolina appellate courts have not directly spoken on the applicability of the economic loss rule to intentional tort claims. The Business Court and federal courts applying North Carolina law have often found sufficient factual and legal authority to dismiss intentional torts such as fraud and tortious interference, as discussed in the cases described above. *See also Broussard v. Meineke Disc. Muffler Shops,* 155 F.3d 331, 345–46 (applying economic loss rule to claims for fraud and negligent misrepresentation); *Wood Prods., Inc. v. Advanced Sawmill Machinery Equip., Inc.*, No. 5:06CV87, 2007 U.S. Dist. LEXIS 46245 (W.D.N.C. Jun. 25, 2007) (applying economic loss rule to dismiss negligent misrepresentation claim) Nevertheless, applying the economic loss rule to claims brought under the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.* ("UDTPA" or "Chapter 75") is a less settled matter of law.

In *Coker v. DaimlerChrylser Corp.*, 2004 NCBC LEXIS 2 (N.C. Super. Ct. Jan. 5, 2004), the Business Court applied the economic loss doctrine to dismiss claims for fraud and unfair and deceptive trade practices. The court relied on a Third Circuit decision to explain the rationale for applying the economic loss rule to intentional torts: "The economic loss doctrine is designed to place a check on limitless liability . . . and establish clear boundaries between tort and contract law. Carving out an exception for intentional fraud would eliminate that check on liability that blurs the boundaries between the two areas of law[.]" (citing *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 679 (3d Cir. 2002)).

The *Coker* decision was affirmed by the Court of Appeals on other grounds, 172 N.C. App. 386, 617 S.E.2d 306 (2005), but now-Supreme Court Justice Hudson, in a dissenting opinion, specifically challenged the application of the economic loss rule to Chapter 75 claims and fraud-based claims, reasoning that in fraud-based claims the loss is almost always purely economic. *Id.* at 406, 617 S.E.2d at 318. Her dissent reasoned that unfair and deceptive trade practices claims are creatures of statute, and "the economic loss rule is judicial, not legislative, and must give way to specific legislative policy pronouncement allowing damages for economic loss." *Id.* at 406–07, 617 S.E.2d at 319 (Hudson, J., dissenting) (quoting National Consumer Law Center, *Unfair and Deceptive Trade Practices Manual*, S. 4.2.16.2 (6th Edition 2004), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006).

North Carolina appellate courts have not squarely resolved the question raised by Justice Hudson's dissent in *Coker*. In at least one opinion, however, it appears that the Court of Appeals has forecast its agreement with Justice Hudson with respect to UDTPA claims. In response to an argument that a UDTPA claim could only survive if it was based on an identifiable and distinct duty from that owed under a contract, the Court of Appeals concluded that *Ports Authority* "[was] not controlling for several reasons," the first of which was that "an unfair trade practices action is neither wholly tortious nor wholly contractual in nature." *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 847–48, 733 S.E.2d 162, 173 (2012).

Following the *Coker* case, a number of trial courts have applied the economic loss rule to fraud-based and UDTPA claims in the absence of any further ruling by the North Carolina appellate courts. *See, e.g.*, *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614 (M.D.N.C. 2006) (dismissing a UDTPA claim under the economic loss rule but limiting its decision to the facts of the case); *Watson v. Fleetwood Motor Homes of Indiana, Inc.*, No. 1:06cv275, 2007 U.S. Dist. LEXIS 53623 (W.D.N.C. July 24, 2007) (dismissing UDTPA claim under the economic loss rule where the plaintiffs essentially alleged a breach of warranty); *Akzo Nobel Coatings*, 2011 NCBC LEXIS

42, at *56 (dismissing fraud claim under the economic loss rule where defendant allegedly misrepresented his compliance with an employment agreement).[4]

Other courts, however, have shown reluctance to apply the economic loss rule to UDTPA claims in light of the uncertainty of the rule's application to such claims in our state. *See Ellis v. Louisiana-Pacific Corp.*, 699 F.3d 778, 786–87 (4th Cir. 2012) (applying North Carolina law and affirming on other grounds the trial court's dismissal of a UDTPA claim under the economic loss rule); *Ramsey v. Bimbo Foods Bakeries Distrib., LLC*, No. 5:15-CV-6-BR, 2015 U.S. Dist. LEXIS 47127, at *18–19 (E.D.N.C. Apr. 10, 2015) (collecting cases and declining to extend the economic loss rule to bar a UDTPA claim under North Carolina law). Judges encountering the economic loss rule as a challenge to an unfair and deceptive trade practices claim should be advised that this is a question of law ripe for clarification by our appellate courts.

IV. Conclusion

The economic loss rule generally bars recovery in tort when a plaintiff can recover in contract for the same loss. Because the rule originated in the products liability context, there is an expansive body of case law applying the rule to claims in that field. The application of the rule in commercial settings occurs with some regularity in the Business Court and in federal courts, although North Carolina appellate courts have not specifically addressed such claims.

V. Summary/Practice Pointers

- The economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law.
- Economic loss is injury to the subject matter of the contract. Personal injury or damage to property other than the subject matter of the contract can be recovered in tort, even in the presence of a contract.
- In products liability and construction defect cases, damage to the larger product caused by a component part is still "economic loss."
- Alternatively, a plaintiff must allege a duty "separate and distinct" from the duty owed under a contract to maintain both tort and contract claims arising from the same conduct.

[4] In some instances where a party seeks application of the economic loss rule to an UDTPA claim, it may be possible to resolve the matter under the "well recognized" rule "that actions for unfair or deceptive trade practices are distinct from breach of contract" and that a party's breach of contract, "even if intentional, is not sufficiently unfair or deceptive to sustain an action under [Chapter 75.]" *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992). In order to sustain a Chapter 75 claim on the basis of an alleged breach of contract, the plaintiff must show "substantial aggravating circumstances." *Id. See Forest2Market*, 2016 NCBC LEXIS 3, at *12–13 (dismissing some tort claims under the economic loss rule but dismissing a Chapter 75 claim for failure to show substantial aggravating circumstances attendant to a breach of contract).

- Privity of contract is generally not needed to invoke the economic loss rule.
- The economic loss rule originated in products liability and construction cases. Courts have since applied the rule in the context of employment agreements and various service contracts.
- North Carolina appellate courts have not expressly embraced the application of the economic loss rule to intentional torts, including claims under Section 75-1.1.