RECENT DEVELOPMENTS IN BUSINESS LITIGATION

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This article highlights significant business litigation cases decided from October 1, 2013, through September 30, 2014, addressing: (1) civil RICO, where federal courts attempted to clarify the necessary elements to plead and prove civil RICO claims; (2) fraud and misrepresentation, in which courts considered a number of cases in the securities fraud context, including a Supreme Court decision on the reliance presumption in such cases; (3) breach of contract, addressing recent developments relating to preemption by federal law and payments made under protest; (4) breach of fiduciary duty, where minority rights are implicated and potential development of federal common law where insider information is involved; and (5) remedies, including a discussion of developments relating to the expansion and contraction of the application of the economic loss rule in several states.

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I. CIVIL RICO

During the past year, federal courts continued to evaluate a plethora of civil RICO lawsuits. The case law discussed in this survey focuses on two primary reasons for dismissal: inadequate pleadings and extraterritorial conduct. However, the Second Circuit issued a decision noting RICO may apply extraterritorially if the proper predicate is established to attach liability to extra-territorial conduct.

To succeed on a RICO claim, a plaintiff must prove, among other elements, injury that was "by reason of" the substantive RICO violation (i.e., proximate cause).[1] Multiple federal courts of appeals addressed the injury requirement under RICO in the past year.

In *Corcel Corp., Inc. v. Ferguson Enterprises, Inc.*, the Eleventh Circuit reversed the district court's dismissal of Corcel's complaint, holding that Corcel properly alleged a RICO claim, including a direct relation between its claimed injury and Ferguson's federal civil RICO violations sufficient to constitute proximate causation.[2] Corcel alleged that Ferguson, its competitor in the plumbing supply business, formed two enterprises to fraudulently procure plumbing supply contracts through the improper use of Palm Beach County's Small Business Enterprise Program, a program in which any certified member would receive a preference when bidding for supply contracts.[3] Corcel further alleged that Ferguson fraudulently procured its member status by preparing false affidavits, altering manufacturers' product packing, and submitting false documents to the county, which resulted in the award of multiple contracts by the county to Ferguson that should have been awarded to plaintiff as the next lowest bidder.[4]

The Eleventh Circuit explained that proximate cause requires, for federal RICO purposes, "some direct relation" between the injury asserted and the injurious conduct.[5] Here, the Eleventh Circuit held that Corcel established a direct relation between its claimed injury and Ferguson's RICO violations.[6] First, Corcel was next in line to receive the plumbing supply contracts if not for the county's reliance on defendants' false documentation; and second, Corcel's damages were ascertainable because plaintiff could prove the alleged profit it would have made for each contract it would have won but for defendants' fraudulent actions.[7] Therefore, the court concluded that Corcel properly pleaded "a sufficiently

1. 18 U.S.C. § 1964(c).
2. 551 F. App'x 571 (11th Cir. 2014).
3. *Id.* at 573.
4. *Id.*
5. *Id.* at 576.
6. *Id.* at 577.
7. *Id.* at 577–78.

direct injury given the factual allegations that directly correlate the defendants' alleged fraud and plaintiff's lost opportunity to obtain the County's business."[8]

In contrast to *Corcel*, the Eleventh Circuit affirmed dismissal of a RICO claim in *Simpson v. Sanderson Farms, Inc.*[9] The court in *Simpson* examined whether the plaintiffs Melissa Simpson and Sabrina Roberts—two former employees of a poultry processing plant owned by Sanderson Farms—alleged enough facts to state a civil RICO claim.[10] Specifically, the issue was whether Simpson and Roberts plausibly alleged that: (1) they were actually injured, and (2) the predicate RICO violations were a proximate cause of the injury.[11]

Simpson and Roberts, on behalf of a putative class, filed an amended complaint alleging a pattern of racketeering activity on the part of Sanderson Farms based on its fraud and misuse of visas, permits, and other documents in violation of 18 U.S.C. § 1546, by hiring undocumented employees and accepting false identification documents, which allegedly depressed the wages Sanderson Farms paid to all genuinely work-authorized employees.[12] In upholding dismissal, the Eleventh Circuit held that Simpson and Roberts failed to allege actual injury as they only suggested in conclusory fashion that Sanderson Farms lost profits or that their wages decreased (or increased at a slower rate) due to defendant's use of undocumented workers.[13] Simpson and Roberts relied on a vague market theory, simply alleging that the number of undocumented workers in the labor pool implied wages paid to legal workers were lower.[14] The court held Simpson and Roberts had offered no facts, no market data, and no details to allege § 1964(c)'s injury element above the speculative level.[15] The court also found they failed to adequately plead their alleged injury occurred "by reason of" Sanderson Farms' § 1546 misconduct because they failed to show wage depression was the "natural consequence" of its alleged § 1546 violation.[16]

The Seventh Circuit also grappled with proximate cause in the RICO context in *Empress Casino Joliet Corp. v. Johnston*.[17] The plaintiffs, who were owners and operators of riverboat gambling casinos, alleged that the defendants, who were members of the horseracing industry, bribed

8. *Id.* at 579.
9. 744 F.3d 702 (11th Cir. 2014).
10. *Id.* at 704.
11. *Id.*
12. *Id.* at 705–07.
13. *Id.* at 712.
14. *Id.* at 709–10.
15. *Id.* at 712.
16. *Id.*
17. 763 F.3d 723 (7th Cir. 2014).

then-Governor Rod Blagojevich in 2006 and 2008 to sign two bills that imposed a 3 percent tax on the casinos that was placed into trust for the benefit of the horse racing industry.[18] The district court granted summary judgment in favor of the defendants on the casinos' RICO claim under 18 U.S.C. § 1962(d), which was based on a claimed conspiracy to exchange campaign contributions for state action.[19] The district court found that there was triable evidence of a pattern of racketeering activity, an enterprise-in-fact consisting of Blagojevich and other participants, as well as evidence of bribery, but determined that the casinos could not show that the alleged bribes proximately caused their injury.[20]

The Seventh Circuit, addressing only the proximate cause element of the RICO claim, reversed the finding of insufficient evidence to survive summary judgment on the 2008 bill and alleged bribery, but not on the 2006 bill.[21] As to the 2006 bill, the Seventh Circuit held that the casinos "have not pointed to evidence that would allow a factfinder to conclude the racetracks' alleged bribery scheme caused the legislature to pass the 2006 Act."[22] As to the 2008 bill, the casinos alleged the racetracks and the governor agreed to a quid pro quo. Specifically, they alleged that in exchange for the governor's signature on the 2008 bill, the racetracks promised to give $100,000 to his campaign fund and, thus, the 2008 bill became law as a direct result of the agreement to trade money for the governor's signature.[23] As such, the Seventh Circuit reversed the district court's holding as to the 2008 bill, finding that the casinos' injury could have resulted from the racetracks' conduct since the object of the "conspiracy was to bring the 2008 Act into effect in exchange for a cash bribe" and that "the Act harmed the casinos to the tune of 3% of their revenue. . . ."[24]

In *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, the Ninth Circuit did not address proximate cause under RICO but, somewhat relatedly, ruled on the question of whether the plaintiffs—purchasers of commercial real estate—presented allegations of a business deal gone bad sufficient to support a RICO claim resting on allegations of mail and wire fraud.[25] The plaintiffs alleged that twenty-two real estate properties they purchased for $30.3 million from sellers and brokers of commercial were really worth only $11.1 million.[26] The buyers alleged that the sellers and brokers inflated property values by conspiring to add commercial

18. *Id.* at 725.
19. *Id.* at 727.
20. *Id.*
21. *Id.* at 725.
22. *Id.* at 729.
23. *Id.* at 731.
24. *Id.* at 733.
25. 751 F.3d 990 (9th Cir. 2014).
26. *Id.* at 993.

leases on the properties paying inflated rents and used sham appraisals for the properties to appear more valuable to prospective purchasers.[27]

In affirming the district court's dismissal, the Ninth Circuit held the "complaint's factual allegations d[id] not support a plausible inference that Defendants had the required specific intent to defraud" such that the buyers could support the racketeering element of RICO.[28] The Ninth Circuit noted the complaint alleged no specific facts supporting its conclusion that the properties' "true fair market value was just $11.1 million" or that "defendants' statements were deceitful."[29] In an effort to sustain claims for mail and wire fraud as the predicate acts for racketeering activity, the buyers presented facts that were consistent with both their own theory of fraudulent intent and an innocent alternative, to wit, that the deep national recession decreased the business viability of the commercial tenants and the property values.[30] Given the context surrounding the events that harmed the buyers, the Ninth Circuit held that the buyers needed to plead more to render their own theory "plausible" within the meaning of the Supreme Court's decisions in *Iqbal* and *Twombley*.[31]

The Second Circuit issued two decisions this past year addressing the pattern of racketeering element under RICO. In *W&D Imports, Inc. v. Lia*, the Second Circuit affirmed the dismissal of the plaintiff's RICO claims based on its failure to sufficiently plead either an open-ended or closed-ended pattern of racketeering activity.[32] W&D Imports had filed administrative protests in accordance with the New Jersey Franchise Practices Act, seeking an order prohibiting American Honda from granting a franchise to a competing dealership in Hamilton, New Jersey, within the "relevant market area" of plaintiff's own dealership.[33] After those administrative challenges failed, W&D Imports filed suit making a RICO claim and contesting American Honda's decision to award the Hamilton dealership to a potential competitor, Allstar.[34]

While W&D Imports argued on appeal it had established an open-ended pattern of racketeering activity by showing that although "the enterprise primarily conduct[ed] a legitimate business, the nature of the predicate acts themselves implie[d] a threat of continued criminal

27. *Id.* at 993–95.
28. *Id.*
29. *Id.* at 999–1000.
30. *Id.* at 999.
31. *Id.* at 998–99 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)).
32. 563 F. App'x 19 (2d Cir. 2014).
33. *Id.* at 20–21.
34. *Id.* at 21–22.

activity,"[35] the Second Circuit disagreed. In affirming dismissal of the RICO claims, the court held the "predicate acts all relate to the 'finite goal of gaining . . . approval of the All Star application for the Hamilton dealership,'" and thus, the operation of the Hamilton dealership did not imply a threat of continued criminal activity.[36] The court also held W&D Imports did not establish closed-ended continuity since the complaint only identified predicate acts extending over a one-and-a-half year period. The court relied on Second Circuit precedent requiring predicates acts extending over a "substantial period of time" amounting to at least two years.[37]

In *Crawford v. Franklin Credit Management Corp.*, the Second Circuit affirmed a grant of summary judgment to a group of lenders on Crawford's RICO claims because the evidence was insufficient to show a pattern of racketeering activity.[38] Crawford alleged the lenders fraudulently procured a mortgage on her home by claiming to be "foreclosure rescuers" and offering a special "bridge loan" that in actuality was a regular mortgage.[39] Crawford asserted that the lenders engaged in wire fraud, consisting of interstate telephone conversations and faxed documents to facilitate the promised bridge loan, and mail fraud, consisting of the mailing of monthly mortgage statements and default notices.[40]

The Second Circuit held the evidence presented by Crawford failed to permit a rational inference of either open-ended or closed-ended continuity of racketeering activity.[41] The court reasoned that "[m]ere mailings of monthly statements seeking payment with respect to a single debt or communications . . . in connection with an action on that debt do not . . . amount to or suggest a threat of continued criminal activity. . . ."[42] Thus, the lenders were entitled to summary judgment on the RICO claims asserted.

Finally, in *European Community v. RJR Nabisco, Inc.*, the Second Circuit breathed new life into a long-pending litigation brought by the European Community and twenty-six of its Member States against RJR Nabisco involving a purported global money-laundering scheme in connection with the sale of cigarettes.[43] In doing so, the court clarified

35. *Id.* at 23–24 (quoting Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc., 187 F.3d 229, 243 (2d Cir. 1999)). The predicate acts alleged consisted of fraudulent mailings between Allstar and American Honda. *See* W&D Imports, Inc. v. Lia, 2013 WL 1750892 (E.D.N.Y. Apr. 22, 2013).

36. *Id.* at 24 (quoting W&D Imports, 2013 WL 1750892, at 7).

37. *Id.* (citing Defalco v. Bernas, 244 F.3d 286 (2d Cir. 2001)).

38. 758 F.3d 473 (2d Cir. 2014).

39. *Id.* at 478–79.

40. *Id.* at 488.

41. *Id.*

42. *Id.*

43. 2014 WL 4085863, (2d Cir. Apr. 22, 2013).

its seemingly blanket rejection of RICO extraterritoriality in *Norex Petroleum Ltd. v. Access Industries, Inc.*,[44] stating the district court was mistaken in interpreting *Norex* to hold that RICO can never apply extraterritorially.[45]

The European Community alleged that RJR Nabisco directed, managed, and controlled a global money-laundering scheme with organized crime groups in violation of the RICO statute.[46] The complaint described a multistep scheme in which illegal narcotics were smuggled into Europe by Colombian and Russian criminal organizations and sold for euros, which were then laundered by the criminal organizations using money brokers.[47] The brokers allegedly then sold the euros to cigarette importers at a discounted rate and the importers used the euros to purchase RJR cigarettes from wholesalers which had purchased the cigarettes from RJR.[48] Further, the complaint alleged that (1) RJR directed and controlled this money-laundering scheme utilizing other companies to handle and sell their products, (2) RJR executives traveled from the United States to Europe to facilitate the money-laundering, (3) RJR shipped cigarettes through Panama in order to use Panama's secrecy laws, (4) RJR employees bribed border guards, (5) RJR communicated through international mail and wires, (6) RJR employees filed large volumes of fraudulent documents with U.S. Customs, and (7) the money-laundering involved millions of dollars allegedly laundered through the Bank of New York by Russian organized crime.[49] The complaint asserted that in the course of executing this scheme, RJR committed various predicate racketeering acts, including mail fraud, wire fraud, money-laundering, and violations of the Travel Act.[50]

The district court dismissed the European Community's RICO claims on the ground that RICO had no application to activity outside the territory of the United States and could not apply to a foreign enterprise.[51] The Second Circuit, however, reversed and held that RICO applies extraterritorially "if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[52] The court reasoned that, while some RICO predicates do not mention any extraterritorial application, others clearly apply to extraterritorial conduct.[53] Specifically, the Second Circuit held that the European Community's allegations of

44. 631 F.3d 29 (2d Cir. 2010).
45. *European Community*, 2014 WL 4085863, at *3.
46. *Id.* at *2.
47. *Id.*
48. *Id.*
49. *Id.* at *1–2, 9.
50. *Id.* at *7.
51. *Id.* at *1.
52. *Id.* at *4.
53. *Id.* at *5–6.

predicate acts involving RJR's alleged money laundering and providing material support of terrorism were sufficient to support RICO claims because the predicate statutes applied extraterritorially in the circumstances alleged in the complaint.[54]

II. FRAUD AND MISREPRESENTATION

In the past year, both federal and state courts have published decisions contributing to the development of fraud and misrepresentation law. The cases discussed here have evaluated the viability of well-settled precedent, resolved or added to conflicts among authorities, and decided issues of first impression.

In a highly anticipated decision, the U.S. Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.*[55] declined to overrule or modify its 1998 decision in *Basic Inc. v. Levinson*[56] that allowed plaintiffs in securities fraud class actions to satisfy the element of reliance by invoking a presumption (the *Basic* presumption). The Court also resolved a circuit split by holding that defendants in securities fraud class action cases may rebut the *Basic* presumption at the class certification stage by demonstrating a lack of price impact.

In *Halliburton*, the Erica P. John Fund alleged Halliburton and one of its executives (collectively, Halliburton) violated Section 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5.[57] The Court noted that investors in a securities fraud action may invoke the *Basic* presumption that anyone who buys or sells stock at the market price relies on public, material information, since "the price of stock traded in an efficient market reflects all public, material information—including material misstatements."[58] The Court further noted that a defendant may rebut the *Basic* presumption by, inter alia, demonstrating the purported misrepresentation did not affect the stock's price and thus had no "price impact."[59]

Halliburton contended class certification was inappropriate because the lack of a price impact from the purported misrepresentations served to rebut the *Basic* presumption.[60] Absent the *Basic* presumption, Halliburton

54. *Id.* at *7. The Second Circuit also concluded that although the mail fraud, wire fraud, and Travel Act violations did not apply extraterritorially, plaintiffs alleged that these predicate acts were completed in the United States, supporting domestic RICO claims as well. *Id.* at *7, 9.

55. 134 S. Ct. 2398 (2014).

56. 108 S. Ct. 978 (1988).

57. *Halliburton*, 134 S. Ct. at 2405.

58. *Id.*

59. *Id.*

60. *Id.* at 2406.

argued that reliance would have to be proven on an individual basis. Thus, individual issues would predominate over common issues and defeat class certification.[61] The district court declined to consider Halliburton's argument, certified the class, and the Fifth Circuit affirmed.[62] The Fifth Circuit held that while a defendant could use price impact evidence at trial to rebut the presumption of reliance, it could not be used for that purpose at the class certification stage.[63]

The Supreme Court rejected the Fifth Circuit's reasoning, explaining it would "lead to bizarre results" to deny defendants the ability to introduce price impact evidence at the class certification stage for the purpose of rebutting the *Basic* presumption.[64] The Supreme Court observed that plaintiffs are permitted to introduce price impact evidence at the class certification stage to demonstrate market efficiency—a prerequisite to invoking the *Basic* presumption—and, likewise, defendants may introduce price impact evidence prior to class certification to counter such a showing.[65] In the absence of price impact, the *Basic* presumption of reliance collapses, and each plaintiff would be obligated to prove reliance individually. As such, the Supreme Court concluded that price impact is an essential precondition for any Rule 10b-5 class action, explaining that "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct evidence that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."[66]

The Supreme Court also reconsidered the general viability of the *Basic* presumption of reliance in the context of securities fraud cases.[67] Finding no "special justification" for overturning this long-settled precedent, the Court rejected several of Halliburton's arguments and observed Halliburton's failure to identify "the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities."[68]

On March 31, 2014, the Supreme Court denied a petition for a writ of certiorari from the Fourth Circuit's decision in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*,[69] which sought review of the current circuit split regarding the requirements under Rule 9(b) in the

61. *Id.*
62. *Id.*
63. *Id.* at 2406–07.
64. *Id.* at 2415.
65. *Id.*
66. *Id.* at 2416.
67. *Id.* at 2407.
68. *Id.* at 2407–10.
69. 707 F.3d 451 (4th Cir. 2013).

context of the False Claims Act, leaving the issue open for further development.[70] The following three decisions resulted.

In *Foglia v. Renal Ventures Management, LLC*, the Third Circuit added to an existing circuit split by holding that a relator under the False Claims Act need not identify a representative sample of specific false claims made to the government in order to satisfy the heightened pleading requirement of Rule 9(b), but need only allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[71]

Foglia alleged that Renal Ventures violated the False Claims Act by, inter alia, falsely submitting claims for reimbursement for the drug Zemplar.[72] The district court dismissed Foglia's complaint. In reversing, the Third Circuit noted the disagreement among the various circuits as to the necessary showing at the pleading stage for satisfaction of the particularity requirement of Rule 9(b) under the False Claims Act.[73] In rejecting the approach of the "Fourth, Sixth, Eighth, and Eleventh Circuits" requiring that a plaintiff show representative samples of false claims, the Third Circuit cited *United States ex rel. Wilkins v. United Health Group, Inc.*,[74] in which it noted that it had never "held that a plaintiff must identify the specific claim for payment *at the pleading stage*. . . ."[75] Moreover, the Third Circuit relied upon a brief for the United States as amicus curiae, filed in *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*,[76] in which the Solicitor General indicated that the rigid pleading standards required by the Fourth, Sixth, Eighth, and Eleventh Circuits are "unsupported by Rule 9(b) and undermine[] the [False Claims Act's] effectiveness as a tool to combat fraud."[77] The Third Circuit, thus, adopted the more "nuanced" approach followed by the First, Fifth, and Ninth Circuits and found that Foglia had provided sufficient facts to state a claim.[78]

Following the *Foglia* decision,[79] the Eighth Circuit, in *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, held that "a relator can satisfy Rule 9(b) without pleading representative examples of false claims

70. 134 S. Ct. 1759 (2014).
71. 754 F.3d 153, 155–56 (3d Cir. 2014) (quotation omitted).
72. *Id.* at 155.
73. *Id.* at 155–56.
74. 659 F.3d 295 (3d Cir. 2011).
75. 754 F.3d.at 155–56 (quotation omitted) (emphasis in original).
76. 707 F.3d 451 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014).
77. 754 F.3d at 156 (quotations omitted).
78. *Id.* at 156–58 (quotation omitted).
79. It bears note that *Foglia* characterized the Eighth Circuit as requiring that a plaintiff show representative samples of the alleged fraudulent conduct, thereby standing on the opposite side of the circuit split.

if the relator can otherwise plead the 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.' "[80]

Thayer alleged that Planned Parenthood violated the False Claims Act and the Iowa False Claims Act by submitting false or fraudulent claims for Medicaid reimbursement.[81] The district court granted Planned Parenthood's motion to dismiss Thayer's complaint on the ground that Thayer failed to allege fraud with particularity as required by Rule 9(b)."[82] In partially reversing, the Eighth Circuit clarified its prior decision in *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*,[83] which articulated the pleading requirements of Rule 9(b). In *Joshi*, the Eighth Circuit held that in the context of the False Claims Act,

> when a relator alleges that a defendant engaged in a systematic practice or scheme of submitting fraudulent claims, the complaint "must provide *some* representative examples of [the defendant's] alleged fraudulent conduct, specifying the time, place, and content of [the defendant's] acts and the identity of the actors."[84]

The Eighth Circuit, however, concluded that *Joshi*'s representative examples requirement need not be satisfied in every False Claims Act complaint.[85] Unlike the relator in *Joshi*—an anesthesiologist who lacked personal knowledge of the submission of the alleged fraudulent claims—Thayer oversaw Planned Parenthood's billing and claims systems and was able to plead personal, first-hand knowledge of its submission of false claims.[86] Under these circumstances, the Eighth Circuit found persuasive the approach of those circuits that concluded that a relator can satisfy Rule 9(b) by "alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[87]

The Second Circuit has not yet weighed in on the debate concerning the pleading requirements for Rule 9(b) under the False Claims Act but, notably, in *United States of America ex rel. Corporate Compliance Associates v. New York Society for the Relief of the Ruptured and Crippled*, the Southern District of New York suggested a possible addition to the circuit split.[88]

80. 2014 WL 4251603, at *4 (8th Cir. Aug. 29, 2014) (citation omitted).
81. *Id.* at *1.
82. *Id.* (quotation omitted).
83. 441 F.3d 552 (8th Cir. 2006).
84. 2014 WL 4251603, at *2 (emphasis in original) (citation omitted).
85. *Id.*
86. *Id.* at *3.
87. *Id.* (quotation omitted).
88. 2014 WL 3905742, at *11 (S.D.N.Y. Aug. 7, 2014).

In *Corporate Compliance Associates*, the plaintiff alleged, inter alia, that the defendant hospital presented false claims for payment under Medicare and Medicaid, thus violating the False Claims Act.[89] The court granted the defendant's motion to dismiss, finding that the complaint failed to satisfy Rule 9(b).[90] The court rejected the relaxed standard adopted by the Third, Fifth, Seventh, Ninth, and Tenth Circuits in favor of the approach adopted by the Eleventh and First Circuits, which requires allegations concerning the particulars of the purported false claims themselves, not merely allegations of an overall fraudulent scheme.[91] The court, in accordance with the recent decision of *United States ex rel. Kester v. Novartis Pharmaceuticals Corp.*,[92] concluded that a construction of Rule 9(b) that requires allegations concerning the particulars of the purported false claims was more consistent with decades of Second Circuit precedent.[93]

In light of the continued split among the circuits, it remains to be seen whether the Supreme Court will reconsider its refusal to offer guidance on the issue of the pleading requirements under Rule 9(b) in the context of the False Claims Act.

In *Loos v. Immersion Corp.*, the Ninth Circuit held, for the first time, that the announcement of an investigation, standing alone, is insufficient to establish the loss causation element of a securities fraud claim.[94] Loos challenged the district court's dismissal of his securities fraud class action due to, inter alia, his failure to establish loss causation.[95] With regard to the loss causation element which, at the pleading stage, requires plausible allegations that a defendant's fraud was "revealed to the market and caused the resulting losses," Loos alleged that Immersion's purported fraudulent accounting was revealed to the market through disclosure of disappointing earnings results followed by the announcement of an internal investigation into prior revenue transactions.[96]

In affirming the district court, the Ninth Circuit relied on the reasoning set forth by the Eleventh Circuit in *Meyer v. Greene*,[97] explaining that the announcement of an investigation does not reveal fraudulent practices to the market since, at the time an investigation is announced, the market cannot know what the investigation will ultimately uncover.[98] The announcement of an investigation simply puts investors

89. *Id.* at *6.
90. *Id.* at *1–2.
91. *Id.* at *11–13.
92. 2014 WL 2324465, at *11 (S.D.N.Y. May 29, 2014).
93. 2014 WL 3905742, at *15.
94. 2014 WL 3866084, at *1 (9th Cir. Sept. 11, 2014).
95. *Id.*
96. *Id.* at *5 (quotation omitted).
97. 710 F.3d 1189 (11th Cir. 2013).
98. *Loos*, 2014 WL 3866084, at *8.

on notice of a possible future disclosure of fraudulent conduct, and any decline in a corporation's share price following such an announcement is thereby attributable to market speculation about whether fraud has occurred.[99] Thus, the announcement of an investigation, without more, is insufficient to establish loss causation.[100]

The Ninth Circuit's decision could cause a decrease in the filing of certain securities fraud actions, since plaintiffs may now have to wait to file suit until there is some actual announcement of wrongdoing. In any event, the court's decision significantly bolsters the defense of securities fraud class actions at the pleading stage.

In *Landstar Inway, Inc. v. Samrow*, the Washington Court of Appeals, addressing an issue of first impression, held that a party seeking to disregard the corporate form due to fraud need not plead the fraud with particularity.[101] Landstar sued Frank Samrow and others concerning an accident involving one of its trucks that was purportedly caused by the negligence of a pilot car operator dispatched through a limited liability company, of which Samrow was a member.[102] The trial court granted Samrow summary judgment and dismissed him from the action, concluding that the facts did not merit disregarding the corporate form.[103]

The appellate court partially reversed, finding the existence of material issues of fact concerning whether Samrow committed fraud that abused the corporate form.[104] The court rejected Samrow's argument that it should not reach the merits of Landstar's corporate disregard theory based on Landstar's failure to properly plead the elements of fraud with the particularity required by Washington Superior Court Civil Rule 9(b).[105] After noting the absence of any Washington state precedent, the court referred to the decisions of the federal courts, but found a lack of consensus.[106] The court noted that corporate disregard is not a freestanding claim for relief, but is instead an equitable remedy; federal courts that declined to impose heightened pleading requirements in the context of corporate disregard did so on the ground that pleading standards only apply to claims for relief and not the relief itself.[107] Based on the foregoing, the court adopted the

99. *Id.*
100. *Id.*
101. 325 P.3d 327, 338 (Wash. Ct. App. 2014).
102. *Id.* at 332.
103. *Id.* at 334.
104. *Id.* at 336.
105. *Id.* at 337.
106. *Id.*
107. *Id.* at 337–38.

interpretation of those federal courts that do not require parties seeking to disregard the corporate form due to fraud to plead the fraud with particularity.[108]

III. BREACH OF CONTRACT

Contract litigation rarely invokes preemption arguments, but recently the U.S. Supreme Court unanimously held in *Northwest, Inc. v. Ginsberg*[109] that duties allegedly arising from a contract were preempted by the Airline Deregulation Act (ADA). That case began when Northwest Airlines terminated Rabbi Binyomin Ginsberg's frequent flyer membership shortly before its merger with Delta Airlines.[110] Northwest claimed the termination resulted from "abuse," but Ginsberg claimed the termination stemmed from the merger.[111] Ginsberg brought two causes of action against Northwest: (1) breach of contract and (2) breach of an implied covenant of good faith and fair dealing arising from the contract.[112]

The trial court dismissed Ginsberg's breach of contract claim because the agreement allowed Northwest to terminate a membership based on abuse at its sole discretion.[113] The trial court then dismissed Ginsberg's implied covenant claims because they were preempted by the ADA.[114] Ginsberg appealed the dismissal of his implied covenant claims, but not the dismissal of his breach of contract claims.[115] After the Ninth Circuit found that the ADA did not preempt Ginsberg's implied covenant claims, the U.S. Supreme Court granted certiorari.[116] The Court found that the implied claims were, in fact, preempted.[117] Expanding on the precedent laid by *American Airlines, Inc. v. Wolens*,[118] which preempts extracontractual state law claims "related to rates, routes, and services," the *Ginsberg* Court found that the implied duties under Minnesota law would have impermissibly expanded Northwest's duties beyond the parties' contract.[119] But the Court would go no further and denied Northwest's request for the court to preempt all state claims under the ADA.[120] The Court

108. *Id.* at 338.
109. 134 S. Ct. 1422, 1430–31 (2014).
110. *Id.* at 1427.
111. *Id.*
112. *Id.*
113. *Id.* at 1427–28.
114. *Id.*
115. *Id.*
116. Ginsberg v. Northwest, Inc., 695 F.3d 873 (9th Cir. 2012); Northwest, Inc. v. Ginsberg, 133 S. Ct. 2387 (2013).
117. *Ginsberg*, 134 S. Ct. at 1430–31.
118. 513 U.S. 219 (1995).
119. *Id.*
120. *Id.* at 1433.

noted that a state law regarding a rate or service escapes preemption if it allows a carrier to contract around those rules.[121] At that point, a carrier can contractually exclude that state's covenant under its agreements with its customers.[122]

Creditors often face the uncomfortable and irritating circumstance of receiving partial, incomplete payments that do not fulfill a debtor's obligations. The creditor often desires to keep its "bird in the hand" without waiving any additional rights or remedies. The Alaska Supreme Court, applying Ohio UCC law, recently made accepting a partial obligation even more difficult under the "battle of the forms" doctrine.[123]

In 2002, a dispute arose between ConocoPhillips Alaska and Williams Alaska Petroleum regarding the rate of interest on a certain prepayment of an obligation under a crude oil exchange agreement.[124] Under an adequate assurance of performance clause in the agreement, ConocoPhillips demanded that Williams transmit more than $35 million that would accrue at the "LIBOR six-month rate" for many years.[125] Weeks later, Williams responded by wiring approximately $31 million to ConocoPhillips and transmitting a letter stating that the money was intended to "avoid . . . litigation and resolv[e] the disputes" and that interest would accrue at a "rate prescribed by [the Federal Energy Regulatory Commission (FERC)]."[126] ConocoPhillips responded the same day, calling the transmission a "preliminary partial settlement" and stating that it "does not agree with all of the terms" of the letter.[127] ConocoPhillips's response did not specifically address the disputed interest rate, and communication regarding the issue ceased for years.[128]

In 2007, after a FERC rate-making case concluded, ConocoPhillips invoiced Williams for $167 million, giving credit for the $31 million prepayment and interest at the LIBOR rate.[129] Williams paid the amount less $5 million, accounting for the difference between the LIBOR rate and the FERC rate.[130] ConocoPhillips responded by revising its invoice to give no credit for any interest, asserting that the parties never agreed on the rate.[131]

121. *Id.*
122. *Id.*
123. ConocoPhillips Alaska, Inc. v. Williams Alaska Petro., Inc., 322 P.3d 114 (Alaska 2014).
124. *Id.* at 118.
125. *Id.* at 119.
126. *Id.* at 120.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

The Alaska trial court initially granted summary judgment to Williams, ruling that Williams' letter modified the exchange agreement in light of ConocoPhillips's "expression of acceptance" of the LIBOR rate.[132] Emphasizing that the only specific objection raised in ConocoPhillips' response was in connection with an unrelated, irrelevant issue, the trial court found that ConocoPhillips "grudgingly but definitively assented" to Williams's proposal of FERC interest.[133] Shortly thereafter, however, the trial court granted ConocoPhillips's motion for reconsideration on UCC grounds.[134] For the first time, ConocoPhillips raised the spectre of the well-known "battle of the forms" under UCC § 2-207.[135] After additional briefing, the trial court again ruled for Williams, but on different grounds. The trial court ruled that the parties' behavior created an implied-in-fact contract under UCC § 2-207(3).[136] After granting Williams its attorney fees, both parties appealed.[137]

After dispensing of preliminary issues regarding the UCC's application to contract amendments in addition to contract formation, the Alaska Supreme Court addressed the heart of the issue: whether ConocoPhillips's response was an acceptance or rejection of Williams's terms.[138] The court determined that rather than functioning as a rejection and counter-offer, ConocoPhillips's response served as a begrudging acceptance.[139] Acknowledging that a return document may "accept" a counter-offer despite containing "material alterations," the court emphasized that a counter-proposal is a cloaked acceptance—forming a contract—when it does not change "sufficiently important" terms.[140]

The court focused its analysis on UCC § 2-207(1), under which a contract's terms include all of an offeror's terms "which are not contradicted by the acceptance."[141] Disagreement as to one term, while indicating acceptance to an offer as a whole, should be expected to form a binding agreement, unless the offeree expresses unwillingness to proceed without

132. *Id.* at 121.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*; Ohio Rev. Code Ann. § 1302.10(A) & (B) (West 2013) ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.").
137. *Id.* (civil appeals in Alaska proceed directly to Alaska's Supreme Court).
138. *Id.* at 128.
139. *Id.* at 120–30.
140. *Id.*
141. *Id.* at 130–32.

assent to the additional or differing term.[142] Essentially, ConocoPhillips's failure to specifically object to the interest rate as opposed to failing to agree with all of the terms was a $5 million mistake.

IV. BREACH OF FIDUCIARY DUTY

In *Ritchie v. Rupe*, the Texas Supreme Court recently significantly changed the remedies available to minority shareholders based on breaches of fiduciary duties owed to them. Like most states, Texas common law had created fiduciary duties owed to minority shareholders and allowed the forced buyout of a minority interest based on a breach of those duties under certain circumstances. The court recently disclaimed many of those duties, limited others, and eliminated many remedies previously available to an aggrieved minority owner.[143] The court left intact some remaining "informal" duties, such as those arising from "a moral, social, domestic or purely personal relationship of trust and confidence."[144] Breaches of those duties might result in receivership, but not a court-ordered buy-out.[145]

The oppression at issue in *Ritchie v. Rupe* was not as severe as the oppression in many shareholder oppression cases. The parties' dispute arose when the trustee of a trust owning 18 percent of a corporation wanted to sell the trust's interests in the company.[146] The majority allegedly refused to meet with potential buyers and refused to share certain information with them.[147] The trustee sued the company, claiming the directors should have helped her sell the stock.[148] The trial court found the directors' refusal to conduct meetings or provide information to be a breach of their fiduciary duties to the minority shareholder and awarded damages of $7.3 million.[149] The Texas Court of Appeals agreed.[150] However, the Texas Supreme Court did not find the company's conduct oppressive.[151] After holding the refusal to cooperate in the sale was not oppressive, the court launched into lengthy dicta comprehensively reexamining minority shareholder oppression in Texas and its remedies.[152]

142. *Id.* at 129 n.53 (emphasis in original).
143. Ritchie v. Rupe, 2014 WL 2788335 (Tex. June 20, 2014).
144. *Id.* at *11 n.27.
145. *See id.* at *3–23.
146. *Id.* at *1.
147. *Id.* *2–3.
148. *Id.*
149. *Id.* at *3.
150. *Id.*
151. *Id.* at *10.
152. *Id.* at *13–23.

The sweeping opinion narrowed the definition of oppression to require (1) the intent to harm the interests of a shareholder, (2) actions inconsistent with the honest exercise of business judgment, and (3) the creation of a serious risk of harm to the corporation.[153] These three elements drastically differ from the previous "fair dealing" or "reasonable expectation" tests.[154] Notably, this narrower holding disapproved of seven Texas Courts of Appeals opinions.[155]

Importantly, *Ritchie v. Rupe* kept in place some duties in connection with employment of a minority owner.[156] While recognizing employment as an important aspect of minority shareholder oppression, Texas now seems to require an aggrieved shareholder/employee without an employment agreement to initiate a derivative action to enforce the lack of "uncorrupted business judgment for the sole benefit of the corporation."[157] The court stated the termination of employment might be oppressive under the state's receivership statutes, but that such cases would require "extreme circumstances."[158] Finally, the court specifically cited the following as other potential breaches of the remaining duty of loyalty: the failure to declare dividends, misappropriation of corporate funds, and the diversion of corporate opportunities as potential breaches of the duty of loyalty.[159]

The dissent emphasized that the majority was departing from the standards and remedies used for decades and by thirty-seven states.[160] The dissent's protests noted the disparity of outcomes that can result from the application of different states' laws. Choice-of-law determinations in connection with fiduciary duty cases might dispose of an entire case or save it.

Before 1997, a person with no duty to the shareholders of a company arguably owed no duty to disclose or abstain from trading based on insider information.[161] *United States v. O'Hagan* rejected that notion, requiring an individual to disclose insider information or abstain from trading based on the duties owed to the source of the information.[162] However,

153. *Id.* at *9.
154. *Id.* at *21.
155. *Id.* at *9 (expressing disapproval of Kohannim v. Katoli, 440 S.W.3d 798, 811–13 (Tex. App. 2013); Boehringer v. Konkel, 404 S.W.3d 18, 24 (Tex. App. 2013); Redmon v. Griffith, 202 S.W.3d 225, 234 (Tex. App. 2006); Cotton v. Weatherford Bancshares, Inc., 187 S.W.3d 687, 699–701 (Tex. App. 2006); Pinnacle Data Servs., Inc. v. Gillen, 104 S.W.3d 188, 196 (Tex. App. 2003); Davis v. Sheerin, 754 S.W.2d 375, 380 (Tex. App. 1988)).
156. *Id.* at *18–19.
157. *See id.*
158. *Id.* at *19.
159. *Id.* at *20–21.
160. *Id.* at *37 (J. Guzman, dissenting).
161. United States v. O'Hagan, 521 U.S. 642, 655 (1997).
162. *Id.* (emphasis added).

the definition and source of those duties remained murky. The inconsistent interpretations created serious problems, especially because "[f]ines, lost careers, and even jail terms rest on an uncertain articulation of when fiduciary relationships exist."[163]

Doug Whitman arguably fell victim to such uncertainty. Whitman received stock tips from individuals who, in turn, had received the information from allegedly low-level employees at Polycom, Inc., Google, Inc., and Marvell Technology, Inc.[164] Whitman then allegedly traded or agreed to trade based on the information.[165] Whitman and the United States disagreed whether he would have owed a duty under California fiduciary law as a "secondary tippee," and Whitman made a compelling argument that under California law, he would owe no duties in connection with the information.[166] Sidestepping the issue, the Southern District of New York and Second Circuit held that the issue was irrelevant because federal common law controlled Whitman's duties.[167] The Second Circuit summarily described this common law as requiring "a relationship of trust and confidence" between the tipper and the company's shareholders and stewards, or the "functional equivalent" of a fiduciary relationship.[168]

The effects of a new, nationwide fiduciary duty could be extremely expansive; a companion case to *Whitman* out of the Second Circuit notes that federally derived fiduciary duties arising from insider information do not necessarily require small, unregistered companies to issue audited financial statements.[169] But, remarkably, that case acknowledged that developing federal common law would require anyone in possession of insider information regarding the lowliest unregistered company to disclose insider information to anyone to whom those fiduciary duties are owed.[170] For now, mere compliance with fiduciary duties of a forum state might not be enough when buying or selling all sorts of securities.

In light of the Second Circuit's conflict with holdings by at least three circuits that fiduciary duties under securities laws arise from state law, Whitman's petition for certiorari to the U.S. Supreme Court was quickly

163. *See* Br. for Prof. Stephen M. Baimbridge as Amici Curiae Supporting Petitioner, Whitman v. United States, (2014) (No. 14-29) (citing Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 188 (1998)).

164. United States v. Whitman, 904 F. Supp. 2d 363, 365 (S.D.N.Y. 2012).

165. *Id.*

166. *Id.*

167. United States v. Whitman, 555 F. App'x 98, 107 (2d Cir. 2014); *Whitman*, 904 F. Supp. 2d at 369.

168. *Whitman*, 555 F. App'x at 107.

169. Steginsky v. Xcelera, Inc., 741 F.3d 365, 371 (2d Cir. 2014).

170. *Id.*

joined by two amici curiae.[171] They made compelling arguments that federal lawmaking authority prohibits the expansive creation of new fiduciary duties arising from common law.[172] Until the Supreme Court weighs in, buyers and sellers of securities nationwide would be well-advised to disclose material information to anyone who might be construed a fiduciary under state and federal law.

V. REMEDIES

The last year has seen the continued expansion and contraction in various states of the economic loss rule, which was created by the California Supreme Court in *Seely v. White Motor Co.*[173] and adopted by the Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[174] The economic loss rule is a judicially created doctrine that seeks:

> (1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.[175]

The economic loss rule generally provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort.[176]

Economic loss includes both direct economic loss, which involves the loss of the product itself, and consequential economic loss, which is all other economic loss attributable to the product defect.[177] Although the economic loss rule was first developed in connection with products liability, the economic loss rule quickly expanded to bar other claims for economic loss where there is no underlying contract or privity between the claimant and the alleged tortfeasor.[178] The economic loss rule generally

171. *See* Br. for Prof. Stephen M. Baimbridge as Amici Curiae Supporting Petitioner, Whitman v. United States (2014) (No. 14-29); *see* Br. for Allan Horwich as Amici Curiae Supporting Petitioner, Whitman v. United States (2014) (No. 14-29).

172. *See supra* note 171.

173. 403 P.2d 145 (Cal. 1965).

174. 476 U.S. 858 (1986).

175. Van Lare v. Vogt, Inc., 683 N.W.2d 46, 51 (Wis. 2004).

176. Gen. Elec. Co. v. Lowe's Home Ctrs., 608 S.E.2d 636, 637 (2005).

177. Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842, 845 (Wis. 1998).

178. *See* BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66 (Colo. 2004) (steel subcontractor's claims for negligence and negligent misrepresentation against a design engineering firm and professional inspector for public works project were barred by the economic loss rule despite lack of privity among the steel subcontractor, the design engineering firm, and the inspector). The economic loss rule encourages parties to a commercial contract to negotiate risk distribution and other legal protections into their contracts if they are concerned about economic damages flowing from the commercial transaction. *See*

does not bar a tort claim that is based on a recognized independent duty of care that is outside the scope of the contract, however.[179]

In the recent case of *LAN/STV v. Martin K. Eby Construction Co., Inc.*,[180] the Texas Supreme Court commented that the economic loss rule "is something of a misnomer":

> [T]here is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law." Vincent R. Johnson, *The Boundary–Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534–35 (2009). The court recently added, "Another scholar also thought *there was no single 'economic loss rule' but instead a 'constellation of somewhat similar doctrines that tend to limit liability' that seemed to work in different ways in different contexts, for not necessarily identical reasons, 'with exceptions where the reasons for limiting liability were absent.'* Oscar S. Gray, *Some Thoughts on the Economic Loss Rule and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006) ("The core concept of this constellation, not quite a 'rule', seems to me to be an inhibition against liability in negligence for economic harm not resulting from bodily injury to the claimant or physical damage to property in which the claimant has a proprietary interest.") (emphasis added).[181]

Given the seemingly constant change in the application of the economic loss rule among the various states and within each state, it is important to keep up with current developments.

Five state supreme court cases in Connecticut, Iowa, South Dakota, Texas, and Washington involving the economic loss rule show how the states vary in their application of the economic loss rule.

In *Ulbrich v. Groth*,[182] the Connecticut Supreme Court formally recognized and applied the economic loss rule for the first time to business relationships not regulated by the UCC. Ulrich was the successful bidder at a combined foreclosure sale of real estate and personal property by a bank conducted pursuant to article 9 of the Connecticut Uniform Commercial Code.[183] When Ulrich discovered his purchase did not include certain

Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1, 881 P.2d 986, 992 (Wash. 1994). Three policies support the application of the economic loss rule to commercial transactions: (1) preserving the fundamental distinction between tort law and contract law; (2) protecting the parties' freedom to allocate economic risk by contract; and (3) encouraging the purchaser, which is the party best situated to assess the risk of economic loss, to assume, allocate, or insure against that risk. *See* Wausau Tile, Inc. v. Cnty. Concrete Corp., 593 N.W.2d 445, 451–52 (Wis. 1999).

179. Grynberg v. Agri Tech, Inc., 985 P.2d 59, 62 (Colo. App. 1999).

180. 435 S.W.3d 234 (Tex. 2014).

181. *Id.* at 236 n.4.

182. 78 A.3d 76 (Conn. 2013).

183. *Id.* at 83.

personal property, he brought suit against the bank, the former owner/debtor, and the auctioneer, alleging their failure to inform him of the existence of conflicting claims to the property constituted negligence and negligent misrepresentation, breach of the warranty of title, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA).[184] The jury returned a verdict for Ulrich on four counts and awarded compensatory damages of $462,000, which the trial court reduced to $417,000, attorney fees of $274,128, and punitive damages of $1,251,000 pursuant to CUTPA.[185]

On appeal, the Connecticut Supreme Court held the economic loss doctrine barred Ulrich's negligence and negligent misrepresentation claims against the defendants because "the economic loss doctrine bars negligence claims that arise out of and are dependent on breach of contract claims that result only in economic loss."[186] The court reasoned the negligence and negligent misrepresentation claims were not independent from the plaintiff's warranty of title claims because "both the tort claims and the warranty claim are premised on the same alleged conduct with respect to the same personal property and rely on the same evidence."[187] However, the court affirmed the trial court's judgment under CUTPA because the statute provided "a remedy that is separate and distinct from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances."[188]

In *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*,[189] the Iowa Supreme Court dealt with claims against a financial advisor by identified beneficiaries of an individual's signed written estate plan, asserting they did not receive what they were supposed to get under the plan due to the advisor's allegedly negligent performance of his duties.[190] The court reversed the trial court's summary judgment in favor of the financial advisor, holding a financial advisor, like a lawyer, owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments. Accordingly, the financial advisor had a separate common law duty to the "direct, intended and specifically identifiable beneficiaries" of the testator.[191] In response to the financial advisor's defense that the plaintiffs' claims were "merely for money damages against a non-professional" and were barred

184. *Id.* at 84.
185. *Id.* at 84.
186. *Id.* at 100.
187. *Id.* at 98.
188. *Id.* at 101–02.
189. 841 N.W.2d 338 (Iowa 2013).
190. *Id.* at 340.
191. *Id.* at 350.

by the economic loss doctrine, the court explained three exceptions to the economic loss rule exist: (1) claims for economic losses against attorneys and accountants, (2) claims for negligent misrepresentation, and (3) claims arising out of a principal-agent relationship. The court held the claims against the financial advisor fell under the third exception to the economic loss rule,[192] reasoning that because the financial advisor breached his duty arising out of the principal-agent relationship between himself and the testator, he can be held liable to the intended beneficiaries of the testator.[193]

In *Kreisers Inc. v. First Dakota Title Ltd. Partnership*,[194] the South Dakota Supreme Court encountered claims by a medical supply company against a title company for negligence, which included allegations that the title company partially failed to properly facilitate the like-kind property exchange by the medical supply company that resulted in additional tax liabilities.[195] Following a bench trial, the trial court held the title company negligently performed its duties and awarded damages to the medical supply company.[196] When the title company appealed the trial court's judgment, the court held the title company had an independent legal duty to exercise reasonable care in ascertaining the type of exchange the medical supply company wanted,[197] and the economic loss doctrine did not apply to bar the claim.[198] Given the nature of the professional services provided by the title company that "arose from extraneous circumstances not constituting the elements of the contract," the court declined to extend the economic loss doctrine to claims against the title company.[199]

In *LAN/STV v. Martin K. Eby Construction Co.*,[200] the Texas Supreme Court held the economic loss rule precluded a contractor in a large light rail construction project from recovering millions of dollars in delay damages from the project architect in tort.[201] The court provided a very detailed examination of the development of the economic loss rule in American law and its current status in Texas.[202] The court then discussed in detail the specific application of the economic loss rule to the contractor's claims against the architect in *LAN/STV*.[203] While the

192. *Id.* at 351.
193. *Id.* at 352.
194. 852 N.W.2d 413 (S.D. 2014).
195. *Id.* at 415–16.
196. *Id.* at 415.
197. *Id.* at 421.
198. *Id.* at 422.
199. *Id.* at 420–22.
200. 435 S.W.3d 234 (Tex. 2014).
201. *Id.* at 249–50.
202. *Id.* at 237–45.
203. *Id.* at 246–50.

court recognized it had previously allowed claims for negligent misrepresentation against banks, lawyers, and accountants under Section 552 of the Restatement (Second) of Torts where the plaintiffs justifiably relied on the negligent misrepresentations,[204] the court distinguished the application of such claims to construction projects, which involve numerous agreements among the participants to allocate risk and liabilities among the parties:

> Typically, those agreements are vertical: the owner contracts with an architect and with a general contractor, the general contractor contracts with subcontractors, a subcontractor may contract with a sub-subcontractor, and so on. The architect does not contract with the general contractor, and the subcontractors do not contract with the architect, the owner, or each other.
>
> We think it beyond argument that one participant on a construction project cannot recover from another—setting aside the architect for the moment—for economic loss caused by negligence. If the roofing subcontractor could recover from the foundation subcontractor damages for extra costs incurred or business lost due to the latter's negligent delay of construction, the risk of liability to everyone on the project would be magnified and indeterminate—the same result Justice Holmes rejected in *Robins* [Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).][205]

The court focused on the fact that the contractor's principal reliance should be on the presentation of the plans by the owner, which is the contractor's client under a written contract, not the architect that is a contractual stranger.[206] In a case of first impression, the court sided with other state supreme courts applying the economic loss rule to preclude claims against architects in construction projects.[207] Because the economic loss rule precluded the contractor from recovering delay damages from the owner's architect, the court reversed the appellate court and rendered judgment that the contractor take nothing from the architect.[208]

In *Donatelli v. D.R. Strong Consulting Engineers, Inc.*,[209] the Washington Supreme Court affirmed the denial of an engineer's motion for summary judgment against the claims of negligence and negligent misrepresentation brought by property owners, who had hired the engineer under a written contract.[210] As reported several years ago, the Washington

204. *Id.* at 245–46.
205. *Id.* at 246.
206. *Id.* at 247.
207. *Id.* at 249 n.60 (listing of the jurisdictions that apply and do not apply the economic loss rule under similar facts and circumstances).
208. *Id.* at 250.
209. 312 P.3d 620 (Wash. 2013).
210. *Donatelli*, 312 P.3d at 621.

Supreme Court in *Eastwood v. Horse Harbor Foundation, Inc.*[211] rejected and changed the name of the "economic loss rule" to a new "independent duty doctrine." In so doing, the *Eastwood* court expressly held that the existence of a contract in which the parties "could or should have allocated the risk of loss, or had the opportunity to do so" will no longer lead to the application of the economic loss rule to preclude tort remedies.[212] Prior to *Eastwood*, the court had held the exact opposite: that negligent misrepresentation claims under Restatement (Second) of Torts § 552 are not an exception to—and are in fact excluded by—the economic loss rule where the claims are between contracting parties and the parties "could or should have allocated the risk of loss, or had the opportunity to do so"[213] As explained in the concurring opinion in *Elcon Construction, Inc. v. Eastern Washington University*:[214]

> The economic loss rule is unlike the "independent duty rule" that has been described in recent opinions. *E.g.*, *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wash. 2d 442, 243 P.3d 521 (2010) (plurality); *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380, 241 P.3d 1256 (2010) (plurality). The economic loss rule defaults to contract remedies where both are available. The "independent duty rule" defaults to tort remedies.[215]

Given the adoption of the independent duty doctrine and rejection of the economic loss rule in *Eastwood*, the court in *Donatelli* held that fact issues precluded summary judgment on the property owners' negligence claims and preluded summary judgment on the property owners' negligent misrepresentation claims "that induced the [property owners] to contract with [the engineer] in the first place," which the court held "do arise independent of any contract the parties might have agreed to."[216]

211. 241 P.3d 1256 (Wash. 2010)
212. *Id.* at 1261.
213. Alejandre v. Bull, 153 P.3d 864, 870–71 (Wash. 2007).
214. 273 P.3d 965 (Wash. 2012).
215. *Id.* at 973.
216. *Donatelli*, 312 P.3d at 621.