UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KATHLEEN RUGGIERO, Plaintiff,	:	CIVIL ACTION NO. 3:11-cv-00760 (AWT)
VS.	:	
HARLEYSVILLE PREFERRED INSURANCE COMPANY, Defendant.	:	AUGUST 19, 2014

Brief re the Applicability of the Economic Loss Rule* to Ruggiero v. Harleysville

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*Courts and commentators use various terminology – both economic loss doctrine and economic loss rule. For consistency, this brief will use the term "economic loss rule" except when using a direct quote.

I. Introduction

The plaintiff files this Brief[1] regarding the Applicability of the Economic Loss Rule ("ELR") to give the court a balanced overview in light of the patently misleading motions and reply briefs filed by the defendant, which portray the ELR in an overly mechanical and simplistic manner. The defendant's analysis both overstates and oversimplifies the ELR. Such broad statements are not accurate.

II. The Background and Theories of the Economic Loss Rule

The Economic Loss Rule, a doctrine that is at the intersection between contract and tort law and that has confounded courts and counsel for decades,[2] is traceable to English case law that predates Abraham Lincoln's presidency. In Hadley v. Baxendale, 9 Ex. 34 (1845) – a case upon which American courts have derived their rules regarding damages for breach of contract – the Court of Exchequer Chamber limited contractual damages to amounts that parties had negotiated when they formed the contract.[3] After numerous challenges to Hadley in cases involving claims for defective products, court recognized that the general public needed protection from faulty products that contract law could not provide through warranties, [4] which may guarantee the reimbursement of a party's economic losses but offer no remedy for personal injury or property damage. These challenges to Hadley caused the boundaries between tort law and contract law to fade. To recreate those boundaries, courts designed the ELR as a barrier between tort and contract claims. The rule stands for the principle that "because parties may allocate risks and remedies through contract negotiations, tort remedies should not be available

[1] The plaintiff plans to file a response to the defendant's Motion in Limine re Plaintiff's Damages (dkt #160), which is due September 11, 2014. However, in order to adequately address the complexities of the economic loss rule, an entirely separate comprehensive discussion is warranted – thus the filing of this brief.
[2] Edward P. Ballinger, Jr. & Samuel A. Thumma, "The History, Evolution and Implications of Arizona's Economic Loss Rule," 34 *Ariz. St. L.J.* 491, 491 (2002).
[3] *Id*. at 492 (citing Hadley v. Baxendale, 9 Ex. 341 (1845)).
[4] *Id.* (citing Seely v. White Motor Co., 63 Cal. 2d 9, 15 (Cal. 1965)).

simply because an unhappy contracting party deems negotiated contractual remedies to be insufficient."[5]

III. The History of the Economic Loss Rule in Connecticut

There are conflicting reported decisions from different superior courts as to whether or not the economic loss rule is limited to disputes between the buyer and seller of goods under Article 2 of the Uniform Commercial Code, or if it applies generally to other types of disputes between parties who are in a contractual relationship.

The Connecticut Supreme Court addressed this issue in November 2013, in Ulbrich v. Groth, 310 Conn. 375 (2013), when it stated that the ELR is not limited to Article 2, and applied the ELR to a sale of personal property pursuant to Article 9. However, that court has not yet addressed whether the ELR will bar tort claims against a defending party. A majority of state superior courts seem inclined to limit application of doctrine to product liability cases.

In Ulbrich v. Groth, 310 Conn. 375 (2013), the court held that the ELR does not bar claims from a breach of contract—such as breach of a contract for the sale of goods covered by the Uniform Commercial Code—if a plaintiff maintains that the breach was accompanied by unethical conduct. The defendant bank filed a foreclosure complaint against the owners of a special events facility. Prior to the foreclosure sale, Frederick Ulbrich toured the property. An owner allegedly indicated that most of the personal property would be included in the auction. Ulbrich bid $1.65 million on real and personal property on behalf of Ulbrich and Ulbrich Properties. Allegedly, the bank knew, prior to the auction, that much of the personal property was leased. After the auction, there were conflicting ownership claims. A jury awarded Ulbrich

[5] Thomas Wade Young, "Ruminations on the Relationship Between the Economic Loss Rule and Claims for Breach of Fiduciary Duty," 86 *Fla. B.J.* 9 (Mar. 2012).

$462,000 for negligence, negligent misrepresentation, breach of warranty and CUTPA violations.

The trial court concluded that the ELR—which bars negligence claims for commercial losses that arise from breach of contract—did not bar the torts claims, because Article 9, as opposed to Article 2 of the UCC, controlled. The trial court granted a remittitur that reduced the award to $417,000. It awarded attorney fees of approximately $273,128 and punitives of $1.25 million. The defendants appealed and argued that the ELR barred the tort and CUTPA counts.

The majority of the Connecticut Supreme Court held that the ELR barred the tort claims. "[W]e are not persuaded that the purported differences between article 2 sales and article 9 sales cited by the trial court," wrote the Supreme Court, "justify treating claims arising under article 9 differently for purposes of the economic loss doctrine." The Supreme Court overruled its 1998 decision in Flagg Energy Development, 244 Conn. 126 (1998), to the extent Flagg concluded that the ELR bars CUTPA claims that arise from breach of contract for the sale of goods under the UCC. The jury reasonably could have found that the failure to ensure the plaintiffs were warned that property was leased was not merely negligent or incompetent, but involved a conscious departure from business standards and was unscrupulous.

Jurisdictions such as Connecticut have refused to apply the economic loss rule where the tort alleged is an intentional one. *See* Connecticut Mutual Life Ins. Co. v. New York & New Haven R. Co., 25 Conn. 265 (1856). Indeed, the Connecticut Supreme Court has expressly rejected the economic loss rule as a bar to a claim for negligent misrepresentation. *See* Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 579 (1995). *See* Orlando v. Novurania of America, Inc., 162 F.Supp.2d 220, 227 n.2 (S.D.N.Y. 2001).

A. Summary from District Court in 2010

In Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 164 (D. Conn. 2010) (MRK), the court (Kravitz, J.), explained that the law in Connecticut regarding the economic loss rule was unsettled and confusing but nonetheless applied the economic loss rule to facts of case. In this case, there was no dispute that Aliki was alleging purely economic losses, and that it was not alleging any intentional wrongdoing on the part of Otter Valley. The court expounded on the economic loss rule at length:

> **III.**
>
> " The economic loss doctrine is a judicially created doctrine which bars recovery in tort where the relationship between the parties is contractual and the only losses alleged are economic." *Smith Craft Real Estate Corp. v. Handex of Conn., Inc.,* No. CV030082188S, 2004 WL 1615896, at *3 (Conn.Super.Ct. June 25, 2004) (citation omitted); *see also Flagg Energy,* 244 Conn. at 154-55, 709 A.2d 1075 (applying the doctrine). While simply stated, the doctrine and relevant case law can be confusing. *See, e.g., Santoro, Inc. v. A.H. Harris & Sons, Inc.*, No. CV030828039S, 2004 WL 2397155, at *4 (Conn.Super.Ct. Sept. 23, 2004) (" With due respect to the parties, neither appears to have correctly understood or applied the Supreme Court's controlling opinion in *Flagg.* "); *Milltex Properties v. Johnson,* No. 565866, 2004 WL 615748, at *4 (Conn.Super.Ct. Mar. 15, 2004) (" The Superior Courts have been divided as to whether the doctrine truly has been adopted in Connecticut and if it has, when to apply the doctrine."); *Reynolds, Pearson & Co., LLC v. Miglietta,* No. CV000801247, 2001 WL 418574, at *4 (Conn.Super.Ct. Mar. 27, 2001) (" There is inconsistency in the decisions of Superior Court judges regarding the applicability of the economic loss doctrine in Connecticut."). For that reason, and for the sake of clarity, the Court finds it useful to discuss here a few of the doctrine's principles.
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> The doctrine arose principally in the context of product liability, " where the economic losses are essentially contractual in nature, and therefore the risk may be allocated by the parties." *Hydro Investors, Inc. v. Trafalgar Power, Inc.,* 227 F.3d 8, 18 (2d Cir.2000) (citation omitted). The Supreme Court, in adopting the economic loss doctrine for general maritime law, explained that:
>
> Contract law ... is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk.
>
> *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872-73, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (citations omitted). The economic loss doctrine, in essence, holds the aggrieved party to the bargain it struck in its contract by preventing it from bringing a tort action for what is really the breach of a contractual duty. This protects the parties' expectancy interests and encourages them to build cost considerations into their contracts

in the first place. *See generally BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo.2004) (explaining the policy reasons for the doctrine); *see also Hartford Fire Ins. Co. v. Leninski*, No. CV970396097S, 2002 WL 31513608, at *3 (Conn.Super.Ct. Oct. 29, 2002) (" Allowing tort claims for what is essentially a breach of contract would cause tort law to swallow up the body of common law surrounding contracts, including the appropriate measure of damages.") *Princess Cruises, Inc. v. Gen. Elec. Co.*, 950 F.Supp. 151, 156 (E.D.Va.1996) (" [T]o permit a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of the parties to allocate the risks of their own transactions.").

Nonetheless, there are limits and exceptions to the economic loss doctrine. One is that the doctrine only applies in situations where the injured party alleges purely economic losses relating to the goods themselves. Thus, the economic loss doctrine does not generally bar recovery in tort if the plaintiff alleges either personal injury or damage to property other than the goods for which the parties contracted. *See, e.g., Cornwall Bridge Pottery, Inc. v. Sheffield Pottery, Inc.*, No. 07CV1154, 2008 WL 906833, at *3 (D.Conn. Apr. 2, 2008). This differential treatment is based on the different purposes served by contract and tort law:

The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the cost of an injury and the loss of time or health may be an overwhelming misfortune, and one the person is not prepared to meet. In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs.... Losses like these can be insured. Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort to injury to the product itself is not justified.

East River, 476 U.S. at 871-72, 106 S.Ct. 2295 (citations and quotation marks omitted); *see also Mountain West Helicopter, LLC v. Kaman Aerospace*, 310 F.Supp.2d 459, 465-66 (D.Conn.2004) (" [E]conomic losses resulting from a product failure are barred because they do not implicate the safety concerns of tort law.").

A second limitation of the doctrine is that it generally applies only to contracts for the sale of goods, the origin of which " lies *not* in the broad common law of torts or contracts, but in the narrower, express provisions of Article 2 of the Uniform Commercial Code, which establishes special rules governing the remedies available for breaches of commercial contracts for the sale of goods." *Santoro*, 2004 WL 2397155, at *4; *see also Flagg Energy*, 244 Conn. at 154-55, 709 A.2d 1075 (explaining why a negligent misrepresentation claim is inconsistent with other claims arising under Article 2 of the UCC). Thus, the economic loss doctrine does not typically apply to tort claims arising out of a contract for services. *See, e.g.,Smith Craft Real Estate Corp.*, 2004 WL 1615896, at *4 (" There is no allegation that the plaintiff's alleged damages resulted from the sale of a defective product. Therefore, the plaintiff's tort claims for economic loss are legally sufficient.").

Of course, many contracts involve so-called " hybrid transactions," under which the seller supplies both goods and services. In that situation, whether the contract is governed by the UCC's provisions regarding the sale of goods-and thus subject to the economic loss doctrine-becomes a question of " whether the dominant factor or ' essence' of the transaction is the sale of the materials or the services." *Nora Beverages, Inc. v. Perrier*

Group of Am., 164 F.3d 736, 747 (2d Cir.1998) (quoting *Incomm, Inc. v. Thermo-Spa, Inc.*, 41 Conn.Supp. 566, 570, 595 A.2d 954 (Conn.Super.Ct.1991)). In the absence of a dispute of material fact regarding the terms of the agreement, Connecticut law treats the " dominant factor" test as a question of law for the court to determine. *See, e.g., Incomm*, 41 Conn.Supp. at 570, 595 A.2d 954; *Myrtle Mills Assocs. v. Bethel Roofing, Inc.*, No. 29-87-34, 1993 WL 382305, at *2 (Conn.Super.Ct. Sept. 14, 1993); *see also Cornwall Bridge Pottery*, 2008 WL 906833, at *2; *Connie Beale, Inc. v. Plimpton*, No. FSTCV085008751S, 2010 WL 398903 (Conn.Super.Ct. Jan. 13, 2010) (determining, on a motion to strike, the " dominant factor" of a contract).

However, even when these requirements are met-and a plaintiff alleges purely economic losses related to a contract for the sale of goods-courts have, to varying degrees, carved out exceptions to the economic loss doctrine. One such exception is for intentional torts, such as fraud. *See, e.g., Dunleavey v. Paris Ceramics USA, Inc.*, No. CV020395709S, 2005 WL 1094424, at *7 (Conn.Super.Ct. Apr. 30, 2005). This exception is premised on at least two justifications. First, the possibility of tort liability could serve as an additional deterrent to the commission of intentionally wrongful acts; and second, it could permit the aggrieved party to recover damages not contemplated when drafting the contract due to that party's reasonable expectation that the other party would not intentionally cause it injury.

That said, courts are careful to distinguish an intentional tort from an intentional breach of the contract. In the latter situation, the bargained-for contract remedies should sufficiently compensate the injured party. Moreover, " [a]lmost every breach of contract involves actions than can be conceived of as a negligent or intentional tort." *Princess Cruises*, 950 F.Supp. at 156. This task of looking beyond the labels and adjectives asserted by counsel to ascertain the gravamen of a claim is similar to what courts already do in related contexts. *See, e.g., Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 747 (2d Cir.1979) (rejecting the argument that the plaintiff had wrongfully pleaded a simple breach of contract claim as a fraud claim in order to take advantage of the latter's longer statute of limitations, and explaining that the case " does not involve an[ ] attempt to dress up a contract claim in a fraud suit of clothes .... [the plaintiff] clearly alleges fraud that was extraneous to the contract, rather than a fraudulent nonperformance of the contract itself"); Ruling and Order [doc. # 62], *GJN Advisors, Inc. v. Woolrich, Inc.*, No. 3:09CV338(MRK) (D.Conn. Jan. 20, 2010) at 2-4 (holding that although the plaintiff had successfully pleaded a breach of contract claim, it had not adequately pleaded a violation of the Connecticut Unfair Trade Practices Act-which requires substantial aggravating circumstances attending the breach-because " when one puts [the plaintiff's] adjectives to the side, and assesses the facts alleged .... this is a case in which [the plaintiff] alleges [only] that [the defendant] committed an intentional breach of contract").

Another exception to the economic loss doctrine that some jurisdictions, including New York, recognize permits recovery under a tort theory if the duty breached arose " from a special relationship that requires the defendant to protect against the risk of harm to plaintiff." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289, 727 N.Y.S.2d 49, 750 N.E.2d 1097 (2001). " Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d

> 540, 551-2, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992) (citations omitted); *see also Trs. of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects,* 192 A.D.2d 151, 601 N.Y.S.2d 116, 119 (1993) (" [S]eparate tort liability [ ] can arise independently of the contractual relationship between the parties where the nature of the performance called for is affected with a significant public interest and failure to perform the service carefully and competently can have catastrophic consequences.") (citation and quotation marks omitted). While well-developed in the New York courts, few Connecticut courts, if any, have had occasion to consider this exception.
>
> Finally, some Connecticut trial courts, hewing closely to the facts in *Flagg Energy,* have limited the economic loss doctrine to situations where both the plaintiff and the defendant are sophisticated commercial parties. *See, e.g., Santoro,* 2004 WL 2397155, at *4; *Milltex Props.,* 2004 WL 615748, at *2 (" [W]hen the parties are sophisticated corporations they are capable of negotiating contractual terms regarding the risk of loss."); *Morganti Nat., Inc. v. Greenwich Hosp. Ass'n,* No. X06CV990160125, 2001 WL 1249807, at *1 (Conn.Super.Ct. Sept. 27, 2001) (describing the use of the economic loss doctrine as " most compelling" when, *inter alia,* " the parties are sophisticated corporations").
>
> With these principles in mind, the Court turns to the merits of Otter Valley's argument that Aliki's negligence claim is barred by the economic loss doctrine.

Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 164-167 (D. Conn. 2010).

B. Summary from District Court in 2012 and 2013

In two recent cases, the district court (Bryant, J.), had an opportunity to again address the economic loss rule. In Davis v. Connecticut Community Bank, N.A., 937 F.Supp.2d 217 (D. Conn. 2013) (VLB), the court (Bryant, J.) held:

> In *Levinson v. Westport Nat. Bank,* 900 F.Supp.2d 143 (D. Conn. 2012) the Court concluded that the economic loss rule did not bar the Plaintiffs' tort claims, noting the split of authority as to the circumstances in which it applies. *Levinson,* 2012 WL 4490432, at *28. The Bank argues that the Court must predict how the Connecticut Supreme Court would rule and determine whether and to what extent the doctrine applies to the present scenario now prior to trial. [Dkt. #191, Def. Men. P. 36-37]. **The Court is disinclined to conclude that the economic loss doctrine bars the Plaintiffs' tort claims considering that part of the Connecticut Supreme Court's reasoning was the sophistication and equal bargaining position of the parties to the contract in that case.** *Flagg Energy Development Corp. v. GMC, Allison Gas Turbine Div.* 244 Conn. 126, 709 A.2d 1075 (1998). **Considering that Connecticut law has long permitted contract and tort claims to coexist and that the Plaintiffs have produced sufficient evidence of liability and damages to maintain separate contract and tort claims at this point, the Court reaffirms its prior determination in *Levinson* that it would be inappropriate to restrict Plaintiffs to just their contract remedies at this point. Moreover, the question of whether the economic loss doctrine applies to bar**

> **Plaintiffs' tort claims might be moot after trial in the event that the Plaintiffs are not able to recover on both their contract and tort claims. The decision to decline consideration of this issue at this juncture comports with the Court's broad discretion to manage its docket in furtherance of " [w]ise judicial administration" and " conservation of judicial resources."** *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 96 L.Ed. 200, 1952 Dec. Comm'r Pat. 407 (1952); *see also Elgin v. Dept. of Treasury*, 132 S.Ct. 2126, 2147, 183 L.Ed.2d 1 (2012) (" District courts have broad discretion to manage their dockets, including the power to refrain from reviewing a constitutional claim pending adjudication of a nonconstitutional claim that might moot the case").
> (Emphasis added).

Davis v. Connecticut Community Bank, N.A., 937 F.Supp.2d 217, 245-246 (D. Conn. 2013)

In Levinson v. Westport Nat. Bank, 900 F.Supp.2d 143 (D. Conn. 2012) (VLB), the court's discussion of the ELR is as follows:

> **Economic loss rule**
>
> WNB argues, based on the economic loss rule, that the Plaintiffs may not recover on their tort claims because the relationship between the parties is exclusively contractual and the Plaintiffs only allege economic injury. (WNB's Mem. in Supp. of Mot. for Summ. J. at 41-43.) Because the Plaintiffs have produced sufficient evidence of liability and damages to maintain separate contract and tort causes of action through the summary judgment stage, this Court concludes that the economic loss rule does not bar the Plaintiffs' tort claims at this point.
>
> In general, Connecticut law permits contract and tort claims to coexist. *See Williams Ford, Inc. v. Hartford Courant Co.*, 232 Conn. 559, 579, 657 A.2d 212 (1995) (" The [plaintiffs] were not barred from pursuing a negligence claim solely because they also might have had a breach of contract claim."); *Johnson v. Flammia*, 169 Conn. 491, 496, 363 A.2d 1048 (1975) (" A party may be liable in negligence for the breach of a duty which arises out of a contractual relationship."). The Connecticut Supreme Court has held that the economic loss rule, an exception to this general principle, prevents a plaintiff bringing a claim based on a contract for the sale of goods from also seeking to recover on a negligent misrepresentation theory. *Flagg Energy Development Corp. v. General Motors Corp.*, 244 Conn. 126, 153, 709 A.2d 1075 (1998). The Connecticut Supreme Court has declined to clarify whether and to what extent the economic loss rule applies in other circumstances. *See American Progressive Life & Health Ins. Co. of New York v. Better Benefits, LLC*, 292 Conn. 111, 118-19, 971 A.2d 17 (2009).
>
> This Court has previously concluded that, **at the motion to dismiss stage, the general rule permitting simultaneous contract and tort claims allows " a plaintiff [to] pursue contract and tort claims simultaneously as long as the plaintiff has alleged sufficient facts and damages to maintain separate contract and tort causes of action.**" *Factory Mut. Ins. Co. v. Pike Co., Inc.*, No. 3:08-cv1775 (VLB), 2009 WL 1939799, at *3 (D. Conn. July 6, 2009). (Emphasis added).

Levinson v. Westport Nat. Bank, 900 F.Supp.2d 143, 178-179 (D. Conn. 2012)(VLB).

The court's cogent analysis in Levinson that, at the motion to dismiss stage, the plaintiff ought to be allowed to pursue both contract and tort claims, and that it would be inappropriate to restrict the plaintiff to the contract claims is applicable to the present posture of this case, where the defendant has sought to dismiss the plaintiff's tort claim.

C. *Akl v. Trumbull Insurance Company*

The defendant has cited to a recent superior court case, Akl v. Trumbull Insurance Company, which is not decisive of the issue presented in this case. The court in *AKL* did not make any analysis of the complex issues involved, did not reference the unequal sophistication and bargaining position of the parties, and merely applied the ELR in an overly mechanical and simplistic fashion.

In addition, the parties in *AKL* were in a different stage of the case, than the present case. The court in *AKL* did not find any facts to support any intentional misconduct on the part of the defendant. In contrast, the parties are on the eve of trial, and the plaintiff has filed its proposed findings of facts, and proposed exhibits and witnesses. The plaintiff's position is that the anticipated testimony will present ample evidence from which this court could find on the negligence claim that the defendant acted intentional, with malice and sinister motive. The plaintiff also maintains that the anticipated testimony will present ample evidence for the court to make a finding of emotional distress.

D. Damages Analysis

The defendant keeps harping on the Damages Analysis filed earlier in this case by prior counsel, but this is a red herring. That Damages Analysis listed the damages that were quantifiable. Even though non-economic damages such as for negligence, emotional distress, and

intentional conduct were not enumerated by prior counsel, such damages by their very nature are not readily quantifiable. When undersigned counsel files a damages analysis, it is generally broken into "economic" and "non-economic" – the latter of which includes line items for "emotional distress, pain and suffering, humiliation" – but any monetary amount which might be listed for such categories of damages are essentially meaningless because those items are generally determined by the trier of fact.

Damages – for emotional distress – are not readily quantifiable, but are 'necessarily uncertain limits of fair and reasonable damages." Carrol v. Allstate, 262 Conn. 433, 449 (2003). As the court stated in Carrol v. Allstate:

> The defendant's final claim is that the award of $500,000 in compensatory damages was excessive as a matter of law "in light of the very limited evidence of distress, and in comparison to the economic damages of $26,468.38." The defendant claims that the trial court improperly denied the defendant's motions to set aside the verdict and to reduce the verdict and that the court should have ordered a remittitur. The plaintiff contends in response that the damages awarded were just, and that the trial court did not abuse its discretion in refusing to set aside the verdict. We agree with the plaintiff.
>
> The trial court denied the defendant's motions, finding that the verdict did not shock the court's conscience. The court found that the jury "could reasonably have reached this verdict and the amount found. The amount falls within the necessarily uncertain limits of fair and reasonable damages."

Carrol v. Allstate Ins. Co., 262 Conn. 433, 448-449 (2003).

IV. The Restatement Quagmire

The *Restatement (Third) of Torts: Products Liability* implicitly recognizes an economic loss rule in the context of products liability.[6] However, outside of product liability claims, neither *Restatement (Second) of Torts* nor *Restatement (Third) of Torts* addresses a more general economic loss rule or the inconsistencies apparent between cases and jurisdictions.

V. The Independent Duty Rule

[6] *See Restatement (Third) of Torts: Products Liability §21* (harm to persons or property includes economic loss if caused by harm to the plaintiff's person, or to the person of another when that interferes with a protected interest of the plaintiff, or to the plaintiff's property other than the defective product itself.

A. The Independent Duty Rule

For plaintiffs to bring a viable tort claim, they must demonstrate that the tort claim is independent of any breach of contract claim. This does not prevent plaintiff from pleading both causes of action together. Whether a tort claim is independent of a breach of contract claim may often present questions of fact, which courts may not appropriately consider on a motion to dismiss.[7] Instead, this issue could survive beyond the pleading stage and then be subject to the discovery process.

Courts often recognize exceptions to the economic loss rule based upon some form of "independent duty." Under the independent duty exception, courts hold that if the tort claim arises from a duty extraneous to the contract, then the tort claim for economic losses may proceed, even where the parties entered into a contract. For example, based upon the concept of an independent duty, many jurisdictions recognize an exception to the rule for professional malpractice claims. The basis for this exception is again rooted in the purpose of the economic loss rule, the preservation of the laws of both tort and contract. If the law has gone so far as to create a standard of care independent of the parties' contractual duties, then it follows that society has made a default determination as to which party should bear the burden as to that particular loss.

Washington State provides a good example of this shift, with its Supreme Court going so far as to rename the "economic loss rule" the "independent duty doctrine":

> "An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. Because the term 'economic loss rule' inadequately captures this principle, we adopt the more apt term 'independent duty

[7] *See, e.g.*, Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of North Am., 763 So. 2d 429, 434-35 (Fla. 5th DCA 2000) (stating that a trial court should not resolve issues of fact on a motion to dismiss).

> doctrine.' The existence of an independent duty is a question of law for courts to decide."[8]

Cases in Washington have interpreted the new "independent duty doctrine" to find that such an independent duty arises in a number of contexts, such as a tort duty of reasonable care owed by professional engineers to their clients despite the existence of a contract.[9]

B. Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing was recently summarized in Akl v. Trumbull Insurance Company, (the very case touted as definitive by the defendant):

> Every contract contains an implied covenant of good faith and fair dealing. Renaissance Management Co. v. Connecticut Housing Finance Authority, 281 Conn. 227, 240, 915 A.2d 290 (2007). "To constitute a breach of [the implied covenant] the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." *Id*. Bad faith implies "a design to mislead or to deceive another . [B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . it contemplates a state of mind affirmatively operating with furtive design or ill will." Buckman v. People's Express, Inc., 205 Conn. 166, 171, 530 A.2d 596 (1987); De La Concha of Hartford, Inc. v. Aetna Life Ins. Co, 269 Conn. 424, 433, 849 A.2d 382 (2004).
>
> Proof of bad faith in the insurance coverage context requires proof that the insurer has denied coverage without a reasonable basis and has acted with a "dishonest purpose." De La Concha of Hartford, Inc., *supra*, at 433. The appellate courts of this state have not addressed the precise issue here: where an insurer denies or limits coverage under an insurance policy, what allegations are required to allege bad faith, as opposed to breach of contract. However, a majority of trial courts have held that "plaintiffs must plead facts that go beyond a simple breach of contract claim and enter into a realm of tortious conduct which is motivated by a dishonest or sinister purpose." Ferriolo v. Nationwide Insurance, 1998 Ct.Sup. 2563 (March 11, 1998, Hartmere, J.). *See also* Chestnut Investment, LLC v. Nautilus Ins. Co., 2012 WL 310761 at *4 (Jan. 6,2012, Wilson, J.); McCullough v. Encompass Indem. Co., 2009 WL 5342506 (Dec. 10, 2009, Swienton, J.) (alleged misrepresentations of the amount of coverage, applicable policy provisions, change in position of the amount due and payable, failure to act with reasonable promptness and failure to timely and accurately handle claim are simply claims that insurer did not property handle claim for benefits under policy not evidence of

[8] Eastwood v. Horse Harbor Foundation, 170 Wn.2d 380; 241 P.3d 1256 (2010).

[9] *See generally* Sorenson, T, Davidson, M, White, M, "When can a Breach of Contract be a Tort and What Difference Does it Make," *ABA Section of Litigation 2012.*

> intentionally dishonest or morally oblique or sinister conduct); Crespan v. State Farm Mutual Automobile Ins. Co., 2006 Ct.Sup. 994 (Jan. 13, 2006, Pickard, J.); Bernard v. Buendia, 2005 Ct.Sup. 11369 (July 20, 2005, Doherty, J.) (In order to make a bad faith claim the plaintiff must allege that the defendant did more than simply deny the plaintiff's claim for benefits); O & G Industries, Inc. v. Travelers Property Casualty Corporation, 2001 Ct.Sup. 12601, (September 7, 2001, Cremins, J.) (plaintiff's mere legal conclusion that the failure to defend and indemnify amounts to a violation of the duty of good faith and fair dealing was insufficient and did not properly state a claim of bad faith); Grant v. Colonial Penn Insurance Company, 1996 Ct.Sup. 482 (Jan. 16, 1996, Hauser, J.) [16 Conn. L. Rptr. 49] (Bad faith claim must be alleged in terms of wanton and malicious injury and evil intent).

AKL v Trumbull Ins, MMX-CV13-6010186-S (March 13, 2014).

C. *Uberrima fides*

Uberrima fides, is a Latin phrase meaning "utmost good faith" (literally, "most abundant faith"). It is the name of a legal doctrine which governs insurance contracts. This means that all parties to an insurance contract must deal in good faith. This contrasts with the legal doctrine *caveat emptor* (let the buyer beware).

VI. Exception for Intentional Torts

The district court (Kravitz, J.) in Aliki Foods discussed exceptions to the ELR for intentional torts:

> However, even when these requirements are met-and a plaintiff alleges purely economic losses related to a contract for the sale of goods-courts have, to varying degrees, carved out exceptions to the economic loss doctrine. One such exception is for intentional torts, such as fraud. *See, e.g., Dunleavey v. Paris Ceramics USA, Inc.*, No. CV020395709S, 2005 WL 1094424, at *7 (Conn.Super.Ct. Apr. 30, 2005). This exception is premised on at least two justifications. First, the possibility of tort liability could serve as an additional deterrent to the commission of intentionally wrongful acts; and second, it could permit the aggrieved party to recover damages not contemplated when drafting the contract due to that party's reasonable expectation that the other party would not intentionally cause it injury.

Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 166 (D. Conn. 2010) (MRK).

VII. Sophistication and Equal Bargaining Position of the Parties

The district court (Kravitz, J.) in Aliki Foods discussed the issue of the sophistication and equal bargaining position of the parties as follows:

> Some Connecticut trial courts, hewing closely to the facts in *Flagg Energy*, have limited the economic loss doctrine to situations where both the plaintiff and the defendant are sophisticated commercial parties. *See, e.g., Santoro,* 2004 WL 2397155, at *4; *Milltex Props.*, 2004 WL 615748, at *2 (" [W]hen the parties are sophisticated corporations they are capable of negotiating contractual terms regarding the risk of loss."); *Morganti Nat., Inc. v. Greenwich Hosp. Ass'n,* No. X06CV990160125, 2001 WL 1249807, at *1 (Conn.Super.Ct. Sept. 27, 2001) (describing the use of the economic loss doctrine as " most compelling" when, *inter alia*, " the parties are sophisticated corporations").

Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F.Supp.2d 159, 167 (D. Conn. 2010) (MRK).

Three years later, the district court (Bryant, J.) also emphasized the importance of considering the sophistication and equal bargaining power of the parties:

> **The Court is disinclined to conclude that the economic loss doctrine bars the Plaintiffs' tort claims considering that part of the Connecticut Supreme Court's reasoning was the sophistication and equal bargaining position of the parties to the contract in that case.** *Flagg Energy Development Corp. v. GMC, Allison Gas Turbine Div.* 244 Conn. 126, 709 A.2d 1075 (1998). (Emphasis added).

Davis v. Connecticut Community Bank, N.A., 937 F.Supp.2d 217, 245-246 (D. Conn. 2013).

VIII. Conclusion

In conclusion, when considering the principle of *Uberrima fides*, the covenant of good faith and fair dealing, the unequal sophistication and bargaining power of the parties, as well as the enormous amount of anticipated evidence the plaintiff plans to present at trial documenting the unscrupulous, intentional, malicious conduct with sinister motive, all of which is accompanied by emotional distress, the court should follow the wise advice from the court in the cogent analysis from Davis v. Connecticut Community Bank, N.A and refrain from ruling on the motion to dismiss until the evidence has been presented at trial.

Exhibit List

1. Featherston v. Tautel & Sons Consulting (April 17, 2012)

2. Hoydic v. B&E Juices, Inc. (Feb. 27, 2008)

3. New Canaan v. Brooks Labs (Nov. 7, 2007)

4. Diversified Technology Consultants, v. Sentinel Equities (Aug. 11, 2006)

5. Riggs-Brewer Industries v. Shelton Senior Housing (June 6, 2006)

6. Dunleavey v. Paris Ceramics (April 20, 2005)

7. Smith Craft Real Estate Corp. v. Handex (June 25, 2004)

8. "When can a Breach of Contract be a Tort and What Difference Does it Make," *ABA Section of Litigation 2012*

9. Dan B. Dobbs Conference on Economic Tort Law at the University of Arizona College of Law, March 3-4, 2006

10. Arizona Law Review, Volume 48, Issue 4

11. Robert L. Rabin, "Respecting Boundaries and the Economic Loss Rule in Tort," 48 *Ariz. L. Rev*. 857 (2006)

12. Vincent R. Johnson, "The Boundary-Line Function of the Economic Loss Rule," 66 *Wash. & Lee L. Rev.*, 523 (2009)

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CERTIFICATE OF SERVICE

This is to certify that on August 19, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by Email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF System.

/S/
Sally A. Roberts (**ct24828)**