RECENT DEVELOPMENTS IN BUSINESS LITIGATION

Brian L. Bank, Kristen M. Bush, Michael A. Sirignano, Priscilla D. Kam, Michelle A. Bholan, Daniel Wilson, and Van Cates

This article provides an overview of significant cases addressing business litigation issues during the period of October 1, 2015, through September 30, 2016. Specifically, this article discusses: (1) recent civil Racketeer Influenced and Corrupt Organizations Act (RICO) jurisprudence addressing the complexities of pleading a civil RICO claim and the indications of a possible trend toward growing tolerance of such claims; (2) recent fraud and misrepresentation jurisprudence resolving circuit splits and addressing the interplay between fraud and various statutory schemes; (3) recent contract jurisprudence highlighting developments in the areas of contractual indemnity, subrogation, insurance, consequential damage exclusions,

Brian L. Bank (brian.bank@rivkin.com), Michael A. Sirignano (michael.sirignano@rivkin.com), Priscilla D. Kam (priscilla.kam@rivkin.com), and Michelle A. Bholan (michelle.bholan@rivkin.com) are with Rivkin Radler LLP in Uniondale, New York. Kristen M. Bush (kristenb@sscmlegal.com) is with Schwartz Semerdjian Cauley & Moot LLP in San Diego. Daniel Wilson (dwilson@susmangodfrey.com) is with Susman Godfrey, LLP in Houston. Van Cates (van.cates@veoliawaterna.com) is with Veolia North America in Tampa.

and confidentiality clauses; (4) recent fiduciary jurisprudence discussing the proliferation of employee stock ownership plan litigation and the dischargeability of certain judgments for breach of fiduciary duty in bankruptcy; and (5) recent remedies jurisprudence in which numerous states continue to develop varying interpretations and applications of the economic loss rule.

I. CIVIL RICO

During the past year, federal courts continued to tackle the complexities of civil RICO cases, including questions regarding the extraterritoriality of RICO, proximate cause in class action cases, and the strict pleading standards necessary to support a RICO claim. While pleading and proving RICO claims remains difficult, one appellate court reiterated that the object of RICO was to encourage civil litigation to supplement the government's efforts to deter and penalize RICO activity, which seems indicative of a trend toward increased acceptance of civil RICO claims.

The Supreme Court, in *RJR Nabisco, Inc. v. European Community*,[1] resolved the conflict among lower courts regarding RICO's extraterritorial application. Specifically, in *RJR Nabisco*—a sixteen-year-long litigation brought by the Members of the European Community against RJR Nabisco alleging a global money laundering scheme involving the sale of cigarettes, international drug trafficking, and black-market money brokers—the district court dismissed the European Community's RICO claims as impermissibly extraterritorial. The Second Circuit reversed that decision, finding that RICO liability could attach to extraterritorial conduct under the relevant RICO predicate. The Supreme Court upheld the concept that RICO applies to some foreign racketeering activity, but reversed the Second Circuit and dismissed the RICO claims on the grounds that it was still necessary to allege and prove a domestic injury.

The Supreme Court agreed with the Second Circuit's conclusion that "with respect to a number of offenses that constitute predicates for RICO liability . . . Congress has clearly manifested an intent that they apply extraterritorially."[2] The Supreme Court held that Congress's incorporation of extraterritorial predicates into RICO clearly indicated its intent that RICO apply to foreign racketeering activity (to the extent the underlying predicates pleaded apply extraterritorially) regardless of the location of the RICO enterprise.[3] RICO's extraterritorial reach, however, is not

1. 136 S. Ct. 2090 (2016).
2. *Id.* at 2099 (quoting European Community v. RJR Nabisco, Inc., 764 F.3d 129, 133 (2d Cir. 2014)).
3. *Id.* at 2102–05. The Court affirmatively held that § 1962(b) and (c) apply extraterritorially, but declined to address the extraterritorial reach of § 1962(a)—the unlawful use of in-

boundless. Indeed, though the RICO enterprise need not be a domestic enterprise, it must be engaged in or significantly affect U.S. commerce.[4] Thus, the Court held that a private plaintiff seeking to recover under RICO must allege and prove a domestic injury to its business or property even if the pattern of racketeering activity alleged is comprised of extraterritorial predicate acts.[5] Since the European Community had waived claims for domestic injuries, the Supreme Court held that the RICO claims had to be dismissed in this case.[6]

In *Chevron Corp. v. Donziger*, the Second Circuit upheld a complaint brought under RICO for injuries sustained as a result of fraudulent activity that took place, in part, outside of the United States.[7] Chevron sued New York attorney Donziger, his law firm, and others alleging that they constituted a RICO enterprise which, through a pattern of racketeering activity, fraudulently procured, and conspired to procure, an $8.46 billion judgment in Ecuador against Chevron for environmental damage.[8] In entering a judgment in favor of Chevron, the district court held, and the Second Circuit affirmed, that the defendants were in fact a RICO enterprise that was associated in fact for the common purpose of recovering money from Chevron and that the imposition of such a wrongful debt on Chevron constituted an injury to its business or property.[9] The court noted that while many of the wrongful activities, including the predicate acts of wire fraud, money laundering, and bribery, took place in Ecuador, "'the evidence at trial established that Donziger, a New York lawyer and resident, here formulated and conducted a scheme to victimize a U.S. company through a pattern of racketeering [activity that] included substantial conduct in the United States.'"[10]

The Second Circuit also addressed the scope of the federal courts' authority to grant equitable relief to a private RICO plaintiff—an issue that the Supreme Court has yet to decide and on which the circuit courts are split. In adopting the Seventh Circuit's reasoning in *National Organization for Women, Inc. v. Scheidler*,[11] the Second Circuit affirmed the district court's order enjoining the *Chevron* defendants from enforcing the Ecua-

come derived from racketeering activity—or § 1964(d)—RICO's conspiracy provision. The Court indicated, however, that § 1962(a) would require domestic use of the racketeering income while § 1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy.

4. *Id.* at 2105.
5. *Id.* at 2106–11.
6. *Id.* at 2111.
7. 2016 U.S. App. LEXIS 14552 (2d Cir. 2016).
8. *Id.* at 144–53.
9. *Id.* at 153–55.
10. *Id.* at 151 (quoting Chevron v. Donziger, 974 F. Supp. 2d 362, 588 (S.D.N.Y. 2014)).
11. 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003).

dorian judgment, holding that the civil remedies provision of RICO does not limit the authority of federal courts to grant equitable relief based on the nature or identity of the plaintiff.[12] The court noted that interim relief, such as a restraining order pending final adjudication, was not available to private persons under RICO, but quoted the Seventh Circuit approvingly, which stated that affording private plaintiffs equitable relief is consistent with Congress's intent to "encourage civil litigation to supplement Government efforts to deter and penalize" RICO activity.[13]

Federal courts addressed RICO proximate cause issues in a number of class action cases this year, with differing results. In *Torres v. S.G.E. Management, LLC*,[14] the plaintiffs brought a civil action under RICO alleging that Stream Energy, through its multi-level marketing program, Ignite, as well as a number of other defendants, operated a fraudulent pyramid scheme. The plaintiffs alleged that the fraud caused them financial losses. The district court certified a class of plaintiffs who lost money participating as independent associates (IAs) in Ignite's program. The Fifth Circuit initially vacated class certification after interlocutory review, but then granted rehearing and affirmed certification of the class after *en banc* review.[15]

In *Torres*, the court focused on the narrow issue of whether the plaintiffs may prove RICO causation through common proof such that individualized issues will not predominate at trial. RICO affords a private right of action only to plaintiffs who can show that they have been injured "by reason of" a violation of RICO's criminal prohibitions.[16] The defendants in *Torres* argued that this causation element requires individualized proof, defeating class certification. The Fifth Circuit disagreed, noting that the defendants' opposition to class certification was at odds with recent decisions emphasizing that RICO claims predicated on mail and wire fraud do not require first-party reliance to establish that the injuries were proximately caused by the fraud.[17] Thus, the plaintiffs merely needed to show that their losses were caused "by reason of" the defendants' operation of a pyramid scheme as opposed to a lawful multi-level marketing program.[18]

In affirming the district court's certification of a class, the Fifth Circuit concluded that if the plaintiffs prove that the defendants operated a fraud-

12. Chevron v. Donziger, 2016 U.S. App. LEXIS 14552, at *158–62 (2d Cir. 2016).
13. *Id.* at *162, 164–65 (quoting *Nat'l Org. for Women, Inc.*, 267 F.3d at 698).
14. 2016 U.S. App. LEXIS 17746 (5th Cir. 2016).
15. *Id.* at *2–3, *9–10 (citing Torres v. S.G.E. Mgmt., LLC, 805 F.3d 145 (5th Cir. 2015), *rev'd en banc*, 2016 U.S. 17746 (2016)).
16. *Id.* at *12.
17. *Id.* at *13.
18. *Id.* at *17.

ulent pyramid scheme, a jury may reasonably infer from the plaintiffs' payments to join as IAs that they relied on Ignite's implicit representation of legitimacy, when in fact it was a fraudulent pyramid scheme and, thus, individualized issues of causation would not predominate.[19]

The Third Circuit reached a similar conclusion regarding the proximate cause element of RICO claims in *In re Avandia Marketing*.[20] There, the plaintiffs—a proposed class comprised of third party payors of health care benefits—brought RICO claims against a drug manufacturer that allegedly concealed significant health risks associated with several of its Type II diabetes drugs.[21] The manufacturer argued that the plaintiffs could not establish proximate cause because the intermediary doctors and patients were actually the ones to rely on the defendants' misrepresentations.[22] The court, relying on the Supreme Court's decision in *Bridge* v. *Phoenix Bond and Indemnity Co.*,[23] held that "if there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury . . . a RICO plaintiff who did not rely directly on a defendant's misrepresentation can still establish proximate causation."[24] The court noted that the plaintiff payors were the primary intended victims of the drug manufacturer's fraud and their economic injury was a foreseeable and natural consequence of the fraud regardless of whether the payors themselves relied on the misrepresentations.[25] Thus, at least at the pleading stage, the plaintiff payors' alleged injuries were sufficiently direct to satisfy the RICO proximate cause requirement.[26]

In contrast, in S*ergeants Benevolent Ass'n Health and Welfare Fund v. Sanofi-Aventis U.S. LLP*, the Second Circuit affirmed the denial of class certification based on the plaintiffs' failure to prove causation through generalized proof.[27] In S*ergeants Benevolent*, the plaintiff health-benefit plans brought RICO claims against a drug manufacturer alleging that it concealed risks of an antibiotic drug that caused the plaintiffs to pay for prescriptions that would have otherwise not been written.[28] The court noted that reliance on the alleged misrepresentation is not an element of a RICO mail fraud claim, but that the plaintiffs' theory of injury in most RICO mail fraud cases will nevertheless depend on establishing

19. *Id.* at *37–39.
20. 804 F.3d 633 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 2409 (2016).
21. *Id.*
22. *Id.* at 645.
23. 535 U.S. 639 (2008).
24. *In re Avandia Mktg.*, 804 F.3d at 643.
25. *Id.* at 645.
26. *Id.*
27. 806 F.3d 71 (2d Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 4592 (2016).
28. *Id.*

that someone—whether the plaintiffs themselves or third parties—relied on the defendant's misrepresentation.

> That is because reliance will typically be a necessary step in the causal chain linking the defendant's alleged misrepresentation to the plaintiffs' injury: if the person who was allegedly deceived by the misrepresentation (plaintiff or not) would have acted in the same way regardless of the misrepresentation, then the misrepresentation cannot be a but-for, much less proximate, cause of the plaintiffs' injury.[29]

According to the Second Circuit, "[b]ecause proving causation will ordinarily require proving reliance, and because of the difficulty of proving reliance using 'generalized proof' . . . it is quite difficult, though not impossible, to certify a class in a RICO mail fraud case."[30]

The Second Circuit thus found that the district court's grant of summary judgment to the defendant on the plaintiffs' RICO claims was sound.[31] The district court had first denied the plaintiffs' motion for class certification, relying on the Second Circuit's decision in *UFCW Local 1776 v. Eli Lilly & Co.* (*Zyprexa*),[32] holding that the individual decisions of prescribing physicians thwarted the plaintiffs' effort to prove class-wide causation using generalized proof. The Second Circuit held that the proof offered by the plaintiffs did not differ in any meaningful way from that offered by the *Zyprexa* plaintiffs, and therefore the district court did not abuse its discretion in denying class certification.[33]

The Eleventh Circuit in *Bryan Ray v. Spirit Airlines, Inc.* also addressed the RICO proximate cause requirement in a putative class action suit against an airline, noting that there must be some direct relation between the RICO violation and the injury.[34] The plaintiffs in *Bryan Ray* alleged that Spirit Airlines conducted an enterprise through a pattern of racketeering activity (including mail fraud and wire fraud) when it concealed and misrepresented airfare and user fees on its website as government-

29. *Id.* at 87 (citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 658–59 (2008)).
30. *Id.*
31. *Id.* at 97.
32. 620 F.3d 121 (2d Cir. 2010).
33. Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71, 90–91 (2d Cir. 2015). The court noted that a class of plaintiffs may be able to prove class-wide causation based on first-party reliance without individualized inquiry if circumstantial evidence strongly infers that all class members relied on an alleged misrepresentation. "Such an inference may be available if, for example, the class members all faced 'the same more-or-less one-dimensional decision making process,' such that the alleged misrepresentation would have been 'essentially determinative' for each plaintiff." *Id.* at 88 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 121 2009)).
34. 2016 U.S. App. LEXIS 16269 (11th Cir. 2016) (citing Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1287–88 (11th Cir. 2006); Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010)).

imposed taxes.[35] The plaintiffs essentially argued that merely purchasing a ticket and paying an unlawful passenger usage fee amounted to reliance on Spirit's fraudulent conduct. The Eleventh Circuit disagreed, noting that the plaintiffs' argument only established a potential injury, but did not establish that the plaintiffs sustained injury as a direct result of Spirit's claimed fraudulent misrepresentations.[36] Among other failings, the plaintiffs pled nothing even remotely suggesting that they—or anyone else—would have acted differently had Spirit been clearer in its presentation and description of the passenger usage fee.[37]

Finally, in *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, the Seventh Circuit addressed the pattern of racketeering requirement in its latest encounter with a dispute between casinos and the horseracing industry that arose from former Governor Rod Blagojevich's corruption scandal.[38] There, the plaintiff casinos alleged that the defendants, members of the horse racing industry, traded a $100,000 campaign contribution to Blagojevich for his signature on a bill that imposed a 3 percent tax on the casinos that was placed into trust for the benefit of the horseracing industry.[39] In 2014, the Seventh Circuit addressed the proximate cause element of the plaintiff casino's RICO claim, finding sufficient evidence to survive summary judgment on the claim that the governor agreed to sign a 2008 bill pursuant to a quid pro quo agreement.[40]

In 2016, the Seventh Circuit again became involved after a jury found for the casinos on all counts and awarded them more than $25 million in damages, which was trebled under RICO's civil damages provision to $75 million. The court, however, held that the jury did not have legally sufficient evidence to support a verdict finding a conspiracy to engage in a pattern of racketeering, since the scheme was limited and had a "natural ending point."[41]

In *Empress Casino Joliet Corp.*, the court noted that continuity is "centrally a temporal concept" and that the continuity requirement ensures that RICO targets long term criminal conduct—not one-off crimes.[42] Although the plaintiff casinos relied on the theory of "open-ended" continuity and the threat of repetition, the court found that the evidence did not

35. *Id.* at *1–3.
36. *Id.* at *15–16.
37. *Id.* at *18–19.
38. 831 F.3d 815 (7th Cir. 2016).
39. *Id.* at 820.
40. *Id.* at 821. The Seventh Circuit reversed in part, holding that there was enough to survive summary judgment on the claim that the governor agreed to sign a 2008 bill, but not a 2006 bill, in exchange for a bribe. *See* Empress Casino Joliet Corp. v. Johnston, 763 F.3d 723 (7th Cir. 2014).
41. *Empress Casino*, 831 F.3d at 827.
42. *Id.*

demonstrate a threat of repetition—and instead stated that the case was about one quid pro quo agreement to exchange one campaign contribution for Blagojevich's signature on one bill.[43] The court thus reversed the district court's denial of the defendant racetracks' motion for summary judgment on the RICO claim, but affirmed judgment in favor of the plaintiff casinos on their state law claims.[44]

II. FRAUD AND MISREPRESENTATION

The past year reflected a continued decline in the number of courts, particularly at the state level, issuing decisions expanding and otherwise altering the landscape of fraud and misrepresentation cases. Notwithstanding the foregoing, federal courts have issued several decisions resolving circuit splits and addressing issues of first impression regarding the interplay between fraud and several statutory schemes.

The Supreme Court in *Husky International Electronics, Inc. v. Ritz*[45] resolved a circuit split and held that the prohibition against a bankruptcy discharge for "actual fraud" Section 523(a)(2)(A) of the Bankruptcy Code encompasses forms of fraud, such as fraudulent conveyance schemes, that can be effected without a false representation.[46]

In *Husky*, the respondent Daniel Lee Ritz, Jr. served as director and shareholder of Chrysalis Manufacturing Corporation, which incurred a debt to the petitioner Husky International Electronics, Inc.[47] The respondent admittedly drained Chrysalis of assets that could have been used to pay its debts to creditors—including the petitioner—by transferring Chrysalis's funds to other entities under the respondent's control.[48] After the petitioner commenced a lawsuit against the respondent seeking to hold him personally liable for Chrysalis's debt, the respondent filed for Chapter 7 bankruptcy.[49] In response, the petitioner initiated an adversarial proceeding in the bankruptcy case and argued that, inter alia, the respondent was prohibited from discharging the Chrysalis debt in bankruptcy because his scheme constituted "actual fraud" under Section 523(a)(2)(A) of the Bankruptcy Code, which explicitly "prohibits debtors from discharging debts 'obtained by . . . false pretenses, a false representation, or actual fraud.'"[50]

43. *Id.* at 825.
44. *Id.* at 836.
45. 136 S. Ct. 1581 (2016).
46. *Id.* at 1586.
47. *Id.* at 1585.
48. *Id.*
49. *Id.*
50. Husky Int'l Elec., Inc. v. Ritz, 136 S. Ct. 1581, 1585 (2016) (quoting 11 U.S.C. § 523(a)(2)(A)).

The district court held that the respondent was personally liable for the debt under Texas law, but that the debt was not obtained by "actual fraud" under Section 523(a)(2)(A) and, thus, could be discharged in bankruptcy.[51] In affirming the district court's decision, the Fifth Circuit agreed that the respondent did not commit "actual fraud" under Section 523(a)(2)(A).[52] The Fifth Circuit rejected the petitioner's contention that transfers effectuated to obstruct debt collection are a cognizable form of actual fraud and held that a misrepresentation from the debtor to the creditor is a necessary element of "actual fraud."[53] The court then concluded that because the respondent did not make any false representations to the petitioner regarding Chrysalis's assets or the transfers, the respondent did not commit "actual fraud."[54]

The Supreme Court, in reversing the decision of the Fifth Circuit, noted that anything that is considered "fraud" and is done with wrongful intent constitutes "actual fraud."[55] The Supreme Court rejected the need to define "fraud" precisely, stating "from the beginning of English bankruptcy practice, courts and legislatures have used the term 'fraud' to describe a debtor's transfer of assets that, like [the respondent's] scheme, impairs a creditor's ability to collect the debt."[56] As the Supreme Court explained, although fraudulent conveyances are a "fraud" under the common law, fraudulent conveyances do not require a misrepresentation from a debtor to a creditor because "fraudulent conveyances are not an inducement-based fraud" since the fraudulent conduct "is in the acts of concealment and hindrance."[57] Thus, the Supreme Court concluded, "a false representation has never been a required element of 'actual fraud' and [it] decline[d] to adopt it as one today."[58]

In a widely anticipated decision, the Supreme Court resolved a circuit split relating to the type of falsehoods that can render a claim "false or fraudulent" under the False Claims Act. The Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*[59] held that the "implied certification theory" can be a basis for liability under the False Claims Act, at least where two conditions are met: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose non-

51. *Id.*
52. *Id.* at 1586.
53. *Id.*
54. *Id.*
55. Husky Int'l Elec., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016).
56. *Id.* at 1587.
57. *Id.*
58. *Id.* at 1588.
59. 136 S. Ct. 1989 (2016).

compliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[60]

In *Escobar*, a teenage beneficiary of a Medicaid program received counseling services at a mental health facility owned and operated by a subsidiary of the petitioner, where she had an adverse reaction to a prescribed medication and eventually died.[61] When the teenager's parents learned that most employees at the mental health facility were not licensed to provide mental health counseling and received minimal supervision, they filed a qui tam action in federal court alleging that the petitioner had violated the False Claims Act under an implied false certification theory of liability.[62] The respondent argued that under this theory, a defendant who submits a claim impliedly certifies compliance with all conditions of payment and that if that claim fails to disclose a violation of a material statutory, regulatory, or contractual requirement, the defendant has made a misrepresentation that renders the claim "false" or "fraudulent" under the False Claims Act.[63] Thus, the respondents alleged, when the petitioner submitted reimbursement claims that made representations about the services provided by specific types of professionals, but failed to disclose violations of regulations pertaining to, inter alia, licensing requirements, it defrauded the Medicaid program, which would not have reimbursed the claims had it known that the services billed were performed by unlicensed and unsupervised staff.[64]

The district court granted the petitioner's motion to dismiss the complaint, holding that the respondents had failed to state a claim under the implied false certification theory of liability because none of the regulations violated by the mental health facility was a condition of payment.[65] The First Circuit, reversing the lower court in relevant part, noted that a "statutory, regulatory, or contractual requirement can be a condition of payment either by expressly identifying itself as such or by implication."[66] The First Circuit then held that the petitioner had violated Medicaid regulations that "clearly impose conditions of payment" and observed that the regulations themselves constituted "dispositive evidence of materiality" because, inter alia, they identified adequate supervision as a condition of payment.[67]

60. *Id.* at 2001.
61. *Id.* at 1997.
62. *Id.*
63. *Id.* at 1995.
64. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1998 (2016).
65. *Id.*
66. *Id.*
67. *Id.*

The Supreme Court "granted certiorari to resolve the disagreement among the Courts of Appeals over the validity and scope of the implied false certification theory of liability" and, ultimately, vacated the First Circuit's decision and remanded for further proceedings consistent with its opinion.[68] The Supreme Court rejected the Seventh Circuit's previously articulated position that only express (or affirmative) falsehoods can render a claim "false" or "fraudulent" under the False Claims Act, reasoning that the term "fraudulent" incorporates the common law meaning of fraud, which has long encompassed certain misrepresentations by omission.[69] The Supreme Court then found that by using payment and other codes that conveyed information about the services provided by specific types of professionals without disclosing the violations of staff and licensing requirements for mental health facilities, the petitioner's claims constituted misrepresentations that fell "squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations."[70]

The Supreme Court further held that False Claims Act liability for failing to disclose violations of legal requirements is not limited to requirements that are expressly designated as conditions of payment and, conversely, that not every requirement that is expressly designated as a condition of payment can result in liability.[71] Instead, "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[72]

Finally, noting that "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act," the Court rejected the First Circuit's view of materiality, namely, that "any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation."[73] Instead, the Court reasoned that the materiality inquiry looks to "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation."[74] Thus, proof of materiality can include "evidence that the defendant is aware that the Government routinely refuses to pay claims in

68. *Id.* at 1998, 2004.
69. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1999 (2016).
70. *Id.* at 2000–01.
71. *Id.* at 1996.
72. *Id.*
73. *Id.* at 2002–04.
74. Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016).

the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement."[75] Conversely, if the government pays a particular claim despite its actual knowledge that certain requirements were violated, that is compelling evidence that those requirements are not material.[76] Notably, the Supreme Court cautioned that the materiality standard is demanding since the False Claims Act is not "an all-purpose antifraud statute."[77]

Because the lower court had analyzed the respondents' complaint based on interpretations of the False Claims Act inconsistent with its opinion, the Supreme Court vacated the judgment of the First Circuit and remanded the case for reconsideration of whether the respondents adequately pleaded a violation under the False Claims Act.[78]

In *Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp.*,[79] the Sixth Circuit in a securities fraud action "join[ed] [their] fellow circuits in recognizing the viability of alternative theories of loss causation and appl[ied] [the theory of] materialization of the risk" to the case before it."[80]

In *Ohio Public Employees*, the plaintiffs filed a class action suit alleging securities fraud against Federal Home Loan Mortgage Corporation and four senior officers (collectively, Freddie Mac) under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5.[81] The plaintiffs alleged that Freddie Mac had "made materially false statements and omissions regarding its extension into the nontraditional mortgage market and its financial health."[82] On November 20, 2007, Freddie Mac made the first public disclosure of accurate information that had been obscured through misstatements and omissions, namely that: (1) Freddie Mac had substantial involvement in the nontraditional low credit and high risk mortgage industry; (2) at least $200 billion of Freddie Mac's $700 billion mortgage portfolio was at high risk of substantial losses; and (3) for the three months ending on September 20, 2007, Freddie Mac had incurred a record $2 billion loss on its mortgage investments.[83] When these risks were realized, the price of Freddie Mac stock plunged dramatically and continued to suffer

75. *Id.* at 2003.
76. *Id.* at 2003–04.
77. *Id.* at 2003.
78. *Id.* at 2004.
79. 830 F.3d 376 (6th Cir. 2016).
80. *Id.* at 385.
81. *Id.* at 382.
82. *Id.* at 388.
83. *Id.* at 382.

significant losses in the following year.[84] The plaintiffs alleged that "the 29% loss in stock price that occurred on November 20, 2007, when Freddie Mac disclosed a loss of $2 billion, [was] 'directly attributable to the market's reaction to revelations of the nature, extent, and impact of the fraud at Freddie Mac.'"[85]

After the plaintiffs amended their complaint three times and withstood three motions to dismiss, the district court granted Freddie Mac leave to file a renewed motion to dismiss and granted the ensuing motion, finding that the plaintiffs failed to adequately plead the loss causation element of a securities fraud action under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5.[86] In so finding, the district court rejected the plaintiffs' materialization of the risk theory of loss causation, stating that it was a "theory not adopted by the Sixth Circuit or persuasive to the Court."[87]

The Sixth Circuit, reversing the district court's dismissal, noted that "[a] decisive majority of circuits have also recognized the alternative theory or materialization of the risk, whereby a plaintiff may allege 'proximate cause on the ground that negative inferences,' drawn from a particular event or disclosure, 'caused the loss and were a foreseeable materialization of the risk concealed by the fraudulent statement.'"[88] The court further noted that it had recognized another alternative theory of loss causation, namely the corrective disclosure theory, in an unpublished decision.[89] Thus, the court concluded, "[w]hile it [had] not yet considered this issue directly, [their] prior decisions, both controlling and unpublished, recognize the viability of alternative theories of loss causation."[90] The court then explicitly joined its fellow circuits in recognizing the viability of alternative theories of loss causation and, applying the theory of materialization of the risk to the case before it, concluded that the plaintiffs had sufficiently alleged loss causation to survive Freddie Mac's motion to dismiss.[91]

Finally, in another securities fraud case, the Eighth Circuit "[a]ddress[ed] an issue of first impression" in *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*,[92] namely, the application of the Supreme Court's 2014 decision in *Halliburton Co. v. Erica P. John Fund, Inc.*[93] (*Halliburton II*), and concluded

84. Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp., 830 F.3d 376, 382 (6th Cir. 2016).
85. *Id.* at 388.
86. *Id.* at 382.
87. *Id.* at 385.
88. *Id.* at 384–85.
89. *Id.* at 384.
90. *Id.* at 385.
91. *Id.* at 385–88.
92. 818 F.3d 775 (8th Cir. 2016).
93. 134 S. Ct. 2398 (2014).

that the district court misapplied the price impact analysis mandated by *Halliburton II*.[94]

In *Best Buy*, the plaintiffs alleged that Best Buy Co. and three of its executives violated SEC Rule 10b-5 by making fraudulent or recklessly misleading statements to the public.[95] The plaintiffs claimed that statements in a press release and ensuing conference call with securities analysts on September 14, 2010, artificially inflated and maintained Best Buy's publicly traded stock price until the misstatements were disclosed through the release of its quarterly earnings on December 14, 2010.[96] After the district court dismissed the plaintiffs' claims relating to the press release as non-fraudulent, the plaintiffs moved for class certification.[97] When the plaintiffs relied on *Basic's* fraud-on-the-market presumption[98] to satisfy Federal Rule of Civil Procedure 23's predominance requirement, the defendants contended that they rebutted the presumption, and the plaintiffs responded that rebuttal evidence was not admissible at the class certification stage.[99]

The district court stayed the plaintiffs' class certification motion until the Supreme Court in *Halliburton II* resolved the issue by holding that defendants in an SEC Rule 10b-5 class action may seek to defeat *Basic*'s fraud-on-the-market presumption at the class certification stage through direct or indirect price impact evidence.[100] The district court then granted the plaintiffs' motion for class certification, recognizing that, under *Halliburton II*, defendants could rebut the fraud-on-the-market presumption at the class certification stage with evidence of no price impact, but concluding that they had not done so.[101] The district court relied on the plaintiffs' expert's opinion that, although the stock price was already inflated after the non-fraudulent press release, the alleged misrepresentations during the subsequent phone conference could have further inflated the price, prolonged the inflation of the price, or slowed the rate of fall.[102] The district court then concluded that the defendants failed to rebut the *Basic* presump-

94. *Best Buy*, 818 F.3d at 777.
95. *Id.* at 776–77.
96. *Id.* at 777.
97. *Id.*
98. Investors in a securities fraud action may invoke *Basic*'s rebuttable fraud-on-the-market presumption of reliance that "is based on the theory 'that the market price of shares traded on well-developed markets reflects all publicly available information,' and therefore '[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price.'" IBEW Local 98 Pension Fund v. Best Buy Co., Inc., 818 F.3d 775 (8th Cir. 2016) (quoting Basic, Inc. v. Levinson, 485 U.S. 224 (1988)).
99. *Id.* at 777.
100. *Id.* at 781–82.
101. *Id.*
102. *Id.* at 782.

tion by submitting evidence that the purported misrepresentations did not impact Best Buy's stock price.[103]

The Eighth Circuit, reversing the district court, found that the lower court ignored the fact that Best Buy rebutted the *Basic* presumption by offering overwhelming evidence of no "front-end" price impact by way of the opinion of the plaintiffs' own expert.[104] As the Eighth Circuit explained, the plaintiffs' expert, who opined that the substance of the non-fraudulent press release and the conference call two hours later were virtually the same, such that the press release had an immediate impact on stock price, while the confirming statements in the subsequent conference call did not, had thereby "severed any link between the alleged conference call misrepresentations and the stock price at which plaintiffs purchased."[105] Thus, the Eighth Circuit concluded that the defendants rebutted the *Basic* presumption and, because the plaintiffs failed to present any contrary evidence of price impact, they failed to satisfy the predominance requirement for class certification.[106]

III. BREACH OF CONTRACT

Recently, appeals in breach of contract litigation have produced important developments in the areas of contractual indemnity, subrogation, insurance, consequential damage exclusions, and confidentiality clauses.

The drilling rig Deepwater Horizon exploded and sank more than six years ago, but the accident continues to produce important law in numerous areas. One recent instance relates to the manufacturer of the well's blow out preventer, Cameron International Corp. Cameron manufactured and sold Transocean the blowout preventer that connected Transocean's rig to the well.[107] As part of the sale, Transocean indemnified Cameron.[108] Transocean, in turn, was indemnified by BP, the owner of the oil well.[109]

Before the accident, Cameron purchased a total of $500 million in insurance comprised of varying layers from different insurance companies.[110] One insurance company in particular, Liberty Insurance Underwriters, covered $50 million of losses between Cameron's first $100 million and $150 million in losses.[111] Under the policy, Liberty owned the right of subrogation against third parties—the right to pursue Cameron's rights against

103. *Id.*
104. *Id.*
105. *Id.*at 782–83.
106. *Id.* at 783.
107. *In re* Deepwater Horizon, 807 F.3d 689, 692 (5th Cir. 2015).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

a third party, such as BP or Transocean, to recover amounts Liberty paid Cameron.[112]

After the accident, thousands of people and businesses sued Cameron, Transocean, and BP, all of which filed lawsuits against each other.[113] After much fighting, BP and Cameron negotiated a tentative settlement in which BP would indemnify Cameron in exchange for $250 million, but only if Cameron's insurers agreed to waive their subrogation rights against Transocean.[114] Without closing the loophole, Cameron's insurers could try to get their money back through Transocean.[115] All of Cameron's insurers agreed except Liberty.[116]

Liberty refused to tender its policy limits, claiming that Cameron breached the contract's subrogation clause when settling with BP and that settlement conditions required Liberty to lose its "other insurance" rights, defined as "any type of self-insurance, indemnification or other mechanism by which an Insured arranges for funding of legal liabilities."[117] Because Liberty was only obliged to pay the "excess of such other insurance," it argued that its liability could not be determined until the amount of "other insurance," i.e., the value of Cameron's indemnification claim against Transocean, was determined.[118] After Liberty refused to pay, Cameron paid the $250 million and sued Liberty for refusing to pay its $50 million in coverage.[119] The district court in Louisiana, however, granted summary judgment in Liberty's favor on all of Cameron's claims.[120]

In the resulting appeal, styled *Cameron International Corp. v. Liberty Insurance Underwriters, Inc.*, the Fifth Circuit sided with Cameron, determining that Liberty's interpretation impermissibly construed "other insurance" to mean other insurance that "potentially" applied to Cameron's loss.[121] The court interpreted the "other insurance" clause to mean insurance or subrogation rights that "actually and presently" apply.[122] According to the court, Liberty's interpretation turned the "other insurance" clause from "a protection against double insuring into a clause that makes Liberty's policy a policy of last resort."[123] Further, under Liberty's interpretation, Cameron would have assigned its subrogation rights while owning

112. *In re* Deepwater Horizon, 807 F.3d 689, 692 (5th Cir. 2015).
113. *Id.*
114. *Id.* at 692–93.
115. *Id.* at 693.
116. *In re* Deepwater Horizon, 807 F.3d 689, 693 (5th Cir. 2015).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *In re* Deepwater Horizon, 807 F.3d 689, 694 (5th Cir. 2015).
122. *Id.* at 694–95.
123. *Id.* at 695.

only a policy of last resort—a worse position than owning no insurance at all.[124]

Having come to the opposite conclusion as the district court, the Fifth Circuit went further, determining that it was Liberty, and not Cameron, that breached the insurance policy when Liberty refused to promptly pay the claim.[125] By wrongfully interpreting the "other insurance" clause, Liberty even lost its subrogation right because the Fifth Circuit held that Liberty's prior material breach waived its rights to subrogation.[126] Based on the holding in *Deepwater Horizon*, many "other insurance" clauses are likely to be rewritten. When faced with uncertainty regarding the interpretation of a contractual provision, insurance companies may be forced to pay under the policy or risk losing all of their other rights under the contract for refusing to pay promptly.

In addition to a sweeping opinion regarding insurance agreements, the Fifth Circuit further developed contract law relating to confidentiality clauses and "best efforts" clauses. The contractual dispute in *Hoffman v. L & M Arts* began when Marguerite Hoffman decided to sell Mark Rothko's painting *Untitled 1961*, but wanted to sell it privately for confidentiality reasons.[127] Before agreeing to sell, the buyer wanted assurances that the fact that she sold the painting would remain a secret.[128] To further these efforts, Hoffman signed a February 2007 letter agreement to individuals brokering a sale that stated "[i]t is the specified wish of the seller that the sale and the terms of the sale remain confidential" and that "[i]t is requested that confidentiality be maintained indefinitely."[129] In March 2007, Christie's auction house contacted Hoffman about the painting, having heard of her plans from a buyer inquiring about an appropriate price.[130] After Christie's contact, Hoffman immediately cancelled the sale and conveyed her sense that confidentiality had been breached.[131]

In April 2007, Hoffman signed a new, one-page letter agreement to sell the painting containing simply-worded terms: a sale price of $17.6 million, an anonymous $500,000 donation to the Dallas Museum of Art, retained possession by Hoffman for a period of six months, a prohibition on hanging or displaying the painting for six more months, and a new confidentiality clause stating, "All Parties agree to make maximum efforts

124. *Id.*
125. *Id.* at 697.
126. *Id.* at 696–97. The court also submitted a certified question to the Texas Supreme Court regarding the viability of Cameron's non-contractual claims against Liberty outside the scope of this survey.
127. 2016 WL 5431818, at *1 (5th Cir. Sept. 28, 2016).
128. *Id.*
129. *Id.* at *2.
130. *Id.*
131. *Id.*

to keep all aspects of this transaction confidential indefinitely."[132] Years later, and after otherwise complying with the agreement, the buyers auctioned off the painting for approximately $31 million, including commissions.[133]

Hoffman sued the buyers and the brokers, claiming that, among other things, the buyers breached the confidentiality provisions through the auction.[134] Hoffman alleged that in selling the painting at auction, the purchasers were not using their "maximum efforts" to maintain the confidentiality of the sale, and asserting the "fact of the sale" was among the "aspects of the transaction."[135] As her damages, Hoffman claimed that she suffered the difference between "the sale price of $17.6 million and what the painting would have sold for at public auction on or around April 24, 2007."[136] In denying the defendants' motion for summary judgment on Hoffman's breach of contract claims, the district court upheld Hoffman's "auction-premium" damages theory "as a matter of law."[137] In fact, the jury was instructed that Hoffman's measure of damages was her auction-premium measure.[138] The jury awarded Hoffman damages for her breach of contract claim, and the judge reduced the award to judgment against the purchaser, L & M. Thereafter, L & M appealed to the Fifth Circuit.[139] Hoffman also appealed the court's decision to force her to elect between two measures of damages, a prior summary judgment disposing of her tort claims, and judgment as a matter of law for one of the brokers.[140]

The Fifth Circuit interpreted the concise contract against Hoffman. First, the Fifth Circuit held that the contract did not prohibit secrecy regarding the *occurrence* of the sale, only the *terms* of the sale.[141] The court held that the contract's allowance for a public or private display of the painting after six months invoked the contractual interpretation canon "expression unius est exclusion alterius," meaning that the contract excluded absolute confidentiality by specifically authorizing a public or private display after six months.[142] Even further, the court held that Hoffman's interpretation of the contract would be an unlawful alienation of the painting, imposing liability for subsequent transfers.[143]

132. Hoffman v. L & M Arts, 2016 WL 5431818, at *2 (5th Cir. Sept. 28, 2016).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at *3.
137. *Id.*
138. Hoffman v. L & M Arts, 2016 WL 5431818, at *3 (5th Cir. Sept. 28, 2016).
139. *Id.* at *3–4.
140. *Id.*
141. *Id.* at *9–10.
142. *Id.* at *9.
143. Hoffman v. L & M Arts, 2016 WL 5431818, at *10 (5th Cir. Sept. 28, 2016).

Even if the court had not invalidated Hoffman's theory of liability, the Fifth Circuit invalidated Hoffman's measure of damages used to instruct the jury.[144] Finding that a hypothetical 2007 auction could not serve as a baseline for benefit-of-the-bargain damages, the court found that the instruction did not account for other consideration given, what was bargained for versus what was received, or the term of the contract that was actually breached, where the defendant in question complied with the other provisions.[145] Likewise, the Fifth Circuit held that Texas courts would not permit Hoffman to have recovered her claimed disgorgement damages.[146] The court also emphasized that Hoffman had ignored a much more concrete and viable theory of damages—the loss actually sustained.[147] As a result, the court held that the defendants were entitled to judgment as a matter of law based on the invalid measure of damages for the claimed breach of contract and reversed and remanded the case to dispose of Hoffman's claims.[148]

The final case examined during the survey period is a cautionary tale regarding consequential damage exclusionary clauses. When upheld, exclusions of consequential damages can leave a party completely without a remedy, even in the face of massive losses, and courts, such as the Fourth Circuit, will not challenge them.

The dispute between Severn Peanut Company and Industrial Fumigant Company (IFC) began when Severn hired IFC to apply a dangerous pesticide within Severn's peanut storage dome.[149] Severn and IFC signed an agreement requiring IFC to apply the pesticide phosphine "in a manner consistent with instructions . . . and precautions set forth in its labeling."[150] The agreement contained a consequential damages limitation provision, however, stating that "[t]he amounts payable by [Severn] are not sufficient to warrant IFC assuming any risk of incidental or consequential damages," including categories such as "property, product, equipment, downtime, or loss of business."[151]

When IFC allowed the pesticide to accumulate in a manner inconsistent with its labeling, the pesticide caught fire, ultimately destroying Severn's twenty million pounds of peanuts and extensively damaging the structure of its storage dome.[152] When IFC failed to follow the pesticide's labeled instructions, it also violated the Federal Insecticide, Fungicide,

144. *Id.* at *11.
145. *Id.* at *11–12.
146. *Id.* at *12.
147. *Id.*
148. *Id.*
149. Severn Peanut Co. v. Indus. Fumigant Co., 807 F.3d 88, 90–91 (4th Cir. 2015).
150. *Id.* at 90.
151. *Id.* at 92.
152. *Id.*

and Rodenticide Act and the North Carolina Pesticide Law of 1971.[153] Alleging negligence, negligence per se, and breach of contract, Severn, its insurer, and Severn's parent company sued IFC and its parent company for the damage to its dome, loss of the peanuts, remediation costs, and lost business.[154]

The trial court first granted partial summary judgment to IFC and its parent company, holding that the consequential damages exclusion in the parties' agreement barred the plaintiffs' breach of contract claims with respect to the dome, loss of the peanuts, remediation costs, and lost business.[155] Later, as the parties were preparing for trial, the trial court found Severn contributorily negligent and awarded summary judgment to IFC on Severn's remaining tort claims.[156] Both parties appealed.[157]

On appeal, Severn argued that the consequential damages exclusion did not bar its claims for damage to its dome, peanuts, and expenses, but the Fourth Circuit brushed aside the argument in a single sentence, holding that Severn sought damages that "unambiguously" fell within the agreement's categories of consequential damages.[158] The Fourth Circuit went on to uphold the consequential damages exclusion despite challenges based on public policy grounds, unconscionability, and disfavored exculpatory clauses.[159]

Ultimately, many of Severn's arguments seemed to emphasize that IFC should not escape liability after causing nearly $20 million in damages for a job for which IFC was paid only $8,604.[160] The Fourth Circuit's responded to Severn's arguments regarding disproportionality, claiming the entire rationale for excluding consequential damages is to prevent unpredictably large liability for jobs that, in the absence of such an exclusion, no one would be willing to perform.[161]

Finally, the Fourth Circuit responded to the district judge's finding of contributory negligence by Severn as a matter of law. The Fourth Circuit found that such a summary judgment on contributory negligence was inappropriate, but found another ground to affirm the court's grant of summary judgment in the record—the economic loss doctrine.[162] The court held that because Severn sought to impose liability based on IFC's failure to apply the pesticide in accordance with its labeling, i.e., the same duty

153. *Id.*
154. Severn Peanut Co. v. Indus. Fumigant Co., 807 F.3d 88, 90 (4th Cir. 2015).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 92.
159. Severn Peanut Co. v. Indus. Fumigant Co., 807 F.3d 88, 92–94 (4th Cir. 2015).
160. *Id.* at 89.
161. *Id.* at 91.
162. *Id.* at 94.

breached in the underlying breach of contract claim, Severn could not seek liability in tort to avoid the rights and remedies imposed by its contract.[163] In response to Severn's claims that the peanuts and dome were "other property" outside the pesticide forming the basis of the contract, the Fourth Circuit responded that the contract was for the treatment of "commodities and/or space," and the peanuts and dome were included in this scope.[164] Upholding both aspects of the district court's judgment, the Fourth Circuit affirmed, leaving Severn without a remedy.[165]

IV. BREACH OF FIDUCIARY DUTY

Over the past year, two areas of fiduciary duty law saw the most significant changes: (1) the Seventh Circuit attempted to quell the tumult regarding employee stock ownership plan litigation, and (2) the Eighth Circuit held that certain judgments for breaches of fiduciary duties are nondischargeable in bankruptcy.

Ever since the Supreme Court issued its opinion in *Fifth Third Bancorp v. Dudenhoeffer*,[166] lower courts have struggled with the proper way to apply its holding to the proliferation of employee stock ownership plan (ESOP) litigation. The Seventh Circuit's opinion in *Allen v. GreatBanc Trust Co.* is merely one recent example.[167]

The dispute began when GreatBanc served as the fiduciary for an ESOP for employees of Personal-Touch, the ESOP's sponsor.[168] Personal-Touch appointed GreatBanc as the plan's trustee when the ESOP purchased $60 million of Personal-Touch's shares—a prohibited transaction under Section 406 of the Employee Retirement Income Security Act (ERISA).[169] Immediately after the ESOP purchased the shares, the value plummeted. The ESOP was left with no valuable assets, debt was incurred to purchase the stock, and interest obligations accrued on the debt.[170] Two employees sued the trustee on two grounds: (1) GreatBanc engaged in a prohibited transaction under Section 406 of ERISA, and (2) GreatBanc failed to appropriately valuate the Personal-Touch stock.[171] The district court dismissed both grounds of the employees' complaint for failing to sufficiently plead breach of fiduciary duty under

163. *Id.* (citing Moore v. Coachmen Indus., Inc., 499 S.E. 2d 772, 780 (N.C. Ct. App. 1998)).
164. *Id.* at 94–95.
165. *Id.*
166. 134 S. Ct. 2459 (2014).
167. 2016 WL 4474730 (7th Cir. Aug. 25, 2016).
168. *Id.* at *1.
169. *Id.* at *2; *see also* 29 U.S.C. § 1106(a).
170. *GreatBanc*, 2016 WL 4474730, at *1.
171. *Id.* at *2.

the new *Dudenhoeffer* standard dictated by the Supreme Court.[172] *Dudenhoeffer* found that a complaint that contains allegations that "a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."[173] The district court held that the plaintiffs had pled neither the "special circumstances" that *Dudenhoeffer* requires nor proper allegations that the plan paid an unfair price.[174] The plaintiffs appealed to the Seventh Circuit.

First, the Seventh Circuit held that the exceptions to ERISA's prohibited transactions are affirmative defenses, not part of the plaintiff's burden.[175] As a result, an ESOP plaintiff's pleadings need not negate affirmative defenses like "adequate consideration" for a prohibited transaction or a "reasonable rate" on a prohibited loan.[176] The Seventh Circuit was not deterred by GreatBanc's threats that a "flood" of prohibited transaction litigation would result.[177]

Again relying largely on *Dudenhoeffer*, the Seventh Circuit reversed and remanded the dismissal of both plaintiffs' theories of liability.[178] In *Dudenhoeffer*, beneficiaries to an ESOP sued the fiduciaries, alleging that a purchase price based on the public market price did not reflect the true value of the shares.[179] The Supreme Court sided with the fiduciaries, holding that fiduciaries can rely on the market price of *publicly traded* stock and the integrity of the prices produced by liquid markets.[180] GreatBanc successfully argued in the district court that *Dudenhoeffer*'s rationale and safe harbors for fiduciaries should extend to fiduciaries that use an "unbiased, independent" assessment of the value of the stock.[181] The Seventh Circuit came to the opposite conclusion: when a plaintiff alleges that a privately held stock was sold at an unfair price, *Dudenhoeffer*'s pleading standards are required because no valuation is presumed to be truly unbiased or independent.[182] In doing so, the Seventh Circuit held that "special circumstances" that *Dudenhoeffer* requires are effectively irrelevant to the sale of privately held stock.[183]

---

172. Allen v. GreatBanc Trust Co. 2016 WL 4474730, at *2 (7th Cir. Aug. 25, 2016) (citing Fifth Third Bancorp v. Dudenhoeffer 134 S. Ct. 2459 (2014)).
173. *Dudenhoeffer*, 134 S. Ct. at 2471.
174. *GreatBanc*, 2016 WL 4474730, at *2.
175. *Id.* at *5.
176. *Id.* at *3.
177. Allen v. GreatBanc Trust Co. 2016 WL 4474730, at *4 (7th Cir. Aug. 25, 2016).
178. *Id.* at *6.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

GreatBanc may largely deter ESOP fiduciaries from engaging in ERISA-prohibited transactions, regardless of any independent appraisals supporting the fair market value of the transaction. At least in the Seventh Circuit, a defendant's only remedy for a frivolous breach of fiduciary lawsuit based on a prohibited transaction would be sanctions under Federal Rule of Civil Procedure 11—not a motion to dismiss.[184] Only time will tell if *GreatBanc's* dire warning of a resultant "flood" of litigation will prove true or not.

The Eighth Circuit recently affirmed the nondischargeability of certain judgments based on breach of fiduciary duty claims that serves as a powerful warning to defendants. *Roussel v. Clear Sky Properties, LLC*[185] signals a change in the plaintiff's collection chances against judgment debtors.

In *Roussel*, a 50 percent owner wanted to sell his share of a brokerage franchise, but his co-owners refused.[186] After the refusal, the 50 percent owner, Roussel, started a competing franchise and hired numerous agents from his former company.[187] His former company sued him in state court for breach of fiduciary duty, fraud, and breach of contract.[188] A jury awarded the plaintiff significant actual damages and punitive damages, forcing Roussel to file for Chapter 7 bankruptcy.[189]

The plaintiff in the state court action initiated an adversary proceeding in Roussel's bankruptcy and asked the bankruptcy court to declare the entire state court judgment nondischargeable.[190] Roussel responded, stating that the nondischargeability requirements described in 11 U.S.C. § 523, requiring "willful" or "malicious" actions, were not litigated in state court.[191] The bankruptcy court agreed with Roussel and found the entire judgment dischargeable in Chapter 7 bankruptcy.[192] The district court disagreed with the bankruptcy court, finding the entire judgment nondischargeable.[193] After a back-and-forth process with the bankruptcy court regarding attorney fees, the entire judgment was found nondischargeable. Roussel appealed to the Eighth Circuit.[194]

Roussel's appeal claimed that the jury could have made its award based on either intentional behavior *or* reckless behavior.[195] He argued that the

184. *Id.* at *4.
185. 829 F.3d 1043 (8th Cir. 2016).
186. *Id.* at 1046.
187. *Id.*
188. *Id.*
189. *Id.*
190. Roussel v. Clear Sky Props., LLC 829 F.3d 1043, 1046 (8th Cir. 2016).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. Roussel v. Clear Sky Props., LLC 829 F.3d 1043, 1047 (8th Cir. 2016).

jury might have found merely "reckless disregard" inflicted the defendants' damages, and that such recklessness could not satisfy the "willful and malicious" test of 11 U.S.C. § 523.[196] The Eighth Circuit agreed with Roussel that § 523 requires more than recklessness.[197] The court also looked more deeply into the instruction to the jury in the underlying state court lawsuit, however, and found the support it needed to justify nondischargeability under § 523.[198] The court noted that the jury's charge required the jury to award punitive damages only if Roussel was "intending or fully expecting" the consequences.[199] Reminding the parties that dischargeability hinges on the deliberate intentional injury, and not the act itself, the Eighth Circuit found that Roussel took his actions "substantially certain" that his conduct would result in the plaintiffs' injuries.[200] As a result, Roussel's breaches of his fiduciary duties were nondischargeable as a matter of law under § 523.[201]

Roussel is likely to spawn many arguments over the significance and breadth of jury instructions. *Roussel* shows that savvy plaintiff attorneys could include language in their charge that would ensure that the unsuccessful defendant cannot escape a judgment, even in bankruptcy.

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.*[202] and adopted by the U.S. Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[203]

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."[204] The economic loss rule generally provides that a contracting party that suffers purely economic losses must seek its remedy in contract and not in tort.[205]

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 1046–47.
201. *Id.*
202. 403 P.2d 145 (Cal. 1965).
203. 476 U.S. 858 (1986).
204. Van Lare v. Vogt, Inc., 683 N.W.2d 46, 51 (Wis. 2004).
205. Gen. Elec. Co. v. Lowe's Home Ctrs., 608 S.E.2d 636, 637 (2005).

Economic loss includes both direct economic loss, which involves the loss of the product itself, and consequential economic loss, which are all other economic losses attributable to the product defect.[206] Although the economic loss rule was first developed in connection with product liability, it quickly expanded to bar other claims for economic loss where there is no underlying contract or privity between the claimant and the alleged tortfeasor.[207] The economic loss rule, however, generally does not bar a tort claim that is based on a recognized independent duty of care that is outside the scope of the contract.[208]

In the case of *LAN/STV v. Martin K. Eby Construction Co., Inc.*,[209] the Texas Supreme Court commented that the economic loss rule "*is something of a misnomer*" and then quoted Professors Vincent Johnson and Oscar Gray:

> "[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. " (quoting Vincent R. Johnson, *The Boundary–Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523, 534–535 (2009)); *see* Restatement, T.D. 1, § 1 cmt. b ("[D]uties of care with respect to economic loss are not general in character; they are recognized in specific circumstances according to the principles stated in Comment *c*."). 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.") (footnotes omitted).[210]

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

207. *See* BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66 (Colo. 2004) (finding 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* Berschauer/Phillips Const. Co. v. Seattle Sch. 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. County Concrete Corp., 593 N.W.2d 445, 451–52 (Wis. 1999).

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

209. 435 S.W.3d 234, 236 n.4 (Tex. June 20, 2014) (emphasis added).

210. *Id.* at 236 n.4.

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.

Recent cases in Colorado, Nevada, and California during the past year show the differences among the states regarding the application of the economic loss rule.

A. *Colorado*

In *Van Rees v. Unleaded Software, Inc.*,[211] the Colorado Supreme Court reversed the decision of the appellate court that dismissed fraudulent inducement claims under the economic loss rule by holding that pre-contract tort claims for negligent and fraudulent inducement constituted an independent tort that was separate from the subsequent integrated contract and was therefore not precluded by the economic loss rule.

In *Van Rees*, John Van Rees, Sr. sold metaphysical crystals through his website, ExquisiteCrystals.com, and entered into a series of contracts with Unleaded Software, Inc. to perform web-related services and design additional websites.[212] After Unleaded missed deadlines and failed to deliver the promised services, Van Rees sued for negligence, fraud, constructive fraud, fraudulent concealment, negligent misrepresentation, civil theft, violation of the Colorado Consumer Protection Act (CCPA), and three breaches of contract.[213] Of particular interest in this case, Van Rees alleged that Unleaded made numerous false statements and representations prior to entering into the contracts that induced him to enter the contracts, knew that it lacked sufficient staff to complete the website on time, and did not intend to provide (and had no capability to provide when the promises were made) webhosting or search-engine optimization work for Van Rees.[214]

The trial court dismissed all but Van Rees's contract claims, which went to a jury and awarded Van Rees damages against Unleaded.[215] Van Rees subsequently appealed the dismissal of his other causes of action prior to the jury trial; the Colorado Court of Appeals affirmed the trial court's dismissal on all counts, including the negligent and fraudulent inducement claims, citing the economic loss rule as a bar to his fraudulent inducement and other tort claims and civil theft claims, and lack of public impact as to his CCPA claim.[216]

211. 373 P.3d 603 (Colo. June 27, 2016).
212. *Id.* at 605.
213. *Id.* at 606.
214. *Id.* (emphasis added).
215. *Id.*
216. *Id.*

On appeal to the Colorado Supreme Court, the court affirmed the dismissal of the civil theft claims and CCPA claim on other grounds, but reversed the appellate court's decision to affirm the dismissal of the negligent and fraudulent inducement claims.[217] In reversing the appellate court, the supreme court acknowledged that the appellate court had considered but incorrectly distinguished the case of *Keller v. A.O. Smith Harvestore Products, Inc.*, in which the supreme court had held that "a contracting party's negligent misrepresentation of material facts prior to the execution of an agreement may provide the basis for an independent tort claim asserted by a party detrimentally relying on such negligent misrepresentations."[218] While the *Keller* decision clearly recognized that negligent and fraudulent inducement claims arising prior to execution of a contract may constitute independent tort claims, the *Keller* decision in 1991 pre-dated the supreme court's decision in *Town of Alma v. AZCO Construction, Inc.*,[219] which first recognized the economic loss rule in the State of Colorado.[220]

The supreme court noted that the appellate court distinguished *Keller* on two grounds: (1) the *Keller* court was not required to evaluate whether there was an independent tort duty in the context of the economic loss rule that was first recognized in 2000; and (2) the inducement related to the sale of a product, rather than the performance of services.[221] The supreme court found these distinctions "illusory" and later explained:

> The critical question in this case, then, is not whether Van Rees's tort claims are related to the promises that eventually formed the basis of the contract, as the court of appeals held. *Rather, the question is whether the tort claims flow from an independent duty under tort law. We conclude that they do.*
>
> *There is an important distinction between failure to perform the contract itself, and promises that induce a party to enter into a contract in the first place*. Here, Van Rees claims not only that Unleaded breached its obligations under the contract (claims that are not at issue in this appeal), but also that it *wrongfully induced him into entering a contractual relationship knowing that it did not have the capability to perform any of the promised web-related services*. Under our case law, the latter allegations state a violation of a tort duty that is independent of the contract.[222]

In effect, the supreme court held for the first time in *Van Rees* that negligent and fraudulent misrepresentation claims constitute independent

217. *Id.*
218. 819 P.2d 69, 72 (Colo. 1991).
219. 10 P.3d 1256, 1262 (Colo. 2000).
220. Van Rees v. Unleaded Software, Inc., 373 P.3d 603, 606 (Colo. June 27, 2016).
221. *Id.* at 607.
222. *Id.* (emphasis added).

torts under Colorado law that are not precluded by the economic loss rule first recognized in 2000.

As to the second ground in *Keller* that was distinguished by the appellate court, i.e., that *Keller* dealt with the sale of goods and *Van Rees* dealt with the sale of services, the supreme court could find no reason to limit the reasoning of *Keller* to the purchase of a product.[223] Rather, the court confirmed that the key holding in *Keller* was the recognition of an independent tort duty regarding negligent misrepresentations inducing the contractual arrangement, not the subject of the arrangement itself, i.e., whether the contract is for product or services.[224] The supreme court appreciated that the appellate court seemed concerned that if it did not affirm the dismissal of the tort claims in this case, the purposes underlying the economic loss rule would not be served because "tort law would swallow contract law." The supreme court, however, stated that it must be cautious of the corollary potential for "contract law to swallow tort law" if independent torts are precluded by the economic loss rule.[225] The court stressed that it was not concluding that Van Rees's tort claims would ultimately be successful at the trial court, but rather was merely holding that Van Rees had sufficiently pled an independent tort that was not precluded by the economic loss rule.[226]

Of additional note, the Colorado Supreme Court acknowledged in *Town of Alma v. AZCO Construction, Inc.* that the Texas Supreme Court had previously held that fraudulent inducement claims are outside the scope of the economic loss rule and not merely an exception to the economic loss rule.[227] The Colorado Supreme Court appears to have adopted this position in the *Van Rees* decision.

B. *Wyoming*

In *Rogers v. Wright*, the Wyoming Supreme Court reversed the decision of the district court granting summary judgment in favor of homebuilder defendants, which was based in part on the economic loss rule. The *Rogers* court held that the homebuyers' claims for negligence against the defendants constituted a tort duty that was independent of their contract to purchase the home and thus excluded from application of the economic loss rule.[228] In the same decision, the supreme court affirmed the decision

223. *Id.*
224. *Id.*
225. *Id.* at 608.
226. *Id.*
227. 10 P.3d 1256, 1262 (Colo. 2000) (citing Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 46–47 (Tex. 1998)) (noting that a fraudulent inducement claim in Texas is based on violation of an independent duty, precluding application of the economic loss rule).
228. Rogers v. Wright, 366 P.3d 1264, 1276 (Wyo. 2016).

of the district court to dismiss the homebuyers' claims based on implied warranties by the homebuilder defendants because such claims were waived by the "as is" clause in the homebuilder's contract.[229]

On July 8, 2009, the Rogers contracted to buy a home from Jeffrey Wright, one of the homebuilder defendants, which was built in early 2009.[230] Shortly after closing, the homebuyers discovered problems including cracks in the walls, basement floor, and foundation; leaks in the foundation; improper grading; and the lack of a final electrical inspection of the home.[231] When the homebuilder defendants failed to remedy the problems, the homebuyers filed a lawsuit alleging breach of contract, negligence, breach of warranty, intentional misrepresentation, and negligent misrepresentation against all of the homebuilder defendants.[232] The homebuilder defendants subsequently filed a motion for summary judgment, which the district court granted, specifically finding: (1) the homebuyers purchased the home in "as is" condition under the contract and, therefore, their claim for breach of contract was dismissed; (2) the homebuilder defendants were not parties to the warranty and, therefore, the breach of warranty claim against them was dismissed; and (3) the homebuyers could not show they relied upon any representations made by the homebuilder defendants.[233]Therefore, the claims for negligent misrepresentation, intentional misrepresentation, and negligence were dismissed.[234]

In reviewing the district court's decision, the supreme court agreed with the dismissal of the contract claim because the contract required the homebuyers to prove the homebuilders knew that a violation of an applicable code, ordinance, law, rule, or regulation existed at the time the parties executed the contract, and no such knowledge was ever pled or proved by the homebuyers.[235] The court dismissed the intentional and negligent misrepresentation claims because the homebuyers never alleged or proved they relied on any false statements made by the homebuilder defendants prior to entering into the contract to purchase the home.[236]

Regarding the negligent misrepresentation claim in particular, the supreme court re-characterized the negligent misrepresentation claim to be a negligence claim against the homebuilders—that they owed an independent duty of care to construct the home in a good and workmanlike manner under Wyoming law.[237] The court then considered whether the eco-

229. *Id.*
230. *Id.* at 1268.
231. *Id.*
232. *Id.*
233. Rogers v. Wright, 366 P.3d 1264, 1269 (Wyo. 2016).
234. *Id.*
235. *Id.* at 1270.
236. *Id.*at 1272.
237. *Id.* at 1275 (citing Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975)).

nomic loss rule barred this recharacterized negligence claim and held that ". . . the economic loss rule does not prevent the [homebuyers] from bringing a negligence claim against the home builder in this instance despite the fact that the damages are solely economic or pecuniary in nature."[238] The court acknowledged in so holding that other jurisdictions, specifically South Carolina and Colorado, have created similar exceptions to the economic loss rule for negligence claims against homebuilders.[239] Despite the court's holding regarding the recharacterized negligence claim, it was forced to agree with the district court's dismissal of implied warranty claims: ". . . *we are compelled to recognize that an "as is" clause in a home buyer's contract still constitutes an effective waiver of any implied warranties against the seller*."[240]

In summary, the Wyoming Supreme Court supports the practice of homebuilders in the state to use an "as is" clause to knock out implied warranties in purchase, but homebuilders will be subject to negligence claims for economic losses as an exception to the economic loss rule if they fail to construct the home in a good and workmanlike manner under Wyoming law.

C. *Illinois*

In the case of *Fattah v. Bim*, the Illinois Supreme Court reversed the appellate court by holding that the implied warranty of habitability, which is not precluded by the economic loss rule, may not be extended to a second purchaser of a house when a valid, bargained-for waiver of the implied warranty has been executed between the builder-vendor and the first purchaser in exchange for an express warranty by the builder.[241] In so holding, the supreme court answered the question left unanswered in its decision in *Redarowicz v. Ohlendorf*[242] about whether the implied warranty of habitability should be extended to a second purchaser of a house when a valid, bargained-for waiver of the warranty was executed between the builder-vendor and the first purchaser.[243]

---

238. *Id.* at 1276 (citing Excel Constr., Inc., v. HKM Eng'g, Inc., 228 P.3d 40, 46 (Wyo. 2010)).

239. *See* Kennedy v. Columbia Lumber & Mfg. Co., 384 S.E.2d 730 (S.C. 1989) (The South Carolina Supreme Court recognized a legal duty of a builder to comply with building codes and industry standards and refrain from constructing housing that he knows or should have known will pose serious risks of physical harm.); Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983) (The Colorado Supreme Court held that a home builder has a duty to act without negligence in the construction of a home, independent of any contractual obligations, and that duty extends to subsequent purchasers who were unable to discover latent defects prior to the purchase.).

240. Greeves v. Rosenbaum, 965 P.2d 669, 673–74 (Wyo. 1998) (emphasis added).

241. 52 N.E.3d 332, 339 (Ill. 2016).

242. 441 N.E.2d 324 (Ill. 1982).

243. *Fattah*, 52 N.E.3d at 339.

In 2005, the builder began construction of a single-family house in Glenview, Illinois, which included a patio made of paver bricks. The patio extended off the rear of the house that was supported by dirt and gravel and a retaining wall because the ground sloped down as it moved away from the house.[244] In 2007, the house was sold by the builder to the first purchaser for $1,710,000, and the first purchaser executed a "waiver and disclaimer of implied warranty of habitability" that "knowingly, voluntarily, fully and forever" waived the implied warranty of habitability in exchange for an express one-year warranty provided by the builder.[245] There was no claim that the builder failed to honor the express warranty during its one-year term.[246]

In 2010, the first purchaser sold the house "as is" to the second purchaser for $1,050,000 and the addendum signed by the second purchaser stated that the house was being sold "as is" and that the seller made no representations or warranty to plaintiff regarding the condition of the house.[247] Notably, the sale to the second purchaser was $660,000 less than the original purchase price, likely reflecting problems with the property.[248] When the patio collapsed in February 2011 after the retaining wall failed, the second purchaser brought suit against the owners of the builder in their individual capacity to collect $86,000 based on the builder's breach of the implied warranty of habitability.[249]

The trial court found that latent defects in the construction of the patio and retaining wall caused the patio to collapse, but held for the builder defendants based on the first purchaser's execution of the waiver and disclaimer of implied warranty of habitability.[250] On appeal, the builder defendants did not file a brief with the appellate court, and the appellate court reversed the trial court by holding that the implied warranty of habitability extended to the second purchaser.[251]

In reviewing the appellate court's reliance on *Redarowicz*, the court revisited the adoption of the economic loss rule by the court in *Moorman Manufacturing Co. v. National Tank Co.*[252] and the holding in *Redarowicz* that a buyer's desire to enjoy the benefit of his bargain is protected by

244. *Id.* at 333.
245. *Id.*
246. Fattah v. Bim, 52 N.E.3d 332, 333 (Ill. 2016).
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 334.
251. Fattah v. Bim, 52 N.E.3d 332, 334 (Ill. 2016); *see* Redarowicz v. Ohlendorf, 441 N.E.2d 324 (Ill. 1982) (where there was no waiver of the implied warranty of habitability by the first purchaser of a house, the warranty should be extended to a second purchaser of the house).
252. 435 N.E.2d 443 (1982).

the law of contracts and is "not an interest that tort law traditionally protects."[253] Applying the economic loss rule in *Redarowicz*, the court held that the plaintiff was seeking only damages for the cost of repair and replacement of the damaged chimney and adjoining structures, which were not recoverable in tort.[254] With respect to the implied warranty of habitability, however, the court held that the plaintiff's complaint could proceed because of the short time period between the completion of the construction of the house and the sale of the house to the second purchaser, and it was fair to require a builder to pay the second purchaser for the cost of repairing latent defects because these damages were also available to the first purchaser.[255] Since the second purchaser in *Fattah* was in fact seeking damages that were available to the first purchaser given the bargained-for waiver of the implied warranty of habitability and had the opportunity to obtain a warranty from the seller but instead purchased the property "as is," the court held that the implied warranty of habitability may not be extended to a second purchaser of a house when a valid, bargained-for waiver of the warranty has been executed between the builder-vendor and the first purchaser.[256] The supreme court, therefore, reversed the appellate court and affirmed the order of the trial court. The court's decision supports the common practice of builders to negotiate for waivers of implied warranties in their contracts of sale.

The above cases demonstrate the conflict that arises when the economic loss rule is used to define the boundary between tort law and contract law. This conflict has led some judges and commentators to liken the economic loss rule to "the ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*" and "a swelling globule on the legal landscape of [the] state."[257] At other times, the economic loss rule has been simply described as "one of the most confusing doctrines in tort law."[258] In any event, this conflict will undoubtedly continue to be played out in cases across the country in the years to come. It is incumbent on legal practitioners to keep abreast of these changes as they occur in their own states.

253. *Fattah*, 52 N.E.3d at 337.
254. *Id.*
255. *Id.*
256. *Id.* at 339.
257. *See* Grams v. Milk Prods., Inc., 699 N.W.2d 167, 180 (Wis. 2005); 1325 N. Van Buren, LLC v. T-3 Group, Ltd., 716 N.W.2d 822, 841 (Wis. 2006).
258. *See* R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789 (2000); Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster that Ate Commercial Torts*, LXIX:10 Fla. Bus. J. 34 (1995) ("[I]t is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine.").