Construction Law Section Newsletter

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The Enforceability of Pay-if-Paid Clauses in New Jersey

by Nicholas B. De Sena

While there are many types of disputes that arise on construction projects, one common type relates to payment. Specifically, payment disputes often occur when an owner has not paid its general contractor, and the contractor, in turn, has not paid its subcontractor. In this situation, the subcontract must be examined and all payment clauses must be analyzed to determine the contractor's payment obligations and the subcontractor's right to receive payment.[1] Significant provisions that frequently appear in a subcontract regarding payment by a contractor to a subcontractor are known as pay-if-paid and pay-when-paid clauses.

Pay-if-Paid vs. *Pay-when-Paid*

Although these clauses may sound similar, they are very different; therefore, the drafting of these clauses is crucial in determining a contractor's payment obligations. In general, under a valid pay-if-paid clause, if the contractor does not receive payment from the owner, the contractor is not obligated to pay its subcontractor, as long as the reason the owner is withholding payment is not due to actions or inactions of the contractor.[2] While there is no specific language required to create an enforceable pay-if-paid clause, a strongly worded pay-if-paid clause may include the following language:

(1) The owner's payment to the contractor is a condition precedent to the contractor's obligation to pay its subcontractor.[3]

(2) The contractor shall have no obligation to pay its subcontractor unless and until the contractor receives payment from the owner for work performed by the subcontractor.[4]

(3) The contractor is not liable for any amounts due to the subcontractor except to the extent that the contractor has received payment from the owner specifically related to work performed by the subcontractor.[5]

(4) The subcontractor expressly assumes the risk of nonpayment by the owner and the subcontract price includes this risk.[6]

(5) The subcontractor acknowledges that it is relying on the creditworthiness of the owner, and not the contractor, in seeking payment.[7]

In contrast, a pay-when-paid clause does not create a condition precedent that must be satisfied before the subcontractor has the right to receive payment from the contractor.[8] Rather, courts have concluded that pay-when-paid clauses only create a timing mechanism for payment, obligating the contractor to make payment within a reasonable time after the contractor receives payment from the owner.[9]

An example of a pay-when-paid clause might state that the "contractor shall pay subcontractor within ten days of contractor's receipt of payment from the owner."[10] Under this clause, unlike a pay-if-paid clause, if the subcontractor is not paid by the contractor within a reasonable time after the subcontractor's payment application is approved, the subcontractor may still be entitled to payment, even if the owner has not paid the contractor.[11] What is considered reasonable depends on several different factors, including the law of the jurisdiction, the nature of the project, the work performed by the subcontractor, and the terms of the parties' contract.[12] Thus, courts have interpreted pay-when-paid clauses as not shifting the risk of the owner's nonpayment to the subcontractor.[13] This is the most significant difference between pay-when-paid and pay-if-paid clauses.

New Jersey Case Law on the Enforceability of Pay-if-Paid Clauses

While pay-when-paid clauses are generally enforceable in most jurisdictions, the enforceability of pay-if-paid clauses varies greatly by state. To determine the validity of pay-if-paid clauses in New Jersey, it is necessary to briefly discuss the handful of New Jersey cases in which these types of payment clauses are the subject of dispute. While state and federal courts in New Jersey have ruled on payment disputes arising from pay-if-paid and pay-when-paid clauses, there is only one officially reported case in the state applying New Jersey law on this issue.

In the case of *Seal Tite Corp. v. Ehret, Inc.*, the United States District Court for the District of New Jersey held that the relevant payment clause, which stated that payment would be made by the contractor to the subcontractor "within seven (7) days of receipt of payment by the Owner," did not create a condition precedent to the subcontractor's right to receive payment.[14] The court determined that the clause did not forever absolve the contractor from tendering payment to the subcontractor, but rather postponed payment for a reasonable period of time after the subcontractor's work was completed, during which time the contractor would have an opportunity to receive the necessary funds from the owner.[15]

In essence, the court in *Seal Tite* found the clause to be a classic pay-when-paid clause, and not a pay-if-paid clause. The court reasoned that there was no indication in the payment clause that the subcontractor intended to assume the risk that the owner would become insolvent.[16] Thus, the court implied that, if such an intention to shift this risk was clearly present, the clause would be enforceable as a pay-if-paid clause. New Jersey courts have subsequently used this reasoning to uphold certain pay-if-paid clauses in subcontracts.

Although *Seal Tite* is the only officially reported case in New Jersey on this issue, there are multiple unreported cases in which courts resolved disputes arising from pay-if-paid and pay-when-paid clauses. While these decisions do not expressly state that pay-if-paid clauses are enforceable in New Jersey, their holdings, analysis, and reasoning with respect to such clauses seem to suggest as much.

In the Appellate Division case of *Avon Bros. v. Tom Martin Construction Co.*, the payment clause in the subcontract stated that "[f]inal payment...shall be made by [contractor] to [subcontractor] when [subcontractor's] Work is fully performed...and [contractor] has received payment from [owner]."[17] Since the owner did not pay the contractor for work performed by the subcontractor, the relevant question was whether the payment clause was a pay-if-paid clause by which the subcontractor assumed the risk of the owner's nonpayment, or merely a pay-when-paid clause that only permitted reasonable postponement of the contractor's payment obligation.[18]

As part of its analysis, the court in *Avon Bros.* noted that the use of the words "if" or "when" is not dispositive in determining whether such a clause is a pay-if-paid clause or a pay-when-paid clause.[19] Rather, the important factor to consider is whether there is clear and unequivocal language in the subcontract evidencing an intent by both parties to shift the risk of collection to the subcontractor.[20] In a similar fashion to *Seal Tite*, the court in *Avon Bros.* held that the clause did not shift the collection risk to the subcontractor, but the court implied that a clause clearly evidencing an intention to shift this risk to the subcontractor would be enforceable.[21] Nowhere does the court state or even hint that such a clause would be deemed unenforceable in New Jersey.

Nine years later, the case of *Fixture Specialists, Inc. v. Global Construction, LLC* was decided by the United States District Court for the District of New Jersey.[22] Here, the payment clause at issue contained language that the contractor "shall never be obligated to pay Subcontractor under any circumstances, unless and until funds are in hand received by Contractor in full....," and that this was "a condition precedent to any obligation of Contractor, and shall not be construed as a time of payment clause."[23] The court upheld this clause as a typical pay-if-paid clause in which the risk of nonpayment from the owner was clearly transferred to the subcontractor.[24]

As part of its analysis, the court in *Fixture Specialists* rejected the subcontractor's argument that New Jersey's public policy of protecting subcontractors would deem such a clause invalid, and agreed with the court in *Avon Bros.* that the parties should have the freedom to contract as they so desire.[25] The court also rejected the subcontractor's argument that New Jersey's anti-waiver provisions of its construction lien law would deem the payment clause to be unenforceable,[26] as further discussed hereinafter.

Also in 2009, the Appellate Division held a pay-if-paid clause to be enforceable in *Brolley Electrical, Inc. v. Ernest Bock & Sons, Inc.*, where the clause in the subcontract stated that payment by the owner to the contractor "is a condition precedent before General Contractor is obligated to pay subcontractor," and that, if "Owner fails to pay [general contractor] for work completed by the subcontractor, then [general contractor] shall not be obligated to pay subcontractor until payment is received by [general contractor] from Owner...."[27] The court looked to the *Seal Tite* and *Avon Bros.* decisions and held that the clause contained sufficient condition-precedent language, which was clear and unambiguous, unlike the payment clauses in *Seal Tite* and *Avon Bros.*[28]

The Appellate Division again upheld a pay-if-paid clause in *O.A. Peterson Construction Co., Inc. v. Englewood Hospital and Medical Center.*[29] In that case, the relevant payment clause in the subcontract stated that "the receipt by the Contractor of payment for the Subcontractor's work shall be a condition precedent to the Contractor's obligation to pay the Subcontractor," and that the contractor "shall have no liability or responsibility for any amounts...to be due Subcontractor for any reason whatsoever except to the extent that the Contractor has actually received funds from the Owner specifically designated for disbursement to the Subcontractor."[30] The court found this clause unambiguously shifted the risk of nonpayment from the contractor to the subcontractor and, under the clause, the contractor was not obligated to pay the subcontractor until the dispute was resolved and the owner tendered payment to the contractor.[31]

In *Veteran Call Center, LLC v. Hammerman & Gainer, Inc.*, decided by the United States District Court for the District of New Jersey, the payment clause at issue in the subcontract contained language that the subcontractor "shall be paid within fifteen (15) days of PRIME'S receipt of payment from the Client for SUBCONTRACTOR'S services....No payment will be made unless PRIME receives payment for SUBCONTRACTOR'S services from Client."[32] For purposes of the court's analysis on a related issue, namely, whether the contractor had actually been paid for the subcontractor's work, the court "assumed" that the provision at hand was a pay-if-paid clause.[33]

The court in *Veteran Call Center* did, however, note that it was not holding that the provision was, in fact, pay-if-paid, but only made such an assumption to demonstrate that the elements of the clause had nevertheless been satisfied, and the court thus reserved its decision on whether the provision was pay-if-paid or pay-when-paid.[34] Notwithstanding, since the court made such an assumption, it can be implied that the court deemed pay-if-paid clauses to be valid and enforceable in New Jersey. Logically, the court would not have made this assumption if it viewed pay-if-paid clauses to be invalid. Therefore, even though the court only made this assumption "for argument's sake only,"[35] it supports the position that pay-if-paid clauses are enforceable in New Jersey.

The Appellate Division case of *Midlantic Fire, LLC v. Ernest Bock & Sons, Inc.* also involved a dispute relating to a payment clause in a subcontract.[36] This clause stated that payment by the owner to the contractor for work performed by the subcontractor "shall be a condition precedent" to the contractor's obligation to pay the subcontractor.[37] The clause also included language that the subcontractor "understands that it shall bear the risk of non-payment by the Owner and shall be entitled to no compensation from the General Contractor in the event of non-payment by the Owner for its work/materials."[38] This case was decided under Pennsylvania law, where pay-if-paid clauses are generally enforceable.[39] However, under Pennsylvania law, such a clause does not apply to nonpayment of a subcontractor's change orders, due to a reluctancy to enforce a conditional payment provision against a subcontractor that is not responsible for the

condition giving rise to the nonpayment.[40]

Since the court in *Midlantic Fire* concluded that the issues requiring the subcontractor to change its work came about as a result of the contractor's error in planning and its lack of communication with the subcontractor, it was clear the subcontractor was not the cause of the change order work.[41] Rather, it was the contractor's own error that prompted the need for the change order work.[42] Accordingly, the court held that pay-if-paid clauses are unenforceable in the change order context when an owner fails to pay a contractor due to an error made by the contractor.[43] Although this case was decided under Pennsylvania law, the holding follows a general principle of law that a party cannot seek enforcement of a condition to an obligation when the failure to meet the condition was directly attributable to that party's actions or inactions.[44] Thus, if this case was decided under New Jersey law, the result would likely have been the same.

While the aforementioned unreported cases suggest that pay-if-paid clauses are enforceable in New Jersey, in *Titan Stone, Tile & Masonry, Inc. v. Hunt Construction Group, Inc.* the United States District Court for the District of New Jersey held that a genuine issue of material fact remained as to whether any provision in the subcontract constituted a clear indication of an agreement by the parties that the collection risk would shift to the subcontractor.[45] Here, the payment clause stated that "Final Payment by the Owner to [contractor] shall be an express condition precedent to [contractor's] duty to make Final Payment to [subcontractor]."[46] An additional clause in the subcontract stated that "[r]eceipt of payment by [contractor] from the Owner is a condition precedent...to the right of [subcontractor] to receive payment from [contractor], unless the failure to have received payment from the Owner shall have been caused solely by the fault of [contractor]," and that "[r]eceipt of payment by [contractor] from the Owner is a condition precedent...to [subcontractor's] right to make any claims against [contractor's] payment bond, if a payment bond is posted for the Project."[47]

Despite the seemingly clear "condition precedent" language in these clauses, the court in *Titan Stone* cited to the *Seal Tite* decision for the proposition that there must be an explicit indication in the subcontract that the subcontractor agreed to assume the risk of the owner's nonpayment.[48] The court thus denied the contractor's motion for entry of summary judgment, concluding that a genuine issue of material fact remained as to whether any subcontract provision clearly showed an intention of the subcontractor to assume the risk of nonpayment by the owner.[49] Even so, this case seems to be an outlier, and appears to contradict more recent decisions in New Jersey in which similar clauses have been upheld as valid pay-if-paid clauses.

As demonstrated in the New Jersey state and federal court decisions discussed herein, the pay-if-paid clauses in those cases were either deemed to be valid and enforceable or implied to be valid and enforceable. However, as shown by the decisions in *Seal Tite* and *Titan Stone*, in order for such clauses to be enforceable in New Jersey, they must be strongly drafted and must contain specific language indicating the intent of the subcontractor to assume the risk of the owner's nonpayment.

The Enforceability of Pay-if-Paid Clauses in Other Jurisdictions

While New Jersey courts have held that certain pay-if-paid clauses are enforceable, courts in other states have invalidated similar clauses. For example, in the case of *Wm. Clarke Corp. v. Safeco Insurance Co. of America*, the Supreme Court of California ruled that a typical pay-if-paid clause containing condition precedent language was unenforceable due to its conflict with California's public policy of protecting a subcontractor's mechanic's lien rights.[50] In California, a subcontractor may not waive its mechanic's lien rights, except under certain limited circumstances.[51] The Court stated that, while a subcontractor's agreement to be bound by a pay-if-paid clause may not amount to a technical waiver of a subcontractor's mechanic's lien rights, it is, in substance, a waiver of those rights because it has the same practical effect as an express waiver.[52] Specifically, the court reasoned that, if the pay-if-paid clause was valid and the owner did not make payment to the contractor, it would be impossible for a subcontractor to enforce its mechanic's lien.[53] Since the amount due under the subcontract is equal to the amount of the mechanic's lien, and since the contractor would effectively be shielded by the pay-if-paid clause, there would be no amount due from the contractor to the subcontractor, and enforcement of the mechanic's lien would not be possible.[54] The court, therefore, held that pay-if-paid clauses are unenforceable in California.[55]

Similarly, the New York Court of Appeals in *West-Fair Electric Contractors v. Aetna Casualty & Surety Co.* held that pay-if-paid clauses violate the public policy of New York's mechanic's lien law, which states that any attempt

to waive the right to file or enforce a lien "'shall be void as against public policy and wholly unenforceable.'"[56] The court further reasoned that an owner who becomes insolvent may never make another payment to the contractor, and the subcontractor's right to receive payment has thus been indefinitely postponed, which amounts to an effective waiver of its right to enforce its mechanic's lien.[57] The court stated that the waiver would occur pursuant to the pay-if-paid clause "because mechanics' liens may not be enforced until a debt becomes due and payable."[58]

The New York Court of Appeals has held, however, that pay-if-paid clauses are enforceable in certain situations. For example, in *Welsbach Electric Corp. v. MasTec North America, Inc.*, the plaintiff subcontractor was a Delaware corporation and the defendant contractor was a Florida corporation, and the parties agreed that Florida law, which generally enforces pay-if-paid clauses, would govern the subcontract.[59] Accordingly, the appeals court had to determine whether New York's public policy against enforcement of pay-if-paid clauses was "so fundamental" that it should override the choice of law provision in the subcontract.[60] Since both parties were non-New York corporations who were sophisticated commercial entities that knowingly and voluntarily entered into the subcontract, the court did not find that pay-if-paid clauses were so "'truly obnoxious'" that the parties' choice of law provision should be invalidated.[61] Thus, in certain limited situations, pay-if-paid clauses may be enforceable in New York.

New Jersey courts have addressed the concern that enforcing a pay-if-paid clause may invalidate a subcontractor's construction lien rights. The court in *Fixture Specialists*, for example, rejected the rationale of the highest courts in California and New York and held that a subcontractor may file a lien to protect its interest even if payment was not technically due from the contractor to the subcontractor by operation of the pay-if-paid clause.[62] The court in *Fixture Specialists* did state, however, that, while a subcontractor may *file* its mechanic's lien, *foreclosure* of the lien would be stayed until all contractual preconditions to payment had been met.[63] Notwithstanding, New Jersey has not adopted the reasoning of the California and New York courts that pay-if-paid clauses are unenforceable as being contrary to the public policy of New Jersey's anti-waiver provisions of its construction lien law.

The Effect of Pay-if-Paid Clauses on Surety Companies

Another important aspect of pay-if-paid clauses relates to the question of whether a surety is obligated to make payment to a subcontractor pursuant to a payment bond if a pay-if-paid clause is found to be a valid defense to the contractor's obligation to make payment. On the one hand, if a surety can use the clause as a defense, it greatly diminishes the value of the payment bond.[64] On the other hand, if a surety cannot use the clause as a defense, the surety will pay the subcontractor and seek indemnification from the contractor, effectively making the pay-if-paid clause worthless.[65]

In New Jersey, the court in *Fixture Specialists* directly addressed this issue. In that case, the payment bond stated that the surety was only obligated to make payment to the subcontractor for sums "as may be justly due."[66] Since the condition precedent in the pay-if-paid clause at issue had not been satisfied, and since the contractor's duty to make payment, therefore, had not accrued, no amounts were "justly due," and the surety was able to use the clause as a defense against the subcontractor's demand for payment.[67]

The court in *Fixture Specialists* reasoned that, in the case of a payment bond, the surety's liability will accrue at the same time as the principal's liability, and the surety will not be liable on the surety contract if the principal has not incurred liability on the primary contract.[68] In this case, since the principal was absolved of its payment obligation pursuant to the pay-if-paid clause, the surety was not obligated to make payment to the subcontractor.[69] Although the court rejected the subcontractor's argument that the surety should be liable since the pay-if-paid language was not incorporated into the payment bond,[70] it would be wise for contractors and surety companies to expressly incorporate the payment terms of the subcontract into the payment bond to avoid any potential dispute.[71]

Conclusion

As discussed herein, there have been several cases in New Jersey state and federal courts that have held pay-if-paid clauses to be valid. If a contractor seeks to include an enforceable pay-if-paid clause in a subcontract, it would be prudent to draft the clause with strongly worded "condition precedent" language, along with language clearly showing that the subcontractor intends to assume the risk of nonpayment by the owner. In addition, for payment bonds issued for the benefit of a subcontractor, contractors and surety companies should incorporate the

payment terms of the subcontract into the payment bond, including the applicable pay-if-paid language. ■

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Endnotes

1. Please note that this article is limited to private construction projects. Public construction projects are beyond the scope of this article.
2. Michael S. Zicherman, Pay-if-Paid vs. Pay-when-Paid in Construction Contracts, *Practical Law Real Estate*, Jan. 2015, at 2-3.
3. *Id*. at 2.
4. *Id*.
5. *Id*. at 3.
6. *Fixture Specialists, Inc. v. Global Constr.*, LLC, No. 07-5614(FLW), 2009 WL 904031, at *4 (D.N.J. March 30, 2009).
7. Michael S. Zicherman, Pay-if-Paid Clauses in Construction Subcontracts, *Practical Law Real Estate*, Jan. 2015, at 2.
8. *Fixture Specialists, Inc.*, 2009 WL 904031, at *4.
9. *Id*.
10. *See, e.g., Seal Tite Corp. v. Ehret, Inc.*, 589 F. Supp. 701, 702 (D.N.J. 1984).
11. Michael S. Zicherman, Pay-if-Paid vs. Pay-when-Paid in Construction Contracts, *Practical Law Real Estate*, Jan. 2015, at 1-2.
12. *Id*. at 2.
13. *Seal Tite Corp.*, 589 F. Supp. at 704.
14. *Id*. at 702-04.
15. *Id*. at 704.
16. *Id*.
17. *Avon Bros. v. Tom Martin Constr. Co.*, No. A-740-99T1, 2000 WL 34241102, at *6 (N.J. App. Div. Aug. 30, 2000).
18. *Id*.
19. *Id*. at *7.
20. *Id*.
21. *Id*.
22. *Fixture Specialists, Inc.*, 2009 WL 904031.
23. *Id*. at *2.
24. *Id*. at *6.
25. *Id*. at *5.
26. *Id*. at *6-8.
27. *Brolley Elec., Inc. v. Ernest Bock & Sons, Inc.*, GLO-L-1079-04, 2009 N.J. Super. Unpub. LEXIS 3229, at *3-4 (N.J. App. Div. May 18, 2009).
28. *Id*. at *10-16.
29. *O.A. Peterson Constr. Co., Inc. v. Englewood Hosp. & Med. Ctr.*, No. L-1367-06, 2010 WL 2696758 (N.J. App. Div. June 30, 2010).
30. *Id*. at *1.
31. *Id*. at *2.
32. *Veteran Call Ctr., LLC v. Hammerman & Gainer, Inc.*, No. 15-6257 (JLL) (JAD), 2016 WL 1587404, at *1 (D.N.J. April 19, 2016).
33. *Id*. at *5.
34. *Id*. n.3.
35. *Id*.
36. *Midlantic Fire, LLC v. Ernest Bock & Sons, Inc.*, No. A-3177-14T2, 2016 WL 3093075 (N.J. App. Div. June 3, 2016).
37. *Id*. at *1.
38. *Id*.
39. *Id*. at *2.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. Michael S. Zicherman, Pay-if-Paid vs. Pay-when-Paid in Construction Contracts, *Practical Law Real Estate*, Jan. 2015, at 3.
45. *Titan Stone, Tile & Masonry, Inc. v. Hunt Constr. Group, Inc.*, No. 05-3362 (GEB), 2007 WL 869556, at *7 (D.N.J. March 20, 2007).
46. *Id*. at *6.
47. *Id*.
48. *Id*.
49. *Id*. at *7.
50. *Wm. Clarke Corp. v. Safeco Ins. Co. of Am.*, 15 Cal. 4th 882, 886 (1997).

51. *Id*. at 889.
52. *Id*. at 890.
53. *Id*. at 892.
54. *Id*.
55. *Id*. at 886.
56. *West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 87 N.Y.2d 148, 156 (1995) (*quoting* N.Y. Lien Law § 34).
57. *Id*. at 158.
58. *Id*.
59. *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 627 (2006).
60. *Id*.
61. *Id*. at 632. It should be noted that New York General Obligations Law Article 35-E was subsequently enacted. Section 767 of Article 35-E provides that, with construction contracts, any provision or clause, with the exception of a contract with a material supplier, that makes the contract subject to the laws of another state, is invalid. Thus, if this case was decided today, the contractual clause in *Welsbach Elec. Corp.*, providing that Florida law governs the subcontract, would be unenforceable.
62. *Fixture Specialists, Inc.*, 2009 WL 904031, at *7.
63. *Id.; see also Thomas Group, Inc. v. Wharton Senior Citizen Housing, Inc.*, 163 N.J. 507, 520-21 (2000) (In a payment dispute between an owner and a contractor, the court concluded that the contractor "did not have to risk losing its statutory lien by waiting until all of the contractual preconditions to payment were satisfied before it asserted its lien," and that "the future [] interests of an owner can adequately be protected by staying the contractor's right to enforce its lien until the contractual preconditions for payment are met.").
64. *See* Allison B. Kingsmill, "Pay-if-Pay" Clauses and Their Effect on Commercial Payment Bond Claims, *AGC Law in Brief*, March 27, 2019.
65. *Id*.
66. *Fixture Specialists, Inc.*, 2009 WL 904031, at *8-9.
67. *Id*. at *11.
68. *Id*. at *10.
69. *Id*. at *11.
70. *Id*. at *9.
71. Kingsmill, *supra* note 64.

Inside this issue

The Interesting Tale of the *Greate Bay v. Perini Case* and its Impact on Construction Law Today

by Jeffrey B. Kozek

Call me Ishmael...[1]

While an expansion project at an Atlantic City casino started as a project to attract whales,[2] it ended up having a profound impact on construction law in New Jersey and changed the general conditions of a standard form document used on building projects throughout the U.S. This author was a participant in the fascinating case of *The Matter of Greate Bay Hotel and Casino v. Perini Corporation* and the associated litigation that followed, which involved the delayed completion of the (now) out-of-existence Sands Hotel & Casino in Atlantic City.

Why was this construction project so interesting? It contained all of the trademarks of a typical construction project gone bad—design issues, outstanding changes, delay, lack of clear communication between owner and contractor, among other things—and resulted in a case that started in arbitration and ended before the New Jersey Supreme Court, with many twists and turns along the way.

In the Beginning...[3]

The Sands Hotel & Casino, the first newly constructed hotel and casino in Atlantic City under the original name of the Brighton Hotel and Casino, ended up with the Sands moniker under a licensing agreement with its famous namesake in Las Vegas through a series of purchases of the property. The Sands was one of two properties along the ocean that were set back from the boardwalk. To attract more visitors and also to attract the aforementioned whales, the Sands decided to make improvements to the facility in three main areas: 1) the addition of a two-story escalator that would carry patrons up to the second floor casino space with expansion of the gaming area and the addition of a new food court; 2) the addition of a new floor to accommodate high-roller suites; and 3) the creation of a new entrance on the corner nearest the boardwalk that included a porte cochere and a glitzy glass fa ade running parallel with the boardwalk.

In 1983, Greate Bay (hereinafter referred to as the Sands) entered into a construction manager/general contractor (CM/GC) agreement with Perini Corporation, a well-known and established contractor out of Framingham, Massachusetts, to perform the expansion/renovation work. The cost reimbursement contract contained a guaranteed maximum price (GMP) of $16.8 million. In addition to a fee of $600,000, Perini was entitled to an additional four percent fee if costs (through approved change orders) exceeded $20 million. While some schedules showed the date of substantial completion as the end of May 1984, the Sands made it clear to Perini that the work needed to be accomplished by Memorial Day of 1984. This was a key date, since Memorial Day is the official kick-off of the summer Jersey shore season and the casinos generated more business during the summer season.

It Was the Best of Times, it Was the Worst of Times...[4]

As is not uncommon on many construction projects, the record keeping was not great. This was more the norm than the exception in 1984, when construction schedules were still being run on mainframe computers, as Primavera and MS Project scheduling software and PCs were just making their debut and not yet fully adopted by the construction industry along with all of the other project management supporting software available today. Typical of many owners who are infrequent construction builders, the construction schedule was a mystery, and the Sands indicated that Perini never took the time to explain what the schedule was showing. In fact, the Sands' general counsel related to this author that, when asked about the negative float in the schedule, he believed "negative float"[5] meant the work was ahead of schedule.

As the summer season approached in 1984, it became clear the work would not be accomplished by Memorial Day and, in fact, the project did not receive a temporary certificate of occupancy (TCO) until the middle of September, well after the end of the busy summer season. The very profitable year the Sands was

anticipating quickly disappeared. As the remaining work was proceeding that summer, the Sands retained the firm this author was employed by as its scheduling expert, and also retained an outside law firm to prepare a demand for arbitration.

All of this Happened, More or Less...[6]

While Perini still had its job trailer on site, the Sands literally took over the trailer in order to preserve the records on site. This led to a court hearing, with the judge ordering that both sides could have access to the trailer and its records. A security guard was posted at the trailer in order to maintain order and access.

During the latter part of 1984 and into 1985, both sides prepared for the arbitration hearings that were to commence in approximately Oct. 1985. Prior to the start of arbitration, the Sands reviewed outstanding change order requests, and certain issues relating to these claimed amounts were addressed and resolved. Although not all change order requests were resolved, this left the arbitration to deal primarily with the larger issue of delay and lost profits.

Arbitrators were selected (an attorney, an architect and an engineer) and the hearings began at the American Arbitration Association office in Somerset. Not long thereafter, while the hearings were proceeding, Perini's corporate office apparently forwarded documents to Perini in Atlantic City at the project site instead of Perini's new location that had been set up for its personnel after the 'taking' of the job trailer. The material mistakenly sent to the job trailer was given to the Sands' general counsel who, in turn, provided it to the Sands' outside counsel, who proceeded to use some of the material during the arbitration hearings. Included in the material were confidential Perini internal memoranda discussing the case, including privileged materials from its in-house counsel. Upon introduction of these materials during the arbitration, the hearings were halted while legal counsel for Perini sought protection from the court to bar introduction of the material in arbitration, since it was mistakenly sent to the wrong location. This occurred in late 1985. After a couple of years of contesting the use of this material up through the appellate level, the court confirmed the lower court's finding that not only were the documents tainted, but the law firm that introduced them was as well. As a result, Sands' outside legal counsel was disqualified, and the Sands was forced to retain new legal counsel.

In late 1987, the Sands retained new legal counsel, and the arbitration re-commenced in Feb. 1988. The locale of the arbitration hearing was changed. Now, the hearings would be held at the Seaview Hotel,[7] just outside of Atlantic City.

Fact and expert witness testimony was provided through most of 1988. Most of the testimony was provided by Sands' witnesses. Strangely, Perini did not provide testimony from its main project participants, including Perini's project manager. Perini's main fact witnesses were its electrical and mechanical subcontractors. A tactic used by Sands' legal counsel was to highlight the absence of testimony by Perini's project manager (the proverbial empty chair). Sands' counsel also proceeded to press Perini for the release of the personnel file of the project manager. This information was never released, and the non-appearance of the project manager and the non-production of his records appeared not to go over well with the arbitration panel.

The Sands' case concluded with its calculation of alleged damages. For this aspect of the case, the Sands' retained one of the 'Big 8' accounting firms (as known at that time) to determine the lost profits incurred due to the delayed completion of the work. The accounting firm prepared a schedule of lost profits with accompanying notes and exhibits to demonstrate the difference in operating income[8] between the claim period of May–Dec. 1984, and the subsequent same timeframe in 1985. The report noted that this difference—almost $13.5 million—was an appropriate measure of the profits lost due to the delayed construction. The report also noted that the improvement in operating income from 1984 to 1985 was not due to improved market conditions, since the Atlantic City casino industry, as a whole, had experienced negative growth from 1984 to 1985. Finally, it was noted that certain conditions and events that occurred during these two periods, notably the opening of the Trump Plaza and Trump Castle Hotel & Casinos during this period plus other negative factors (with regard to income generation) should have, in all likelihood, decreased operating profits in 1985 as compared to 1984, and thus represented the claimed damages amount as being on the conservative side. The exhibits that accompanied the report provided various comparisons between the Sands and the other hotel/casinos during the same timeframe, to highlight how the Sands' income deviated from the other establishments during the latter half of 1984.

For the damages portion of its case, Perini retained

another Big 8 accounting firm to counter the numbers and assumptions used by the Sands' accounting expert. Its position was, among some other more minor points, that failures to consider depreciation and interest expenses inflated lost profits by over $5 million.

The hearing was concluded prior to the end of 1988.

It Was Love at First Sight...[9]

The arbitration panel issued its decision in Jan. 1989. Not including the signature pages, the award consisted of nine brief paragraphs over two pages, which listed the gross amount awarded to the Sands; the gross amount awarded to Perini and its subcontractors for certain unpaid invoices; the apportionment of fees owed by the parties to the American Arbitration Association, the arbitrators and the Seaview (of which Perini was responsible for 75 percent and Sands the remaining 25 percent); and the statement that the award was a complete settlement of all claims and counterclaims associated with the arbitration. It was a split decision, with one of the three arbitrators dissenting. No explanation was provided as to how the amounts were reached or the basis for why the panel ruled as it did. There was also no explanation as to why one of the arbitrators (the attorney) did not agree on the award.

Justice? You Get Justice in the Next World, in This World you Have the Law ...[10]

Soon thereafter in 1989, judgment was entered by Judge L. Anthony Gibson in the Chancery Division confirming the awards.[11] Both sides appealed.[12] Perini contested the judgment based on four points: 1) an award of lost profits contravened the terms of the contract and was beyond the contemplation of the parties; 2) the award did not resolve all issues; 3) the award to the Sands was contradictory and inconsistent with the award to a subcontractor; and 4) the award would result in "manifest injustice" (a term cited in the arbitration statute) since the damages were grossly disproportionate to Perini's $600,000 fee under the contract.

In an unpublished opinion in May 1991, the Appellate Division affirmed Judge Gibson's confirmation of the award. The court noted that the evidence presented essentially came from Sands' fact and expert witnesses and not Perini witnesses, and demonstrated support for Judge Gibson's rejection of Perini's arguments regarding incompleteness of award and lack of liability. As to the substantial completion argument (that would have reduced the period for which damages were assessed), the court pointed to the testimony of senior Sands' management and Sands' scheduling expert as to the actual effect of the uncompleted outside work on the full beneficial use of the building. As to damages, the court pointed out that the damages experts were subject to exhaustive questioning by both sides, in addition to questions asked by the arbitrators.

In the end, the court stated that the credibility of the experts' testimony rested with the arbitrators. The court noted that the record suggested no absence of evidence or mistake of law sufficient to disturb the award on the ground that lost profits were not a reasonably certain consequence of the breach. In disregarding the manifest injustice argument, while stating that this argument is not one of the criteria for vacating an award, the court noted that even if it were to consider the argument, a $14.5 million award in comparison to a final $24 million contract value did not take on the enormity to make the award manifestly unjust.

In the Land of the Blind, the One-eyed Man is King...[13]

The Appellate Division decision was appealed to the New Jersey Supreme Court. In a decision handed down in Aug. 1992,[14] the Court addressed the following issues: 1) whether the asserted mistake of law was reviewable by the courts; 2) the continued validity of the principle that mistakes of law are the equivalent of "undue means" (another term used in the arbitration statute); and 3) the disproportionality of the arbitration award as compared to the amount of the contract and the amount of Perini's fee.[15]

The two principal errors of law asserted were that the arbitrators failed to follow principled settled areas of law by awarding damages: 1) that were not in the contemplation of the parties at the time of contract; and 2) that should not have been awarded for the period after the project was considered substantially complete. A majority found "that the asserted errors of law were not so gross, unmistakable, or in manifest disregard of the applicable law as to warrant judicial invalidation of the award."[16] Specifically addressing the two perceived mistakes of law, the Court found that as to foreseeability of the extent of the damages, the arbitrators had more than enough evidence to conclude that Perini was aware that its failure to complete the project in a timely fashion could lead to a significant loss of income.[17] After a lengthy discussion on the meaning and use of the term "substantial completion" in the context of construction contracts, the Court agreed

that delay damages cannot be awarded after substantial completion of the contract. However, the Court, citing the testimony elicited during the arbitration concerning the appearance of the building after the issuance of the TCO in mid-September of 1984, noted that the arbitrators could have considered it fair to award damages based on the uncompleted conditions that still existed subsequent to the issuance of the TCO.[18] The Court also noted that the public's perception of the building during the summer months could have had a significant impact on operations that could have had a carryover effect on lagging profits into the fall season.[19]

As to Perini's argument that the award was highly disproportionate to the fee received, the Court noted that Perini was not a novice when it came to casino construction in Atlantic City. In addition, Perini could have bargained for a no damages for delay clause or a liquidated damages clause in the contract.[20]

In a lengthy concurring opinion, Chief Justice Robert Wilentz stated that arbitration decisions should be final and not subject to judicial review, absent fraud, corruption or similar wrongdoing on the part of the arbitrators;[21] and that unless the parties state otherwise in the arbitration agreement, mistakes of law do not serve as a valid basis for judicial review.[22]

Two years later, in *Tretina Printing, Inc. v. Fitzpatrick & Associates*,[23] the plurality adopted as a rule governing judicial review of private contract arbitration awards the standard set forth in Chief Justice Wilentz's concurring opinion in the *Perini v. Greate Bay* decision. The plurality ruling in the *Perini* case was that the arbitrators must have clearly intended to decide according to the law, must have clearly mistaken the legal rule, and that mistake must appear on the face of the award. In addition, the error, to be fatal, must result in a failure of intent or be so gross as to suggest fraud or misconduct.[24] That standard was superseded in *Tretina,* and is now as follows:

> Basically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators. [They] can be corrected or modified only for very specifically defined mistakes as set forth in [*N.J.S.A.* 2A:24-9]. If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award...[25]

The Past is a Foreign Country; They Do Things Differently There...[26]

Based on the number of articles and commentaries that have been published, the *Perini* decision sent shockwaves through the contracting community given the focus on a contractor being assessed damages 24 times in excess of its fee. As an apparent result, when the American Institute of Architects (AIA) updated its set of general conditions (Standard Form A201) in 1997, a "mutual" waiver of consequential damages clause appeared. The waiver language[27] included:

> 1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the service of such persons; and
> 2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

The provision went on to state that it did not preclude the inclusion and award of liquidated damages in accordance with the requirements of the contract documents.

This language remained relatively intact in the A201 2007 and 2017 updates.[28] The inclusion of this provision was somewhat controversial, since owner groups believed their potential losses due to consequential damages[29] dwarfed the amount the contractor was giving up, and thus the waiver was not equitable or truly mutual. The AIA, however, decided to include the provision so the parties could plan accordingly and avoid such claims in the future.[30] Another commentator's take was that in a 1988 Missouri case,[31] wherein the engineer was found liable in a pedestrian bridge collapse where it was held that the engineer failed to review a shop drawing that was found to be in error, that decision caused havoc in the design professional community. Thus, the inclusion of the waiver of consequential damages provision served to protect both contractors and design professionals.[32]

As can be deduced from the above, the Sands case was rather unique. The use of arbitration did not convey some of the supposed benefits of this alternative dispute resolution process (*i.e.*, a shorter period of time for reso-

lution (there were over 60 days of hearings; information was introduced during the arbitration whose admittance needed to be addressed by the courts, which suspended the arbitration for over two years; and the parties saw the inside of a courtroom again at the end when the arbitration panel's decision was appealed)). The case led to new law in New Jersey regarding the grounds for appeal of an arbitration decision, and it appears to have been the impetus for changing the way consequential damages are addressed in the AIA's Standard Form A201 General Conditions. As for the Sands itself, it is only a memory, as it was imploded in 2007. ■

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Endnotes

1. Opening line of *Moby-Dick* by Herman Melville (1851).
2. The term given to gambling high rollers.
3. Even Bill Maher knows where this opening line came from.
4. Opening line of *A Tale of Two Cities* by Charles Dickens (1859).
5. In critical path method scheduling, negative float generally refers to the number of days work is projected to finish beyond the current contract completion date.
6. Opening line of *Slaughterhouse Five* by Kurt Vonnegut (1969).
7. The Seaview is a historic 100+-year-old hotel that once hosted Warren G. Harding, Dwight D. Eisenhower, The Rolling Stones, Bob Dylan and Grace Kelly—not all at the same time.
8. The excess of net revenues over operating expenses as explained on page 2 of the report.
9. Opening line of *Catch 22* by Joseph Heller (1961).
10. Opening line of *A Frolic of His Own* by William Gaddis (1994).
11. Judge L. Anthony Gibson, J.S.C. (ret.) handled this matter as well as the prior issues in the Sands matter that came before the Court.
12. Greate Bay's cross-appeal was limited to Judge Gibson's refusal to fashion a net award such that Perini should have had to pay its subcontractor, which would then have reduced the amount due Greate Bay by Perini.
13. Proverb from *Adagia* by Desiderius Erasmus (1500).
14. *Perini Corporation v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479 (1992).
15. *Id.* at *489.
16. *Id.* at *484.
17. *Id.* at *499.
18. *Id.* at *507.
19. *Id.* at *508.
20. *Id.* at *515. It should be noted that a no damages provision is typically incorporated into a contract to protect the owner, and not the contractor, by granting a time extension but no compensation. Why the court indicated that a no damages provision could have protected Perini from damages claimed by the Sands is unknown.
21. *Id. at *519* (Wilentz, C. J., concurring).
22. *Id. at *525* (Wilentz, C. J., concurring).
23. 135 N.J. 349 (1994).
24. *Supra* at *494.
25. *Id.* at *358; 129 N.J. at *548-49. The court then noted that either under the *Perini* plurality standard or the standard expressed in C.J. Wilentz' concurring opinion now adopted in *Tretina*, the result would have been the same.
26. Opening line in *The Go-Between* by L.P. Hartley (1953).
27. AIA Document A201, General Conditions of the Contract for Construction (1997).
28. The major change was a re-numbering of the applicable paragraph from §4.3.10 (in the 1997 edition) to §15.1.6 (in the 2007 edition) to §15.1.17 (in the 2017 edition) and the removal of the word "direct" when referring to liquidated damages.

29. For a discussion on the distinction between direct and consequential damages, *see* Benton T. Wheatley and Randy A. Canche, Navigating the Labyrinth of Consequential Damages in the Construction Industry: A History of and Legal Approaches to Living with Them, *The Construction Lawyer* (Vol. 33, Number 3, Summer 2013);and John H. Dannecker, Jason W. Hill, John E. Kofron and Dale B. Rycraft, Recovering and Avoiding Consequential Damages in the Current Economic Climate, *The Construction Lawyer* (Vol. 30, Number 4, Fall 2010).
30. S.H. Harness, K.W. Cobleigh, M.B. Bomba and H.G. Goldberg, 2007 Revisions to AIA Contract Documents, *The Construction Lawyer* (Spring 2008).
31. D*uncan v. Missouri Board for Architects*, 744 S.W.2d 525, 541 (M0. App. 1988).
32. Ty D. Laurie and Jessica Manning, AIA A201's "Mutual Waiver of Consequential Damages, *Construction Law Corner eNewsletter* (Fall 2015).

Understanding Key Exclusions in Construction Liability Insurance Policies

by Matthew Lakind

Legal claims stemming from a construction project typically involve injuries to workers on site, or defective work causing property damage to the construction itself. Many contractors/developers believe both they and their subcontractors have commercial general liability (CGL) insurance policies to cover these types events. But what many do not realize is that there are perhaps dozens of "exclusions" buried in the hundreds of pages of these CGL insurance policies that allow an insurance company to deny coverage for these claims.

For a plaintiff seeking to recover damages for bodily injury or property damage, these exclusions can be the difference between recovering nothing from a liable defendant with no assets on an 'excluded' claim, or obtaining a sizeable judgment or settlement paid out by an insurance company. For a defendant, these exclusions can be the difference between an insurance company providing monetary coverage (including coverage for costs of attorney representation and expert witnesses, as well as paying out the claim itself) and financial ruin for the contractor/developer if the claims and defense costs are not covered by their insurance policy.

Depending on the type of claim against a contractor or developer, there are three key exclusions in many insurance policies that every claimant, contractor, developer, and their attorneys should be aware of. These are the 'your work' exclusion, the 'exterior insulation and finish system (EIFS) exclusion,' and the 'employer's liability exclusion.' If an accident occurs on a construction project, these exclusions may apply, and insurance coverage for any resulting property damage or bodily injury could be denied.[1]

Your Work Exclusion

The 'your work' exclusion is perhaps the most common exclusion relied upon by insurance companies to deny coverage for damages caused by a contractor's (or subcontractor's) defective work. It essentially states that the insurance company will not cover property damage to "your work" that is caused by "your [defective] work."[2]

Prior to updating these standard form CGL insurance policies in 1986, the your work exclusion left general contractors and developers at great risk because all of the work on the project (even if performed by a subcontractor) would have been considered the work of the general contractor/developer. However, the standard form CGL insurance policies have now been updated to include two exceptions to the exclusion. The first is the 'subcontractor exception.' This exception states that the your work exclusion does not apply if the work out of which the damage arose was performed "on your behalf by a subcontractor."[3]

There is another exception to the your work exclusion that has not yet been the subject of any precedential case law in New Jersey. That exception (referred to as the 'incomplete exception') states that the your work exclusion does not apply if "the work has not, at the time of the damage, been abandoned or completed."[4] The implications of this exception have not yet been fully tested in any New Jersey court.

Based on a plain reading of the incomplete exception, if a roofing contractor improperly installs the gutters, and that improper installation causes damage to the leaders (which were also installed by the roofing contractor), the roofing contractor's CGL insurance policy may provide coverage for the damage to the leaders so long as the roofing contractor's work has not been abandoned or completed at the time of the damage. Without this exception, the damage to the roofer's own leaders may not be covered. But if the roofer's work is incomplete and the roofer remains on the project as of the time of the damage, the damage to the leaders should be covered. It bears repeating that the full scope of the incomplete exception has not been ruled on by any New Jersey court. This exception notwithstanding, in no event will the CGL policy provide insurance coverage for repairing the improperly installed gutters. It will only cover the costs to repair the property damage caused by that improper installation.

In order for general contractors, subcontractors, and developers to protect themselves against defective work

alone, and defective work causing additional damages, it is important to review their CGL policies with their insurance professionals and ensure those policies include the subcontractor exception and incomplete exception to the your work exclusion. These exceptions can be used by plaintiffs to argue in favor of insurance coverage for their losses, and by defendants who are seeking to have their insurance carriers provide counsel at no additional cost.

EIFS Exclusion

The EIFS exclusion is highly consequential on any project where EIFS is installed. EIFS has been defined as a "nonload bearing, exterior wall cladding system that consists of an insulation board attached either adhesively or mechanically, or both, to the substrate; an integrally reinforced base coat; and a textured protective finish coat."[5] It is a commonly used exterior system in the construction industry.

The EIFS exclusion states that there is no coverage for bodily injury or property damage "arising directly or indirectly" out of "your EIFS product" or "your EIFS work."[6] The EIFS exclusion may be incredibly broad, perhaps to the point of making the entire insurance policy coverage itself illusory and unenforceable. This is so because the EIFS exclusion appears to exclude coverage for any property damage or bodily injury occurring at *any* property where EIFS may have been installed anywhere on the building.[7] This was the apparent holding of a recently unreported decision from the New Jersey Appellate Court.[8] Thus, if there is EIFS on any "exterior component, fixture or feature of any structure" where property damage or bodily injury resulted from an accident or defective work, coverage for such damage may be denied based on the EIFS exclusion.[9]

By way of example, if a large building has a leaking roof, insurance coverage for the damages caused by that leaking roof may be excluded because EIFS is found somewhere else on the structure.[10] It may not matter that the EIFS itself has nothing to do with the defective work or resulting damage. While this interpretation of the EIFS exclusion may be so broad as to render the insurance policy itself illusory, this proposition has not been fully tested in New Jersey's courts. In contrast to the unreported New Jersey case of *Crum & Foster,* a Florida District Court has found that the EIFS exclusion, when applied to exclude coverage for property damage unrelated to the EIFS, is illusory.[11]

If this EIFS exclusion is upheld in New Jersey, it will have sweeping consequences for property owners, developers, and general contractors alike. There is a very real prospect that if bodily injury or property damage is suffered on a property where EIFS has been installed, the EIFS exclusion could preclude insurance coverage for damages resulting from that accident even if the EIFS installation itself had nothing to do with the accident.

The easiest way to protect contractors and developers from this exclusion is to ensure they do not purchase insurance containing this clause. Additionally, the development team, including the architect, must ensure the term 'EIFS' is only used if EIFS, in fact, appears somewhere on the construction project. Decorative EIFS may not qualify as EIFS, since it may not be installed for the purpose of insulation. If that is the case, referring to decorative EIFS as EIFS in any design documents will increase the likelihood that an insurance carrier will deny coverage based on the EIFS exclusion.

Eventually, the EIFS exclusion will have to make its way through the New Jersey court system, and the Supreme Court will have to decide whether such a broad exclusion is enforceable. Short of that, property owners, developers, and general contractors must either purchase coverage without the EIFS exclusion, or refrain from using the product on their construction projects.

Employer's Liability Exclusion

The third exclusion everyone (injured workers, contractors and property owners) must be aware of is the 'employer's liability exclusion.' The exclusion precludes coverage for any bodily injury suffered by an employee, subcontractor to an employee, independent contractor, employee of an independent contractor, temporary worker, leased worker, or volunteer worker on a construction project. It can have serious consequences for a host of entities involved in a project if a worker is injured on a construction site.

Typically, if a worker suffers an injury at a construction site, the employer has worker's compensation insurance that insures the injured worker (providing coverage for medical treatment and/or disability payments) regardless of fault.[12] In exchange, the injured worker is generally barred from suing his or her employer for those injuries.[13] However, that injured employee may still sue any other third party he or she believes was negligent and caused his or her injuries.[14]

For example, if an employee of a subcontractor, Roofing Contractor, LLC, is injured while working, that

employee can obtain worker's compensation insurance coverage through its employer (Roofing Contractor, LLC), but cannot sue the employer absent some applicable extenuating circumstances. However, if the subcontractor's employee believes the general contractor, property owner, or developer was negligent and contributed to the cause of his accident, the employee can sue those entities for money damages in addition to whatever the employee received from worker's compensation insurance (subject to any subrogation rights of the worker compensation insurance carrier).[15]

If an owner, general contractor, other subcontractor, construction manager, or developer has the employer's liability exclusion in their insurance policy, it is unlikely its insurance carrier will provide coverage for the damages claimed by the injured worker, and any damages and defense costs would have to be paid out of the company's own pocket. This presents a huge risk of substantial exposure to those entities if the employee's injuries are serious or even fatal.

Not all insurance policies contain this exclusion, and it is crucial that any company (whether in construction or not) review their own insurance policies to determine whether this exclusion applies. Any entity involved in construction must balance the payment of higher premiums to remove the employer's liability exclusion against the risk of no coverage for potential injuries to workers on the project. In addition, an injured worker and any attorney looking to represent that worker should determine whether anyother potentially liable parties have insurance to cover the injured worker's damages, or whether the employer's liability exclusion might preclude such coverage. Depending on the financial status of the potentially liable entity, the injured worker may not be able to recover against that entity if the employer's liability exclusion applies.

Conclusion

In sum, the your work exclusion, the EIFS exclusion and the employer's liability exclusion can have devastating consequences for any entity working on a construction project, including owners, developers, contractors, and claimants alike. Applicability of any one of these exclusions could work to preclude insurance coverage for sizeable property damage or bodily injury claims, thereby preventing claimants from obtaining adequate compensation for their damages, or putting potentially liable owners, developers, and contractors in financial jeopardy. It is important that all entities embarking on a new construction project ensure they have the proper insurance coverage, and weigh the cost of eliminating an exclusion against the risks of possibly not having insurance coverage for an expensive accident. It is likewise important that claimants and their attorneys learn as much as they can about the insurance coverage of potentially liable parties before instituting suit, to avoid wasting money on a costly litigation only to get a judgment against a defunct company with no insurance coverage. ■

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Endnotes

1. *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 237 (N.J. 1979).
2. *Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.*, 441 N.J. Super. 369, 379 (2015).
3. *Id.*
4. *313 Jefferson Trust, LLC v. Mercer Ins. Cos.*, 2018 N.J. Super. Unpub. LEXIS 35, *19, 2018 WL 316972.
5. https://www.eima.com/eifs.
6. *Crum & Forster Ins. Co. v. Breese Corp.*, 2016 N.J. Super. Unpub. LEXIS 829, *1, 2016 WL 1453518.
7. *Id.*
8. *Crum & Forster Ins. Co. v. Breese Corp.*
9. *Id.* at 8.
10. *Id.*
11. *Amerisure Ins. Co. v. Auchter Co.*, 2017 U.S. Dist. LEXIS 185753, *64-71.
12. N.J.S.A. 34:15-1, *et. seq.*
13. *Millison v. E. I. Du Pont de Nemours & Co.*, 101 N.J. 161 (1985); N.J.S.A. 34:15-8.
14. N.J.S.A. 34:15-40.
15. *Id.*

New Jersey's Enigmatic Economic Loss Doctrine: Application to Construction Disputes Can Be Unpredictable, Fact-Specific, and Nuanced

by Damian Santomauro

The economic loss rule is a judicially created doctrine that purports to define the boundaries between contract and tort claims.[1] In essence, the economic loss doctrine bars tort claims (as well as strict liability claims) for economic loss arising out of a contractual relationship.[2] Although this appears to be a relatively straightforward concept, application of the economic loss doctrine is complex and subject to various exceptions and inconsistencies. This is particularly true in construction disputes where decisions from New Jersey state and federal courts have often eschewed a predictable, bright-line rule in favor of a more nuanced and unpredictable approach that can make outcomes dependent on the specific facts of, and precise nature of the claims raised in a case. As a result, construction law practitioners can be confronted with uncertainty in pleading and defending against tort claims where economic loss is implicated.

Overview of the Economic Loss Doctrine in New Jersey

The New Jersey Supreme Court first adopted the economic loss doctrine in its seminal 1985 decision in *Spring Motors Distribs. v. Ford Motor Co.*[3] There, the Court considered strict liability and negligence claims asserted by a plaintiff purchaser of commercial trucks, who contended alleged defects in the transmissions caused the plaintiff to suffer economic loss (including lost profits and a decrease in the value of the trucks).[4] The Court held that a "commercial buyer seeking damages for economic loss resulting from the purchase of defective goods may recover from an immediate seller and a remote supplier in a distributive chain for breach of warranty under the [Uniform Commercial Code (U.C.C.)], but not in strict liability or negligence."[5] Central to the Court's analysis was a consideration of the principles underlying tort and contract claims, which led the Court to conclude that "[a]s among commercial parties in a direct chain of distribution, contract law, expressed here through the U.C.C., provides the more appropriate system for adjudicating disputes arising from frustrated economic expectations."[6]

As the Court stated:

> [A] seller's duty of care generally stops short of creating a right in a commercial buyer to recover a purely economic loss. Thus viewed, the definition of the seller's duty reflects a policy choice that economic losses inflicted by a seller of goods are better resolved under principles of contract law. In that context, economic interests traditionally have not been entitled to protection against mere negligence.
>
> The demarcation of duties arising in tort and those arising in contract is often indistinct, but one difference appears in the interest protected under each set of principles. The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.
>
> Although the nature of the damage may be a useful point of distinction, it also signals more subtle differences in the roles that tort and contract play in our legal system. The differ-

> ences include judicial evaluation of the status, relationship, and expectations of the parties; the ability of the parties to protect themselves against the risk of loss either by contractual provision or by insurance; and the manner in which the loss occurred. This evaluation reflects, among other things, policy choices about the relative roles of contracts and tort law as sources of legal obligations.[7]

In reaching its conclusion, the Court focused in part on the fact that the dispute involved a commercial buyer rather than an individual consumer,[8] that the U.C.C. was a legislative enactment,[9] and that the plaintiff had an available remedy against the defendants (although, in this case, the statute of limitations under the U.C.C. had expired).[10]

Subsequent decisions from New Jersey courts have eroded some of these distinctions. For example, in *Alloway v. General Marine Indus., L.P.*, the Court expanded the application of the economic loss doctrine beyond disputes between commercial parties and held that an individual consumer's tort and strict liability claims arising out of the purchase of a defective product were barred.[11] In addition, shortly after the *Spring Motors* decision, the Appellate Division decision in *New Mea Constr. Corp. v. Harper* applied the economic loss doctrine to a services contract (which was not governed by any exclusive statutory scheme) in holding the defendant's counterclaim for negligence claim against the individual principal of the plaintiff contractor was barred.[12]

There are a legion of decisions from New Jersey state and federal courts grappling with issues relating to the economic loss doctrine subsequent to the *Spring Motors* decision. These decisions evidence three general principles courts have developed regarding efforts to recover in tort for economic loss where contract claims may be implicated.

Courts will typically look at the substance of a party's tort claim for economic loss, rather than its label, in assessing whether to apply the economic loss doctrine.[13]

Unfulfilled contractual promises do not give rise to tort claims unless the breaching party owes an independent duty imposed by law,[14] which may include, for example, duties of care imposed on doctors, lawyers, and insurance brokers.[15]

Claims for economic loss include both direct and consequential damages,[16] but may not include claims for personal injury or damage to other property[17] (such claims in the context of a defective product are typically governed by New Jersey's Product Liability Act (PLA),[18] which subsumes negligence and certain other causes of action for harm caused by a product[19] and includes a codification of the economic loss doctrine in its definition of 'harm').[20]

Although these principles provide some general guidelines, the outcome of a court's analysis may also depend on the specific facts of the case.[21] Further, additional concepts can also impact a court's analysis of whether to apply the economic loss doctrine to bar a party's tort claim.

For example, the New Jersey Supreme Court's decision in *People Express Airlines v. Consol. Rail Corp.*,[22] which was issued months after the Court's decision in *Spring Motors,* raises interesting implications for the application of the economic loss doctrine (particularly with respect to the second, general principle identified above) that have not yet been fully resolved in subsequent decisions. There, the plaintiff airline asserted negligence claims seeking business interruption damages arising out of an evacuation that took place after a fire ignited on the defendant's property (the fire started when ethylene oxide manufactured by another defendant escaped from a tank car manufacturer by another defendant, and ignited).[23] In holding that the negligence claims could proceed, the Court provided a lengthy analysis regarding tort claims for economic loss,[24] noted "the hopeless artificiality of the per se rule against recovery for purely economic losses,"[25] and broadly pronounced:

> [A] defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.[26]

There is no clear direction from the New Jersey Supreme Court explaining the relationship or distinction (if any) between *People Express* and the cases precluding tort claims under the economic loss doctrine. Some courts have attempted to articulate a distinction by emphasizing that there was no contractual relationship implicated in *People Express*.[27] While this is correct, the

broad duty identified by the Court in *People Express* does not contain any *caveat* that the duty only exists in the absence of any contractual relationship.[28] Moreover, the Court relied upon and cited to numerous cases from other jurisdictions where tort claims for economic loss were permitted "based on the 'special relationship' between the tortfeasor and the individual or business deprived of economic expectations."[29] Although the Court emphasized there was no "direct" contractual relationship at issue in these cases,[30] it is clear from a review of the cases relied upon by the Court that contractual relationships existed (even if there was no direct contract between the injured plaintiff and the defendant).[31]

The *People Express* decision appears somewhat consistent with the jurisprudence flowing from *Spring Motors* and *Alloway* recognizing that the existence of an "independent duty" is an exception to the economic loss doctrine's prohibition on tort claims for economic loss.[32] However, *People Express* could also potentially be construed as both more expansive than (as a result of its reference to a broad duty to foreseeable plaintiffs) and more limiting than (as a result of its reliance on cases where there was no direct contractual relationship) those cases. *Marina Dist. Dev. Co., LLC v. Ivey*,[33] a recent unpublished decision from the District Court of New Jersey, highlights the difficulty in reconciling these different lines of case law. There, the court acknowledged a common law duty of care on a defendant manufacturer of a product and held that the economic loss doctrine did not prohibit the plaintiff from asserting a negligence claim against the defendant (although the negligence claim failed on proximate cause grounds).[34] The court did so even though the plaintiff had a direct contractual relationship with the defendant manufacturer[35] and asserted breach of contract claims against that manufacturer that were governed by the U.C.C. (and, with respect to the breach of warranty claim, permitted to proceed).[36] In short, the extent to which the *People Express* decision may be construed to impact tort claims seeking economic loss where contractual relationships exist (or an economic loss doctrine defense to such claims) remains unclear, and decisions to date have not been uniform.[37]

Fraud claims can also raise an additional wrinkle to courts' application of the economic loss doctrine, particularly because the New Jersey Supreme Court has not provided clear guidance on the issue (and, in fact, much of the case law addressing this issue under New Jersey law comes from federal courts in the District of New Jersey).[38] As a general matter, courts have drawn a distinction between claims for fraud in the inducement of a contract and fraud in the performance of a contract, holding that the former are permitted, while the latter are barred by the economic loss doctrine.[39] Courts have characterized this distinction, and whether a viable fraud claim can be asserted alongside a breach of contract claim, as depending on whether the alleged fraud is extrinsic to the contract between the parties.[40] Thus, where the fraud claim is based on pre-contractual misrepresentations or omissions, courts are more likely to permit the claim to proceed.[41] However, where the alleged fraud relates to the performance of the contract, courts have found that the economic loss doctrine will bar the fraud claim.[42]

Notably, however, the forgoing distinction relates to common law fraud as opposed to statutory fraud causes of actions, such as those arising out of the Consumer Fraud Act (CFA).[43] In *Alloway*, the New Jersey Supreme Court strongly suggested that CFA claims are not barred by the economic loss doctrine.[44] Indeed, the plain language of the CFA states it applies to specified fraudulent conduct by a person "in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person."[45] Thus, New Jersey federal and state courts have held, provided that the elements of the CFA claim[46] are otherwise satisfied, that such claims by a consumer may be viable (and not barred by the economic loss doctrine) regardless of whether the fraud arises in the pre-contractual setting[47] or in the performance of the contract.[48] However, where the gravamen of a CFA claim is harm caused by a product, New Jersey courts have held that a consumer's claims may be subsumed, and barred, by the Product Liability Act, even where the plaintiffs plead only economic loss that is not recoverable under the PLA.[49]

The Economic Loss Doctrine in Construction Disputes

It is well settled that the economic loss doctrine can apply to construction disputes.[50] Indeed, there are myriad ways in which the potential application of the economic loss doctrine can arise in a construction dispute. Such circumstances include claims relating to the supply of a defective construction product,[51] defective installation of a product,[52] defective design,[53] defective construction work,[54] and failure to perform construction work.[55]

In the context of claims regarding the supply or use

of a defective product in construction, application of the economic loss doctrine more closely adheres to principals set forth in *Spring Motors*, *Alloway*, and their progeny when claims are asserted against the product's supplier. The recent decision in *Tri Coast LLC v. Sherwin-Williams Co.*, a federal decision from the New Jersey District Court applying New Jersey law, is illustrative. There, the plaintiff, a commercial entity, was awarded a contract by the United States Bureau of Prisons to paint metal roofs on buildings at a federal prison in New Jersey. The plaintiff purchased a primer and finisher from the defendant and used those products on the project.[56] Thereafter the new paint began to peel and the plaintiff sued the defendant for contract and tort (negligent misrepresentation) claims, seeking the costs it incurred in having to prepare and paint the roofs a second time.[57] The court held the negligent misrepresentation claim was barred by the economic loss doctrine because the plaintiff had asserted "no injury other than [] intangible economic losses" and, as such, its remedy was under the U.C.C.[58]

While the economic loss doctrine has similarly been applied to bar claims against individual consumers (*i.e.,* homeowners) who assert claims against the manufacturer of a defective product used in the construction of a home, consistent with its general application, the doctrine would likely not apply to claims where the product resulted in a personal injury or caused damage to other property.[59] In addition, courts have permitted plaintiffs to proceed with tort claims for economic loss where the plaintiffs distinguish themselves from a commercial entity that is often better equipped to bear the risk of economic loss than an individual plaintiff, but such cases are rare and highly fact specific.[60] However, notwithstanding such decisions, the New Jersey Supreme Court's decisions in *Alloway* and *Dean v. Barrett Homes, Inc.* (both of which emphasized application of economic loss doctrine principles to reject claims by individual plaintiffs regarding economic loss to the product)[61] provide strong authority that such claims should be barred by the economic loss doctrine.

In analyzing whether the economic loss doctrine might apply to claims regarding the supply of a defective product on a construction project, complications can arise when considering what constitutes the 'product' at issue. The decisions in *Barrett Homes*[62] and *Easling v. Glen-Gery Corp.*[63] exemplify the different approaches courts have taken. In *Easling*, the plaintiffs (husband and wife) purchased recently constructed apartments. The defendant supplied brick used by the contractor in the apartments' construction. Many years later, the plaintiffs noticed the bricks were deteriorating and substantial pieces were falling off the walls, which caused damage to the walls and created a safety risk to residents.[64]

The plaintiffs filed an action against the defendant alleging strict liability in tort and warranty claims.[65] The New Jersey District Court rejected the plaintiffs' arguments that, because the defective bricks damaged other property, their claims were cognizable under the PLA. Instead, the court determined the product at issue was the apartment complex—not the bricks—and, as such, the plaintiffs' claim was for damages to the product itself, which is barred by the economic loss doctrine.[66]

The New Jersey Supreme Court subsequently reached a different result in *Barrett Homes,* when it considered tort claims by the plaintiffs, who were subsequent purchasers of a home that had been constructed with an exterior insulation and finish system (EIFS) allegedly designed and manufactured by the defendant.[67] The plaintiffs sought to recover the cost to replace the EIFS as well as damages it caused to other parts of the home.[68] The Court held that the former was barred by the economic loss doctrine, but, as to the latter, that the plaintiffs could assert PLA claims for damages the EIFS caused to other parts of the house because the EIFS (and not the house) was the product at issue.[69] At first glance, these two decisions appear at odds. However, while a New Jersey court would certainly be likely to follow the subsequently decided *Barrett Homes* decision because it was issued by the New Jersey Supreme Court, each decision is sufficiently fact-specific to defy any hard and fast rules.[70]

Parties to construction disputes also attempt to pursue negligence claims for economic loss arising out of the construction work performed on a project. Extending the rationale of *Spring Motors* and *Alloway* suggests that such claims should be barred by the economic loss doctrine when they do not involve personal injury or damage to other property. However, while courts have typically barred such claims,[71] including against principals of the party performing the work,[72] there remains some potential ambiguity in the law as a result of the Appellate Division's decision in *Juliano v. Gaston*.[73] There, the plaintiff homeowners asserted negligence claims for economic loss against subcontractors alleging negligent performance of the work in constructing the plaintiff's home.[74] As the court explained, "the basis legal problem in this case is whether plaintiff's damages are recovery in this negli-

gence action."[75] In reversing dismissal of these claims and permitting plaintiffs to pursue them, the court stated:

> It appears that the nature of the damages here may be limited to replacement and repair of defective workmanship, a category of damages customarily referred to as 'economic loss.'... We see, however, no impediment, conceptual or practical, to the recovery of this category of damages in a negligence action by the purchaser against a subcontractor.[76]

The *Juliano* decision predates the Supreme Court's enunciation of the economic loss doctrine in *Spring Motors*, but, although courts have distinguished this decision,[77] it has not been overruled.[78] As a result, although it is likely a New Jersey court would bar negligence claims that seek economic loss for negligent construction (particularly where there is a contract between the plaintiff and the defendant), that outcome is not certain in all cases.[79]

Application of the economic loss doctrine in constructions disputes regarding negligent design claims is also not always clear. While the underlying principles set forth in *Spring Motors* and *Alloway* apply to such disputes, these cases typically fall outside the context of the U.C.C. or the economic loss rule embodied in the PLA because they involve a service rather than a product. New Jersey state and federal courts have reached differing, and sometimes inconsistent, results in applying the economic loss doctrine to these types of claims.[80]

Negligence claims for economic loss arising out of the design of a construction project were traditionally governed by the *Conforti & Eisele, Inc. v. John C. Morris Associates*[81] ruling issued in 1980. There, the plaintiff builder asserted professional negligence claims against the mechanical engineer who prepared certain plans for the construction of a portion of the New Jersey College of Medicine and Dentistry. The plaintiff alleged it relied on the plans in preparing its bid, the plans were negligently designed, and the plaintiff suffered economic loss as a result.[82] The question before the court was straightforward: "Is a design professional answerable in tort to a contractor who sustains economic damages as a result of the negligence of the design professional in the absence of privity of contract?"[83] The court answered in the affirmative, stating:

> To deny this plaintiff his day in court would, in effect, be condoning a design professional's right to do his job negligently but with impunity as far as innocent third parties who suffer economic loss. Public policy dictates that this should not be the law. Design professionals, as have other professionals, should be held to a higher standard.[84]

Although the case was not the subject of significant discussion in subsequent New Jersey state or federal decisions for many years,[85] courts from other jurisdiction accepted that this was the rule in New Jersey.[86] Recently, however, the *Conforti* holding has received disparate treatment in New Jersey.

First, the New Jersey Supreme Court's decision in *Saltiel v. GSI Consultants, Inc.*,[87] although not citing *Conforti,* suggested[88] potential limitations on the breadth of *Conforti's* reach. Specifically, the Court rejected negligence claims for economic loss asserted by the plaintiff landscape architect arising out of the preparation of turfgrass specifications by the consultant plaintiff retained, which the plaintiff used in the reconstruction of a New Jersey university's turf field.[89] The claims were asserted against the consultant's principals under the "tort participation theory," which required as an "essentially predicate... the commission by the corporation of tortious conduct, participation by the corporate officer, and resultant conduct."[90] Acknowledging that a tort remedy can arise from a contractual relationship where "the breaching party owes an independent duty imposed by law,"[91] the Court nevertheless found the consultant did not owe an independent duty outside of the contract.[92]

More recently, courts have considered these decisions and reached different and inconsistent results. In *Horizon Group of New Eng., Inc. v. New Jersey Sch. Constr. Corp.*,[93] the court relied upon *Saltiel*, rejected that the standard of care on design professionals "translates into a duty of care, and held that a contractor could not assert negligence claims for economic loss (delay damages) against the design professionals who designed a school built by the contractor.[94] The court specifically noted that, although the contractor did not have a contract with the design professional, the contractor had remedies available to it for economic loss based upon its contract with the owner.[95] Conversely, in *SRC Constr. Corp. v. Atl. City Hous. Auth.*,[96] the district court conducted a similar analysis of New Jersey law and reached the opposite conclusion under virtually identical circumstances. There, the court "conclude[d] that the New Jersey Supreme Court would

not extend the economic loss doctrine to bar [contractor's] negligence claim against [design professional]."[97]

Significantly, the court rejected the reasoning of the *Horizon* decision, stating:

> Even in the typical economic loss doctrine case...the reason for foreclosing a tort claim is not simply because a contract claim exists, but rather, that the tort claim is not really a tort claim at all; it is a contract claim in tort claim clothing. But where there is no direct contractual relationship between the plaintiff and defendant, frequently there can be no contract claim at all, and therefore any tort claim asserted cannot possibly be a contract claim in tort clothing. Thus, the Court respectfully disagrees with the reasoning of the cases cited by [the design professional] to the extent that they rely upon the availability of an alternate avenue of redress as a reason for barring the tort claims.[98]

Other decisions have reached similarly mixed results on the application of the economic loss doctrine to negligence claims by contractors against design professionals.[99]

Finally, consistent with the general approach New Jersey courts have taken regarding impact of the economic loss doctrine on fraud claims, courts have permitted parties to construction contracts to assert fraud in the inducement claims for economic loss (along with breach of contract claims),[100] but prohibit such claims when they relate to the performance of the contract.[101] Moreover, the case law is replete with decisions allowing parties to assert CFA claims in both the pre-contractual[102] and contract performance settings.[103]

Conclusion

The economic loss doctrine can be a useful tool to streamline and limit the myriad of claims that can arise in a construction dispute, particular one that involves multiple parties and disciplines. However, despite its seemingly straightforward premise, application of the economic loss doctrine by New Jersey state and federal courts has not always been consistent or led to predictable results (generally, and in construction disputes). Indeed, outcomes sometimes turn on fact-specific circumstances, which has resulted in a sea of case law that can, in assessing certain aspects of the doctrine's scope and impact, be difficult to synthesize and reconcile.

Thus, while there are general principles regarding the economic loss doctrine that construction law practitioners should be mindful of when representing clients in a construction dispute, the specific facts of each case, including the nature of the construction dispute, the type of tort at issue, the relationships (or lack thereof) between the parties involved in the project, and the type of damages sought should also be accounted for when assessing the potential viability of any tort claims that may be asserted (or in determining whether to assert such claims). ■

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Endnotes

1. *See, e.g., Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 244 (3d Cir. 2010) ("Under New Jersey law, the economic loss doctrine defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort[.]") (internal quotation marks and citations omitted).
2. *See, e.g., LG Elecs. U.S.A., Inc. v. ActionLink, LLC*, Docket No. BER-L-5074-16, 2018 N.J. Super. Unpub. LEXIS 1242, at *7 (Law. Div. Jan. 29, 2018) ("New Jersey Courts have applied the economic loss doctrine to preclude plaintiffs from suing in tort when their claims arise from the breach of a contract and involve economic damages.").
3. 98 N.J. 555 (1985).
4. *Id.* at 562-64.
5. *Id.* at 561.
6. *Id.* at 579-80.

7. *Id.* at 580.
8. *Id.* at 576 ("The considerations that give rise to strict liability do not obtain between commercial parties with comparable bargaining power....Insofar as risk allocation and distribution are concerned, [plaintiff] is at least as well situated as the defendants to assess the impact of economic loss. Indeed, a commercial buyer, such as [plaintiff], may be better situated than the manufacturer to factor into its price the risk of economic loss caused by the purchase of a defective product.").
9. *Id.* at 577 ("Delineation of the boundary between strict liability and the U.C.C. requires appreciation not only of the policy considerations underlying both sets of principles, but also of the role of the Legislature as a coordinate branch of government. By enacting the U.C.C., the Legislature adopted a carefully-conceived system of rights and remedies to govern commercial transactions. Allowing [plaintiff] to recover from [defendant] under tort principles would dislocate major provisions of the Code.").
10. *Id.* at 582 ("In the present case, the commercial buyer understandably was disappointed in its purchase. The point remains, however, that the U.C.C. provides an adequate set of rights and remedies to resolve the differences between [plaintiff] and the [] defendants.").
11. 149 N.J. 620, 642 (1997) ("By providing for express and implied warranties, that U.C.C. amply protects all buyers—commercial purchasers and consumers alike—from economic loss arising out of the purchase of a defective product. In addition, many buyers insure against the risk of the purchase of defective goods either directly through the purchase of an insurance policy, such as [plaintiff's] purchase of the [insurance] policy, or through insurance provided indirectly through many credit card purchases."). *See also Boyes v. Greenwich Boat Works*, 27 F. Supp. 2d 543, 550 (D.N.J. 1998) ("Whether the sale is characterized as a consumer purchase or a commercial transaction, it is now well established in New Jersey that contract remedies embodied in the Uniform Commercial Code are better suited than tort law to resolve claims for economic loss.").
12. 203 N.J. Super. 486, 494 (App. Div. 1985) ("The crux of defendants' counterclaim for negligence is that plaintiff [] negligently supervised the construction of the premises. Defendants are apparently claiming that [plaintiff's] 'negligent supervision' included use of materials that were not of the quality mandated by the contract's terms and other unnecessary work. For instance, defendants claim that the flooring and framing were done with lesser quality material than specified in the contract....[T]his cause sounds basically in contract. The obligation to use the material specified in the contract rather than some lesser-grade material was clearly not an obligation imposed by law....Here there was no personal injury or consequential property damage arising from a traumatic event. Rather the loss is of a nature more normally associated with a contract action. Given these factors and the understanding that the relationship between the parties is governed by a lengthy and comprehensive contractual arrangement, defendants' counterclaim is more soundly based on contract than on tort."). *See also Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 316 (2002) ("When a company agrees to render a service or sell a product, a contract normally will define the scope of the parties' specific obligations."); *Schenker, Inc. v. Expeditors Int'l of Wash., Inc.*, Docket No. A-3555-14T1, 2016 N.J. Super. Unpub. LEXIS 1535, at *3-4 (App. Div. July 1, 2016) ("Early economic loss cases arose in the context of defective goods and strict liability, but has expanded to service contracts.") (internal citations omitted). *But see In re Merritt Logan, Inc.*, 901 F.2d 349, 353, n.1 (3d Cir. 1990) (permitting the plaintiff to assert a negligence claim, seeking, among other things, the replacement costs and lost profits, against the installer of a defective refrigerator and stating: "The U.C.C. does not apply to [defendant installer], which provided services and was not a seller of goods. Therefore, the U.C.C. does not preclude [plaintiff's] negligence claim against [defendant installer].").
13. "Essentially, the economic loss doctrine functions to eliminate recovery on a contract claim in tort claim clothing." *G&F Graphic Servs. v. Graphic Innovators, Inc.*, 18 F. Supp. 3d 583, 588-589 (D.N.J. 2014). Thus, a party's characterization of its claim as one that sounds in tort is not dispositive. *See Saltiel*, 170 N.J. at 315-16 ("Irrespective of the terminology used in the complaint, however, we are persuaded that this case is essentially a basic breach of contract case, and that plaintiff, through her tort allegations, simply is seeking to enhance the benefit of the bargain she contracted for with defendant."); *New Mea Constr.*,

203 N.J. Super. at 494 ("Merely nominally casting this cause of action as one for negligent supervision does not alter its nature."). Thus, New Jersey courts will generally scrutinize the specific allegations to determine whether the tort claim for economic loss is really a contract-based claim in disguise, and, as such, barred by the economic loss claim. *See, e.g., J.H. Reid Gen. Contr. v. Conmaco/Rector, L.P.*, Civ. Action No. 08-6034, 2010 U.S. Dist. LEXIS 6929, (D.N.J. Jan. 27, 2010) (barring a tort cross-claim for economic loss by the manufacturer of a pile hammer against the distributor, stating: "First, . . . the nature of [distributor's] activities was contractual. [Distributor's] duty arose from the terms of the Distributorship Agreement....Second, the relationship between [manufacturer] and [distributor] was contractual....Finally, the type of injury or harm threatened by [distributor'] alleged breach of the Distribution Agreement is the harm that was directly foreseeable from a breach of the contract. It follows that [distributor's] motion to dismiss [manufacturer's] tort claim is granted because the complaint essentially arises in contract rather than in tort.").

14. *See, e.g., International Minerals & Mining Corp. v. Citicorp North America, Inc.*, 736 F. Supp. 587, 597 (D.N.J. 1990) ("It has long been the law that remedies in tort relating to a breach of contract may not be maintained in addition to those established under the contract itself in the absence of any independent duty owed by the breaching party to the plaintiff.... Where a party does not owe another a duty of care absent the existence of a contract, a separate duty of care cannot arise simply by virtue of the existence of the contract. Indeed, it is fundamental that a party's liability for breach should be governed strictly by the application of foreseeable damages stemming from the establishment of the contractual relationship. To hold otherwise would chill business relations through the application of unforeseen damages upon one who may elect to effectively breach an agreement. It has, thus, consistently been held that an independent tort action is not cognizable where there is no duty owed to the plaintiff other than the duty arising out of the contract itself.") (internal citations omitted). *See also Jacobsen Diamond Ctr., LLC v. ADT Sec. Servs.*, Docket No. BER-L-1177-12, 2014 N.J. Super. Unpub. LEXIS 1270, *12 (App. Div. May 23, 2014) ("In this transaction, there is no discernable duty that would hold [defendant] liable for gross negligence, negligent supervision or willful and wanton misconduct. The installation and monitoring of the security system were obligations that arose exclusively under the parties' contract. Any liability related to those services is at most a breach of contract claim, not an action in tort."); *Village Square Madison Ave., LLC v. TD Bank, N.A.*, Docket No. BER-L-7441-13, 2016 N.J. Super. Unpub. LEXIS 269, at *26 (Law Div. Feb. 5, 2016) ("Here, plaintiff's] promissory estoppel claim is barred by the economic loss doctrine. [Plaintiff] has not, as a matter of law, proven any duty owed by [defendant] independent of the Lease. Rather, [plaintiff] is attempting to enhance its reimbursement of Carrying Cost Charges despite the express allocation the parties contracted for under the Lease. [Plaintiff] cannot ignore the express contractual provisions simply to recover damages it is not entitled to under the contract....The alleged wrongdoing, *i.e.*, breach of contract, the nature of the damages sought, and the existence of a lengthy and comprehensive contractual arrangement between the parties collectively sound in contract rather than tort law").

15. *Saltiel*, 170 N.J. at 317.

16. *See Spring Motors*, 98 N.J. at 566 ("Economic loss can take the form of either direct or consequential damages. A direct economic loss includes the loss of the benefit of the bargain, *i.e.*, the difference between the value of the product as represented and its value in its defective condition. Consequential economic loss includes such indirect losses as lost profits."); *Alloway*, 149 N.J. at 627 ("Preliminarily, economic loss encompasses actions for the recovery of damages for costs of repair, replacement of defective goods, inadequate value, and consequential loss of profits. Economic loss further includes the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.") (internal citations and quotation marks omitted).

17. *See Alloway*, 149 N.J. at 623 (noting that under New Jersey law, "[w]hen the harm suffered is to the product itself, unaccompanied by personal injury or property damage,...principles of contract, rather than of tort law, were better suited to resolve the purchaser's claim"); *Boyes*, 27 F. Supp. 2d at 550 (dismissing the plaintiff's strict liability and negligent representation claims on the basis of the economic loss doctrine,

stating "[b]ecause the vessel did not cause personal injury or damage to other property, the damages sought by plaintiff are defined as 'economic loss' which encompasses cost of repair, replacement of defective goods, and diminution in value of a product that breaches the warranties made when it was sold"); *Unifoil Corp. v. Cheque Printers & Encoders*, 622 F. Supp. 268, 270 (D.N.J. 1985) ("New Jersey law also permits tort recovery for product defects which give rise to claims of either personal injury or property damages."); *Hehr Int'l, Inc. v. Sika Corp.*, Civil Action No. 12-1624, 2013 U.S. Dist. LEXIS 109355, at *12-15 (D.N.J. Aug. 5, 2013) (denying the plaintiff window manufacturer's motion to amend complaint to re-assert negligence claim against the manufacturer of adhesive used in making the windows, which had previously dismissed on economic loss doctrine grounds, because the plaintiff did not plead sufficient allegations of damage to other property).

18. N.J.S.A. § 2A:58C-1, *et seq.*
19. *See, e.g., Tirrell v. Navistar Int'l*, 248 N.J. Super. 390, 398 (App. Div. 1991) ("The Product Liability Act no longer recognizes negligence or breach of warranty (with the exception of an express warranty) as a viable separate claim for "harm" (as defined in the Act) caused by a defective product....Since a product liability action encompasses 'any claim or action brought by a claimant for harm caused by a product,' and section 2 describes the sole method of proof, namely that recognized for strict liability claims, it is clear that common-law actions for negligence or breach of warranties (except express warranties) are subsumed within the new statutory cause of action, if the claimant and harm also fall within the definitional limitations of section.") (internal citation omitted).
20. *See* N.J.S.A. § 2A:58C-1(b)(2) (defining "harm" under the PLA as (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph"). *See also Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 295-298 (2010) ("[The PLA's] definition of harm was not a new one, for it represented a codification of the economic loss rule. Understanding that rule and its analytical underpinnings is essential to any analysis of the statute. The economic loss rule, which bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself, evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies....In enacting the [PLA], and in codifying the economic loss rule within the definition of the 'harm' found in the Act's general provision, *N.J.S.A.* § 2A:58C-1(b)(2), the Legislature both recognized and agreed with its designation of the line that divides tort and contract remedies."); *Ford Motor Credit Co., LLC v. Mendola*, 427 N.J. Super. 226, 240 (App. Div. 2012) (stating "[w]hether couched in terms of negligence, strict liability, or breach of an implied warranty, a product liability cause of action is subject to New Jersey's [PLA]" and noting a PLA claim constitutes "claims arising from personal injury or damage to property other than the defective product itself").
21. *See, e.g., Livingston Bd. of Educ. v. United States Gypsum Co.*, 249 N.J. Super. 498, 502 (App. Div. 1991) ("It is not immediately satisfying to say that decisions in the subject area are fact-sensitive, but it is accurate to say so."); *Touristic Enters. Co. v. Trane, Inc.*, Civil Action No. 09-02732, 2009 U.S. Dist. LEXIS 106145, at *5 (D.N.J. Nov. 13, 2009) ("In rendering its opinion, this Court is not defining the precise parameters of the economic loss doctrine as it will be viewed by the New Jersey Supreme Court. Existing precedent, however, concludes that the economic loss doctrine will be applied with a good deal of moderation, likely to be tailored narrowly to the specific facts at issue, so as to not inappropriately bar meritorious causes of action.").
22. 100 N.J. 246 (1985).
23. *Id.* at 249-50.
24. *Id.* at 251-63.
25. *Id.* at 261.
26. *Id.* at 263.
27. *See, e.g., Schenker, Inc. v. Expeditors Int'l of Wash., Inc.*, Docket No. A-3555-14T1, 2016 N.J. Super. Unpub. LEXIS 1535, at *4-5 (App. Div. July 1, 2016) (citing *People Express* for the proposition that an exception to the economic loss doctrine "is where the injured party would not otherwise have a remedy" because the plaintiff in that case had no contractual relationship with the defendants); *Tri Coast LLC v. Sherwin-Williams Co.*, Civil Action No. 16-3366, 2018 U.S. Dist. LEXIS 7825, at *12, n.10 (D.N.J. Jan. 18, 2018) ("*People Express* is distinguishable because

there was no contractual relationship between the plaintiff and defendant in that case; plaintiff's only possible claim sounded in tort.").

28. 100 N.J. at 264 (identifying the limitations on foreseeable plaintiffs without reference to contractual relationships as follows: "[a]n identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted").
29. *Id.* at 256-58.
30. *Id.* at 256 ("Importantly, the cases do not involve a breach of contract claim between parties in privity; rather, they involve tort claims by innocent third parties who suffered purely economic losses at the hands of negligent defendants with whom no direct relationship existed.").
31. *Id.* at 257-58 (*citing* "*Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969) (surveyor whose negligence resulted in error in depicting boundary of lot held liable to remote purchaser); *Hardy v. Carmichael*, 207 Cal.App.2d 218 (Cal.Ct.App. 1962) (termite inspectors whose negligence resulted in purchase of infested home liable to out-of-privity buyers); *M. Miller Co. v. Central Contra Costa Sanitary Dist.*, 198 Cal.App.2d 305 (Cal.Ct.App. 1961) (engineers whose negligence resulted in successful bidder's losses in performing construction contract held liable); *United States v. Rogers & Rogers*, 161 F.Supp. 132 (S.D.Cal. 1958) (architects whose negligence resulted in use of defective concrete held liable to out-of-privity prime contractor); *Glanzer v. Shepard*, 233 N.Y. 236 (1922) (public weigher whose negligence caused remote buyer's losses was liable for loss").
32. *See* n. 14, 15, *supra*.
33. Civil Action No. 14-2283, 2018 U.S. Dist. LEXIS 49274 (D.N.J. March 26, 2018).
34. *Id.* at *14-15 ("The Court finds that the economic loss rule does not preclude [plaintiff's] negligence claim premised on [defendant's] common law duty of care to Borgata....Through [plaintiff's] allegations against [defendant] for its negligence, [plaintiff] does not seek damages for the harm that the asymmetry of the cards caused to the cards themselves. [Plaintiff] is not asking that [defendant] replace the asymmetrical cards with symmetrical ones, or refund its purchase price for the cards. Instead, [plaintiff] seeks a remedy for the harm caused by [defendant's] breach of duty of care that goes beyond the cards themselves—*i.e.*, the integral and necessary part [defendant's] asymmetrical cards played in the edge-sorting scheme that resulted in over $10 million in damage to [plaintiff]. These allegations readily exclude the application of the economic loss rule to [plaintiff's] negligence claim."). *But see Horizon Group of New Eng., Inc. v. New Jersey Sch. Constr. Corp.*, Docket No. A-5934-09T1, 2011 N.J. Super. Unpub. LEXIS 2271, at *19-20 (App. Div. Aug. 24, 2011) (holding that *People Express* did not allow a plaintiff to assert a negligence claim for economic loss against defendant design professionals even though the plaintiff had no direct contractual relationship with the design professionals).
35. *Id.* at *4 (noting "[Plaintiff] claims that in October 2011, it and [defendant] entered into a contract for" the playing cards").
36. *Id.* at *25, n. 2 ("[Plaintiff's] common law breach of contract claim is subsumed by its breach of warranty claims governed by the U.C.C....Thus, only Count XIV, breach of express warranty, remains.").
37. *Compare id.* (allowing a negligence claim to proceed even though the plaintiff had a direct contract with the defendant card manufacturer) *with TBI Unlimited, LLC v. Clear Cut Lawn Decisions, LLC*, Civil Action No. 12-3355, 2013 U.S. Dist. LEXIS 162025, at *20-21 (D.N.J. Nov. 14, 2013) (dismissing the plaintiff's negligence and negligence misrepresentation claims, stating "[landscaping contractors] have alleged that a valid contract existed with [subcontractor and principal), and have failed to set forth any allegations that would establish an independent duty of care... [the] allegations evince a violation of the terms of the contract itself, rather than an independent duty imposed by law").
38. *See Montclair State Univ. v. Oracle USA, Inc.*, Civil Action No. 11-2867, 2012 U.S. Dist. LEXIS 119509, at *17-18 (D.N.J. Aug. 23, 2012) ("In the past twenty-two years, the New Jersey Supreme Court has still not expressed its view on what precise sort of fraud claims may proceed alongside breach of contract claims, despite the development within the District of New Jersey courts of the "extraneous to the contract" doctrine relating to fraudulent inducement claims. Nor have any appellate court decisions spoken directly to this development. In my view, District Courts would greatly benefit from the guidance of

the New Jersey Supreme Court in this regard and it is hoped that the New Jersey Supreme Court will take the opportunity to clarify this area of law when the issue is next presented to the Court.").

39. *See, e.g., Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 F. Supp. 2d 557, 562-564 (D.N.J. 2002) ("The distinction between fraud in the inducement and fraud in the performance of a contract remains relevant to application of the economic loss doctrine in New Jersey....The pattern that has emerged in New Jersey decisional law is that claims for fraud in the performance of a contract, as opposed to fraud in the inducement of a contract, are not cognizable under New Jersey law.").
40. *See id.* at 563-64 ("Courts have continued to affirm the conceptual distinction between a misrepresentation of a statement of intent at the time of contracting, which then induces detrimental reliance on the part of the promisee, and the subsequent failure of the promisor to do what he has promised. No decision has formally negated the distinction between fraudulent inducement extraneous to the contract and fraud in its subsequent performance....Further, in our most recent statement recognizing the fraud-in-the-inducement and fraud-in-the-performance distinction, this District Court stated again that the critical issue with regard to economic loss is whether the allegedly tortious conduct is extraneous to the contract."). *See also UBI Telecom Inc. v. KDDI Am., Inc.*, Civil Action No. 13-1643, 2014 U.S. Dist. LEXIS 88842, at *44 (D.N.J. June 13, 2014) ("While courts have indeed recognized fraudulent inducement claims as distinct from contract claims, this area of the law is not entirely settled, and it is only when the alleged pre-contractual misrepresentation is 'extraneous' or 'extrinsic' to the contract that the fraud-based claim can properly proceed.").
41. *See, e.g., G&F Graphic Servs.*, 18 F. Supp. 3d at 593 (holding the economic loss doctrine did not bar a plaintiff's common law fraud claim where the plaintiff alleged the defendant made misrepresentations during negotiations regarding the contract and alleged it would not have contracted with the defendant if had known of the historical problems with the product it purchased); *D'Angelo v. Miller Yacht Sales*, 261 N.J. Super. 683, 686-688 (App. Div. 1993) (holding a plaintiffs' common law fraud claim was not barred because a remedy existed under the U.C.C., stating: "Plaintiff alleges in the sixth count that defendant 'willfully and with malice' misrepresented the yacht as new. He seeks compensatory and punitive damages for alleged material omissions.' The claim is based on the common-law tort of fraud....An express provision of the [U.C.C.] saves from preemption common-law fraud and Consumer Fraud Act claims arising from a sales transaction. Such claims may be brought within six years of accrual."); *Rivas v. Estate of Melillo*, Docket No. ESX-L-1531-13, 2015 N.J. Super. Unpub. LEXIS 727, at *1-3, 15-16 (Ch. Div. March 15, 2015) (permitting claim that a seller of building failed to disclose the building had suffered significant fire damage, stating: "Here, Plaintiffs claim that they relied on Defendants nondisclosure in deciding to purchase the building. Because these claims are for fraud in the inducement, they do not implicate contractual duties and instead implicate an independent tort duty not to misrepresent the condition of the property. Therefore, the economic loss doctrine does not operate to bar Plaintiff's claims.").
42. *See, e.g., RNC Sys. v. Modern Tech. Group, Inc.*, 861 F. Supp. 2d 436, 451, 454 (D.N.J. 2012) ("Here, [plaintiffs] fraudulent inducement claim is in essence a breach of contract claim. [Plaintiff's] two purported misrepresentations are addressed squarely within the language of the License Agreement and are intrinsic to [defendant's] performance under the contract and have the same measure of damages as [plaintiff's] breach of contract claim. Therefore, the New Jersey economic loss doctrine applies"); *Cudjoe v. Ventures Trust 2013I-H-R by MCM Capital Partners, LLP*, Civil Action No. 18-10158, 2019 U.S. Dist. LEXIS 30836, at *10, (D.N.J. Feb. 26, 2019) ("[Defendant's] alleged misrepresentations arose while it was servicing Plaintiff's mortgage, and the misrepresentations all concern how Plaintiff could retain her property under the mortgage agreement. As such, the economic loss doctrine bars Plaintiff's fraud in the inducement claim.").
43. N.J.S.A. § 56:8-1, *et seq.*
44. 149 N.J. at 640-41 (noting that in addition to contract rights, plaintiffs who suffer an economic loss may have claims under state and federal statutes, including the CFA). *See also Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 219 F. Supp. 2d 600, 608

(D.N.J. 2002) ("To [apply the economic loss doctrine to plaintiffs' CFA claim] would foreclose plaintiffs from seeking special tort remedies specifically allowed by the New Jersey legislature.").

45. N.J.S.A. § 56:8-2.
46. To state a claim under the CFA, a plaintiff must allege sufficient facts to demonstrate: (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss. *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372, 389-391 (2007).
47. *See, e.g., Barton v. RCI, LLC*, Civil Action No.: 10-3657, 2011 U.S. Dist. LEXIS 80134, at *19-20 (D.N.J. July 22, 2011) (permitting a CFA claim to proceed, stating: "The economic loss doctrine does not bar Plaintiffs' NJCFA cause of action. Plaintiffs emphasize throughout Plaintiffs' Complaint that the crux of Plaintiffs' case revolves around Defendant's pre-contractual representations regarding the Points Program....Plaintiffs satisfactorily allege that Defendant's misrepresentations regarding the Points Program proximately caused Plaintiffs to suffer an ascertainable loss. As such, Plaintiffs' NJCFA cause of action may proceed.").
48. *See, e.g., 49 Prospect Street Tenants Asso. v. Sheva Gardens, Inc.*, 227 N.J. Super. 449, 468 (App. Div. 1988) (a tenant was entitled to a CFA remedy because the landlord had a continuing duty during the performance of the lease to provide heat, water, and basic security and there was evidence the landlord mismanaged the property to force out the tenants and convert to condominiums).
49. *See Gupta v. Asha Enterprises, L.L.C.*, 422 N.J. Super. 136, 145 (App. Div. 2011) (noting that the New Jersey Supreme Court "has held that the PLA subsumes claims for a defective product under the [CFA], and that [CFA] cannot provide an alternative remedy for injury."). *See also Sinclair v. Merck & Co.*, 195 N.J. 51, 65-66, (2008) (holding a plaintiff's CFA claim for medical monitoring damages arising out of purchase of allegedly defective drug was subsumed by PLA, and therefore barred, even though the plaintiff's PLA claim failed because the plaintiff did not allege one of PLA's actionable harms, stating: "The language of the PLA represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product. The heart of plaintiffs' case is the potential for harm caused by [defendant's] drug. It is obviously a product liability claim. Plaintiffs' CFA claim does not fall within an exception to the PLA, but rather clearly falls within its scope. Consequently, plaintiffs may not maintain a CFA claim."); *Nafar v. Hollywood Tanning Sys.*, Civil Action No. 06-CV-3826, 2010 U.S. Dist. LEXIS 65183, at *1-4, *32, (D.N.J. June 3, 2010) (dismissing CFA claims by a plaintiff, who had disclaimed personal injury claims, for economic loss arising out of the defendant's failure to warn about potential future harm that could occur as a result of using the defendant's tanning beds because such claims were subsumed by the PLA). However, not all CFA claims regarding allegedly defective products will be subsumed by the CFA. Although the outcome will likely turn on the specific facts of the case and the specific allegations regarding the allegedly defective product, New Jersey courts have held that CFA claims for economic loss to the product itself, as opposed to harm caused by the product itself, are not subsumed by the PLA and may be asserted by plaintiffs. *See, e.g., Gorczynski v. Electrolux Home Prods.*, Civil Action No. 18-10661, 2019 U.S. Dist. LEXIS 71391, at *8 (D.N.J. April 29, 2019) (holding that a plaintiff's CFA claim regarding a defect in a microwave handle was not subsumed by the PLA, stating: "In this case, Plaintiff alleges only that the Handle Defect damages the value and usefulness of the Microwave itself. Specifically, Plaintiff alleges that Handle Defect makes the handle unreasonably hot and prevents consumers from opening the Microwave door, rendering the Microwave unusable when an individual is cooking on the surface below. As result, Plaintiff seeks economic damages associated with the cost of repair or replacement of the Microwave. Plaintiff neither alleges nor seeks any damages for physical harm caused by the handle defect (such as burns to his hand). Plaintiff also does not seek any damages for other harms under the purview of the PLA, such as emotional distress."); *Volin v. GE*, 189 F. Supp. 3d 411, 415-16, 418 (D.N.J. 2016) (holding a plaintiff's CFA claim regarding allegedly defective ovens manufactured by the defendant was not subsumed by the PLA, stating: "Thus a quasi-products liability claim—one that a defective product caused personal injury to the plaintiff, or even consequential damage to the plaintiff's home—would properly be brought only under the PLA. On the other hand, when the essential nature of the claim is not that of a PLA claim, the plaintiff may maintain a separate cause of action. I find that the non-PLA counts

here allege theories and harm that do not fall under the PLA. They are not disguised products liability claims. The common theme of those other counts is not that the product caused harm to plaintiff or her property; it is that [plaintiff] did not get what she paid for. To that extent, then, [plaintiff's] CFA, implied warranty, and unjust enrichment claims would not be subsumed by the PLA.") (internal citations and quotation marks omitted).

50. *See, e.g., CapitalPlus Equity, LLC v. Prismatic Dev. Corp.*, Civil Action No. 07-321, 2008 U.S. Dist. LEXIS 54054, at *16-17 (D.N.J. 2008) ("[T]he economic loss doctrine has been applied not only in products liability cases, but also in actions arising out of contracts for services and mixed goods/services contracts, including construction contracts such as the one between [subcontractor] and [general contractor]."); *Titan Stone, Tile & Masonry, Inc. v. Hunt Constr. Group, Inc.*, Civil Action No. 05-3362, 2007 U.S. Dist. LEXIS 4661, at *12 (D.N.J. Jan. 22, 2007) (applying the economic loss doctrine to bar a fraud claim arising under a subcontract in an construction dispute, stating: "while the doctrine has predominantly been applied in connection with transactions for goods, it has also been found, in New Jersey, to apply to contracts for services").
51. *See, e.g., Barrett Homes*, 204 N.J. at 289-293, 305 (holding the economic loss doctrine barred tort claims, asserted by subsequent purchasers of a home against the manufacturer of EIFS used in construction, for damage to the EIFS itself, but did not bar tort claims for damage the defective EIFS caused to other parts of the house); *Tri Coast LLC*, 2018 U.S. Dist. LEXIS 7825, at *1, 9-13 (dismissing a negligent misrepresentation claim asserted by the plaintiff, who purchased an exterior metal roof coating system from the defendant to use in painting roofs on federal prison, because they were barred by the economic loss doctrine).
52. *See, e.g., Lacroce v. M. Fortuna Roofing, Inc.*, Civil Action No. 14-7329, 2017 U.S. Dist. LEXIS 203990, at *1-7, 9-13 (D.N.J. Dec. 12, 2017) (declining to bar a plaintiff's negligence claims against the defendants, the contractor and its principal who installed roof system on the plaintiff's home, where the roof failed and damaged plaintiff's property).
53. *See, e.g., Saltiel*, 170 N.J. at 299-302, 316-17 (the plaintiff's tort claims against defendant architects, who were individual principals of defendant firm with which plaintiff contracted for preparation of turfgrass specifications and who provided the services, were barred by economic loss doctrine); *First Am. Title Ins. Co. v. Semester Consultants, Inc.*, Docket No. A-5367-10T1, 2012 N.J. Super. Unpub. LEXIS 689, at *2-5, 8-10 (App. Div. March 29, 2012) (considering a plaintiff's negligence claims for economic loss relating to the preparation of site plans and surveys by the defendants, a licensed engineer and his company that contracted with plaintiff, and permitting such claims to proceed).
54. *See, e.g., Juliano v. Gaston*, 187 N.J. Super. 491, 496-498 (App. Div. 1982) (considering negligence claims by the plaintiff homeowners, who sought costs for replacement and repair of defective workmanship against the defendant subcontractors who had done work on the new house plaintiffs purchased from builder, and holding the claims were not barred even though they sought economic loss); *New Jersey-American Water Co. v. Watchung Square Assocs., LLC*, Docket Nos. A-3436-13T1, A-3445-13T1, 2016 N.J. Super. Unpub. LEXIS 1639, at *25-26 (App. Div. July 15, 2016) (a property owner's negligence claims, arising out of relocation of existing water main, against the water supply company and the water supply company's excavation contractor were barred by the economic loss doctrine because of a contractual relationship between owner and water supply company).
55. *Dutton Rd. Assocs. LP v. Sunray Solar, Inc.*, Civil Action No.: 10-5478, 2011 U.S. Dist. LEXIS 39798, at *10-12 (D.N.J. Apr. 12, 2011) (a plaintiff's negligence claim against a defendant, who did not install solar panel system because the defendant was not authorized to conduct business in the jurisdiction where work was to be performed, was barred by the economic loss doctrine).
56. 2018 U.S. Dist. LEXIS 7825, at *1.
57. *Id.* at *1, 12-13.
58. *Id.* at *11-13. *See also Pro-Spec Painting, Inc. v. Sherwin-Williams Co.*, Civil Action No. 16-2373, 2017 U.S. Dist. LEXIS 73207, at *11-12 (D.N.J. May 15, 2017) ("Plaintiff's essential claim for damages here is for the costs it expended to repair the coating on the water tower; the purported reason for this was Defendant's provision of an allegedly defective product. Such a claim is governed by the U.C.C. and cannot be alleged as a negligence claim.").

59. *See, e.g., Totten v. Gruzen*, 52 N.J. 202, 210 (1968) (holding that the plaintiff tenant was permitted to assert negligence claims, arising out of injuries to child from defective heating system, against the contractor, architect, and heating contractor); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 73-77, 96 (1965) (the plaintiff lessees of home were permitted to assert tort claims against the builder regarding the installation of a defectively designed boiler and water system where a child was burned by hot water). *Totten* and *Schipper* pre-date the New Jersey Supreme Court's enunciation of the economic loss rule in *Spring Motors*. However, these decisions are consistent with that doctrine and the rationale underlying them has been subsequently accepted. *See Barrett Homes*, 204 N.J. at 301 (citing *Schipper* and stating: "[O]ne can easily conceive of circumstances in which a house would not only qualify as a product, but would also create a compensable cause of action in tort. A prefabricated home that gave off fumes and sickened its residents, for example, would certainly qualify."). *See also DiIorio v. Structural Stone & Brick Co., Inc.*, 368 N.J. Super. 134, 141 (App. Div. 2004) ("Plaintiff claims the stones installed on his house caused damage to other portions of the house, to the deck and to the landscaping. The economic consequences were therefore not limited to the value of the stones themselves and a claim for recovery of such economic losses would not be governed by the U.C.C.").
60. *See, e.g., Livingston*, 249 N.J. Super. at 504 (holding a public school district could assert tort claims seeking recovery for costs for asbestos removal against the manufacturer due to a combination of facts, including "(1) that the building owner is a public entity and not a business enterprise seeking lost profits [and] (2) that the product defect was not its failure to perform the function for which it was bargained for and purchased, but rather its capacity to expose building users to an unforeseen but potentially grave personal safety risk", and stating "[w]e do not say that any one of those factors is sufficient, but together they require that result").
61. 149 N.J. at 642 ("By providing for express and implied warranties, [the] U.C.C. amply protects all buyers--commercial purchasers and consumers alike--from economic loss arising out of the purchase of a defective product."); 204 N.J. at 289-90 (applying economic loss rule to claims by "Plaintiffs Robert, Jennifer, and Mary Sue Dean [who] purchased a home in 2002 from its original owners").
62. 204 N.J. 286 (2010).
63. 804 F. Supp. 585 (D.N.J. 1992).
64. *Id.* at 586.
65. *Id.* at 587.
66. *Id.* at 590-91 ("The plaintiffs purchased a completed apartment complex. They did not purchase a load of bricks from the defendant....Thus, even if the court assumes that plaintiff can prove that the allegedly leaking walls have led to damage to the studs or interiors of the building, the plaintiffs cannot prove that the product that they purchased is anything other than the apartment complex itself, and the Products Liability Act thus fails to provide them with a basis for seeking tort relief.").
67. 204 N.J. at 289-90.
68. *Id.* at 291-92.
69. *Id.* at 305 ("There is no room, in light of the clear purposes of the Products Liability Act, to expand it so as to create a new remedy for plaintiffs' assertions that the product, EIFS, failed to perform as expected. Rather, we conclude that the economic loss rule, as embodied in the act's definition of harm, precludes plaintiffs from recovering any damages for harm that the EIFS caused to itself. Notwithstanding that, because we also conclude that the EIFS was not so fully integrated into the structure of the house that the house effectively became the product for purposes of the economic loss rule, to the extent that the EIFS caused damage to the structure of the house or its immediate environs, plaintiffs retain a cause of action pursuant to which they may proceed against the product's manufacturer.").
70. For example, in *Easling* the District Court focused in part on the fact that although the plaintiff purchasers were individuals the transaction was essentially a commercial one. 804 F. Supp. at 589 ("It is a fortuity of no present consequence that the business investors in this major transaction happened to be individuals rather than a corporation. Even if plaintiffs could prove that they were unsophisticated purchasers of an apartment complex, the court would be required to dismiss their strict liability complaint, as they entered into a large commercial transaction, were not forced to purchase the building, and could have bargained for any warranties or assurances which they deemed necessary. The fact that

plaintiffs purchased this large apartment complex demonstrates that plaintiffs clearly had the financial power to stand on substantially equal footing with the defendant. The purchase of a large apartment complex is undeniably a commercial transaction."). Conversely, the plaintiffs in *Barrett Homes* purchased a residential construction home from a prior owner. 204 N.J. at 289-90. Another interesting case on this issue, which aligns more closely with the *Easling* decision, is *Longport Ocean Plaza Condo., Inc. v. Robert Cato & Assocs.* Civil Action No. No. 00-CV-2231, 2002 U.S. Dist. LEXIS 4609 (E.D.Pa. March 16, 2012). There, the District Court applied New Jersey law and held that a third-party defendant contractor's claims against a window manufacturer who provided windows as part of the contractor's renovation project for plaintiff condominium association were barred by the economic loss doctrine. *Id.* at *2-3, 13-19. Although the allegedly defective windows leaked and caused damage to other elements of the building, the District Court held this was not damage to "other property." *Id.* at *13-19. As the District Court stated: "[Plaintiff's] complaint specifically alleges that it contracted for a water tight, structurally sound, and aesthetically pleasing building from [contractor]. [Contractor] then effectively sought to purchase this finished product from a variety of other parties. Therefore,...the entire successfully renovated building should be considered the purchased product. As such,...the damage sought is not damage to 'other property,' but is properly considered damage to the renovated building - the bargained-for product. Therefore, these claims are subject to the economic loss doctrine." *Id.* at *16-17 (internal quotation marks omitted). Although the District Court cited to *Easling* and the third-party plaintiff was a commercial entity, this did not appear to be the basis for the District Court's decision.

71. *See, e.g., Saratoga at Toms River Condo. Ass'n v. Menk Corp.*, Docket No. A-5421-11T3, 2014 N.J. Super. Unpub. LEXIS 1754, at *1-2, 11-16 (App. Div. July 17, 2014) (holding that a plaintiff condominium association's negligence claims against the developer and masonry subcontractor, alleging that the defendants did not complete the work in a workmanlike fashion or in accordance with industry standards of accepted practice, were barred by the economic loss doctrine because the "claims [were] essentially breach-of-contract claims"); *Pope v. Craftsman Builders, Inc.*, Docket No. A-3138-09T4, 2013 N.J. Super. Unpub. LEXIS 53, at *13-23 (App. Div. Jan. 10, 2013) (holding that the trial court erred in issuing a negligence jury charge in a case where a plaintiff homeowner sought economic loss against a renovation contractor who allegedly did not perform work correctly, stating: "In this case, plaintiff contends that the defendant violated the duty of care owed to the plaintiff by negligently completing the task and the contract, and by failing to complete certain tasks as have been testified to, such as the railings, the siding, the structural work. Failing to complete certain tasks, however, is evidence of a breach of contract, not negligence. Additionally, in light of an express warranty regarding workmanship, negligently completing the tasks set forth in the contract is also evidence of a breach of contract."); *Ferrell v. America's Dream Homes, Inc.*, Docket No. A-1151-08T1, 2010 N.J. Super. Unpub. LEXIS 1898, at *23-25 (App. Div. Aug. 4, 2010); (dismissing a plaintiff's negligence claims for economic loss against the defendant builder who constructed the plaintiff's new home, stating: "Plaintiffs allege that defendants were negligent in not constructing the property in conformance with the exhibits, by improperly sloping the yard, and improperly constructing the retaining walls. All of these allegations arise from the contract documents, indicating that plaintiffs were merely seeking to enhance the benefit of their bargain. Moreover, plaintiffs provided no evidence suggesting that defendants owed an independent duty as to the retaining walls and the yard."); *Kornblith v. Rothe*, Civil Action No. 89-3864, 1991 U.S. Dist. LEXIS 711, at *5-9 (D.N.J. Jan. 23, 1991) (dismissing the defendant engineer's statutory joint tortfeasor contribution claim against the contractor in a case where the plaintiff homeowner alleged only economic losses, stating: "The Court finds that [contractor] cannot be liable to [plaintiff homeowner] as a joint tortfeasor with [engineer] because [plaintiff homeowner] cannot bring a negligence claim against [contractor].").

72. *See New Mea Constr.*, 203 N.J. Super. at 492-97 (holding a homeowner's negligence counterclaim against a contractor's principal for negligently supervising the construction of a home was barred by the economic loss doctrine, stating: "Here, the prime allegation of negligence appears to relate to the

plaintiff-contractor's failure to supervise in a manner that would assure compliance with the contract terms, agreed upon in writing between the parties.... In this case the claim was premised on a contract.").

73. 187 N.J. Super. 491.
74. *See id.* at 493-94, 526.
75. *Id.* at 526.
76. *Id.*
77. In *New Mea Const.*, the Court attempted to distinguish *Juliano* by stating "Plaintiff there was a subsequent purchaser of the house and ostensibly was precluded from proceeding against the contractor on contract grounds because of lack of privity." 203 N.J. Super. at 494-95. This appears inconsistent with the *Juliano* opinion, which states that the plaintiff's purchased the home from the builder. 187 N.J. Super. at 494. As the Court stated in *Juliano*, the plaintiffs filed their claims against the subcontractors only after they had filed a previous action against the builder of their home and the builder defaulted in that action and disappeared. *See id.* at 524-25. However, as the District Court noted in *SRC Constr. Corp. v. Atl. City Hous. Auth.*, this did not appear to be a basis for the decision in *Juliano* to allow the negligence claims against the subcontractors to proceed. 935 F. Supp. 2d 796, 800 (D.N.J. 2013) ("*Juliano*, admittedly, is different from this case insofar as the homebuilder was insolvent and therefore the court observed that the judgment against the homebuilder would not likely be paid. But that fact does not appear to be integral to the court's holding.") (internal citation omitted).
78. The New Jersey Supreme Court considered a similar issue in *Aronsohn v. Mandara*, but declined to address it. 98 N.J. 92 (1994). Specifically, the issue raised below was "whether a person who purchases a house, including a patio, from a prior owner may have a valid negligence action against the builder of the patio for loss of the benefit of his bargain damages due to the defective condition of the patio." *Id.* at 105. Ultimately, the Court held that it did not need to decide this issue because the plaintiff could pursue an implied warranty of workmanship claim against the prior builder. *Id.* at 107 ("However, what is involved here is essentially a commercial transaction, and plaintiffs' claim is rested on the violation of the implied contractual provision that the patio would be constructed in a workmanlike fashion. We do not intend to exclude the possibility that a cause of action in negligence would be maintainable. However, we do not need to decide the validity of plaintiffs' negligence claim, since, as discussed above, the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner.") (internal citation omitted).
79. In addition, the New Jersey Supreme Court has recognized causes of action for breach of an implied warranty of workmanship, which protects parties adversely impacted by poor workmanship that is not addressed by contract, and breach of an implied warranty of habitability. *See McDonald v. Mianecki*, 79 N.J. 275, 293 (1979) ("[W]e therefore hold that builder-vendors do impliedly warrant that a house which they construct will be of reasonable workmanship and habitability. An implicit understanding of the parties to a construction contract is that the agreed price is tendered as consideration for a home that is reasonably fit for the purpose for which it was built—i.e., habitation."); *Aronsohn*, 98 N.J. at 98 ("When, as in this case, there is no express contractual provision concerning workmanship, the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner."). *See also Hodgson v. Chin*, 168 N.J. Super. 549, 555 (App. Div. 1979) (applying the implied warranties of workmanship and habitability to a commercial building, but noting the issue of their application in the commercial setting was unsettled); *Terrace Condominium Ass'n v. Midlantic Nat. Bank*, 268 N.J. Super. 488, 495 (Law. Div. 1993) ("The defendant, as the developer, sponsor, and builder of The Terrace, had an obligation to construct the condominium so that it would be of reasonable workmanship and be fit for its particular use: habitation.").
80. *Compare, e.g., Horizon Group of New Eng., Inc. v. New Jersey Sch. Constr. Corp.*, Docket No. A-5934-09T1, 2011 N.J. Super. Unpub. LEXIS 2271, at *20 (App. Div. Aug. 24, 2011) (holding that a contractor's negligence claim, seeking economic loss damages including for delay, against a design professional hired by the owner was barred by the economic loss doctrine) *with SRC Constr.*, 935 F. Supp. 2d at 801 (rejecting *Horizon Group* and holding a contractor's negligence claim, seeking economic loss damages including for delay, against a design professional hired by the owner was not barred by the economic loss doctrine).

81. 175 N.J. Super. 341 (Law Div. 1980). This decision was affirmed by the Appellate Division on the issue relevant to application of the economic loss doctrine for the reasons stated below in the Law Division opinion. *Conforti & Eisele, Inc. v. John C. Morris Associates*, 199 N.J. Super. 498 (App. Div. 1985).
82. 175 N.J. Super. at 342.
83. *Id.*
84. *Id.* at 344.
85. One of the few cases to cite *Conforti* was *Dynalectric Co. v. Westinghouse Electric Corp.*, 803 F. Supp. 985 (D.N.J. 1992). There, the District Court considered a negligence claim for economic loss by the plaintiff subcontractor against the design-builder and design professional. *Id.* at 986-88. The defendants sought to dismiss the case due to the economic loss doctrine and the absence of privity, but the District Court, citing *Conforti* and *People Express*, stated that "New Jersey has decided to discard these formalistic doctrines in favor of a more commonsensical 'foreseeability' and 'proximate cause' rule." *Id.* at 990. However, the District Court noted that "when a party has suffered economic loss because of negligent actions of another, and the party has another means of redress against the alleged tortfeasor, that party may not assert the identical claims for identical damages under tort theories." *Id.* at 991. The District Court ultimately determined that the subcontractor's claims were currently being arbitrated (by the contractor in an arbitration against the design-builder pursuant) and, as a result, stated that the subcontractor's tort claims "may not at this juncture be actionable in tort." *Id.* at 987, 993.
86. *See, e.g., National Steel Erection v. J.A. Jones Constr. Co.*, 899 F. Supp. 268, 272, n. 10 (N.D.Wv. 1995) (*citing Conforti*, but reaching a different result); *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1296, n. 3 (Az. 1984) (*citing Conforti* and reaching the same result). In addition, although not citing *Conforti* and ultimately holding that the defendant architect did not breach a duty or proximately cause the plaintiff homeowners' economic loss, the District Court in *Berman v. Kornstein*, stated a homeowner's negligence claim against the architect was permissible under New Jersey law even though the homeowner's contract was with the contractor. Civil Action No. 88-8245, 1992 U.S. Dist. LEXIS 21, at *5-12 (E.D.Pa. Jan. 3, 1992) ("Although the [homeowners] were not [architect's] clients, lack of contractual privity is not a bar to recovery on a negligence theory.").
87. 170 N.J. 297 (2000).
88. Although the *Saltiel* decision involved a negligence claim by a design professional against a consultant's principals and the Court noted the consultant provided "design" services, it is not clear the principals were licensed professionals. *Id.* at 300. In addition, unlike *Conforti*, the plaintiff in *Saltiel* had a direct contractual relationship with the consultant.
89. *Id.* at 299-302.
90. *Id.* at 309.
91. *Id.* at 316.
92. *Id.* at 316-17 ("In this transaction, we are unable to discern any duty owed to the plaintiff that is independent of the duties that arose under the contract. Defendant [consultant] possessed specific technical skills that it was obligated to apply under the contract. Its failure to do so was not a violation of an obligation imposed by law, but rather a breach of its contractual duties."). The court cited examples of "duties that are specifically imposed by law in New Jersey which can be enforced separately and apart from contractual obligations," including physicians, attorneys, and insurance brokers, but did not reference design professionals even though they are also licensed professions held to an applicable standard of care. *Id.* at 317. However, a subsequent decision from the Appellate Division, *First Am. Title Ins. Co. v. Semester Consultants, Inc.*, held that a licensed engineer did owe an independent duty imposed by law to a property owner. Docket No. A-5367-10T1, 2012 N.J. Super. Unpub. LEXIS 689, at *1-4, 9-10 (App. Div. Mar. 29, 2012). Indeed, citing *Saltiel*, the Court permitted the plaintiff property owner, who had contracted with the engineer's company, to assert a breach of contract claim against the company and a negligence claim against the engineer for economic loss arising out of improperly prepared site plans and survey, stating: "There was simply no need to pierce the corporate veil for plaintiff's negligence claim against [defendant] to either proceed or success. A corporate officer, like [defendant] is subject to individual liability for his negligence if he owes the plaintiff an independent duty imposed by law....As a licensed professional engineer, [defendant] clearly owed such a duty to plaintiff and he could be found liable for this

individual negligence whether or now the corporate veil was pierced." *Id.*

93. 2011 N.J. Super. Unpub. LEXIS 2271.
94. *Id.* at *2-8, 18.
95. *Id.* at *20 ("Finally, we recognize that [contractor] did not have a contractual relationship with either [design professional]. Unlike *Conforti* and *People Express*, however, [contractor] did have a direct contractual relationship with [owner] and possessed contractual remedies to address the situation it encountered in the performance of its work. Furthermore, [contractor] entered a contract in which it was clearly informed of the nature of the relationship, or lack thereof, among the various contractors and professionals. The contractual scheme was specifically designed with [owner] functioning as the hub and requiring all contracting parties to deal with it, not each other....Under these circumstances, the contractual remedies are sufficient to address its claims.). The basis for the *Horizon* Court's statement regarding *Conforti* is unclear. The *Conforti* opinion does not appear to indicate the contractor in that case had no contract with the owner. On the contrary, the Appellate Division's opinion in *Conforti* states the contractor "was the general contractor for the owner, the State of New Jersey." 199 N.J. Super. at 500. Further, while the Court's statement regarding *People Express* appears correct with respect to the plaintiff in *People Express*, the New Jersey Supreme Court's recognition of a defendant's " duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct," 100 N.J. at 263, acknowledged this duty can arise from a "'special relationship' between the tortfeasor and the individual or business deprived of economic expectations" that does not require a direct contractual relationship. *Id.* at 256. As the Court stated: "Courts have justified their finding of liability in these negligence cases based on notions of a special relationship between the negligent tortfeasors and the foreseeable plaintiffs who relied on the quality of defendants' work or services, to their detriment. The special relationship, in reality, is an expression of the courts' satisfaction that a duty of care existed because the plaintiffs were particularly foreseeable and the injury was proximately caused by the defendant's negligence." *Id.* at 256-57. Although the Court noted there was no "direct" contractual relationship in these cases, *id.* at 256, that was also the case in *Horizon* where the plaintiff had no direct contractual relationship with the design professional defendants. Moreover, in describing the "special relationship" exception permitting the recovery of economic loss for negligent conduct, the *People Express* Court cited, and relied upon, cases involving claims by injured third-parties against design professionals. *See* note 31, *supra*.
96. 935 F. Supp. 2d 796.
97. *Id.* at 801.
98. *Id.* (internal citation omitted).
99. *Compare Spectraserv, Inc. v. Middlesex County Utils. Auth.*, Docket No. L-2577-07, 2013 N.J. Super. Unpub. LEXIS 2173, at *29-30 (Law. Div. July 25, 2013) (holding a contractor's negligence claims for economic loss were barred by the economic loss doctrine, stating: "Here, there is a large construction project, with multiple parties....The parties relied on these contracts to allocate their risks, duties, and remedies. Given the nature of the relationships among the parties, the absence of a direct contractual relationship does not preclude the application of the economic loss doctrine. Applying the doctrine in such cases will serve its purpose of limiting the expansion of tort liability where contractual remedies exist.") *with Bedwell Co. v. Camden County Improvement Auth.*, Civil Action No. 14-1531, 2014 U.S. Dist. LEXIS 95510, at *8-9, n. 4 (D.N.J. July 14, 2014) (allowing negligence claims for economic loss by the contractor to proceed against the design professional who designed a hospital, stating: "Here, [contractor] and [design professional] did not enter into a written contract, and no oral agreement is alleged in the complaint. Consequently, the obligations of the parties are defined by tort law, unaffected by third-party agreements. And New Jersey tort law holds that the economic loss doctrine does not preclude [contractor's] instant claims."), *First Am. Title Ins. Co.*, 2012 N.J. Super. Unpub. LEXIS 689, at *9-11 (permitting the plaintiff to assert negligence claim for economic loss against a professional engineer, who was a principal of the company with which the plaintiff contracted to prepare site plans and survey),

and Ford Motor Co. v. Edgewood Props., Civil Action Nos. 06-1278, 06-4266, and 08-774, 2012 U.S. Dist. LEXIS 125197, at *9-10, 73-76 (D.N.J. Aug. 31, 2012) (holding that a contractor retained by owner to haul concrete off site could assert a negligence claim for economic loss against the Industrial Site Recovery Act consultant retained by the owner, stating: "Here, [contractor] alleges contract claims against [owner],, but not against [consultant]. Accordingly it cannot be said that [contractor's] recovery from [consultant] flows only from a contract. Indeed, under the Court's analysis...[contractor's] recovery would flow from the independent duty imposed by law that [consultant] owed to [contractor].") (internal citations and quotation marks omitted).

100. *See, e.g., KBWB Constr. Co., LLC v. Allied Envtl. Servs.*, Civil Action No. 1-18 -08224, 2019 U.S. Dist. LEXIS 23313, at *1-3, 9 (Feb. 13, 2019) (permitting the plaintiff contractor to proceed with a claim of fraud in the inducement, along with a breach of contract claim, against a subcontractor who allegedly represented that it was able to lawfully drill in New Jersey, but then violated statutory and regulatory requirements regarding well drilling); *Atl. City Assocs. LLC v. Carter & Burgess Consultants, Inc.*, Civil Action No. 05-3227, 2007 U.S. Dist. LEXIS 72649, at *18 (D.N.J. Sept, 28, 2007) (permitting a design professional's fraud claim to proceed against the lessee with which it contracted, stating: "Assessing [design professional's] fraud claim, the Court finds that [design professional] has adequately alleged that [lessee] made false representations to induce [design professional] to enter into a contract with [lessee]. The allegations as stated by [design professional] go beyond how [lessee] hoped the project would proceed and provide that [lessee] made misrepresentations about its ability to organize and fund the project, the amount of leased space at the time of signing the contract and the role of [design professional] in obtaining permits.").
101. *See, e.g., Clear Cut Lawn Decisions*, 2013 U.S. Dist. LEXIS 162025, at *14-15 (holding that because the allegations that subcontractors misrepresented the work actually completed "simply rehash [parties'] breach of contract claims, the economic loss doctrine precludes their common law and equitable fraud counts"); *Titan Stone*, 2007 U.S. Dist. LEXIS 4661, at *12-13 ("Plaintiff's fraud claim is premised on the allegation that [defendant] knew it would not pay [plaintiff] for work performed, yet promised [plaintiff] imminent payment to ensure its continued performance....[T]he damages sought by Plaintiff under [the fraud count] are damages to which they were entitled, if at all, under the Agreement. Accordingly, this Court finds that Plaintiff's fraud [claim is] barred under the doctrine of economic loss, as they seek the recovery of economic losses in tort when Plaintiff's alleged entitlement to the monies flowed from a contract.").
102. *See, e.g., Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 606 (1997) (relator's "affirmative misrepresentations about the builder's experience and qualifications as well as the quality of his homes" were actionable under the CFA); *Coastal Group, Inc. v. Dryvit Systems, Inc.*, 274 N.J. Super. 171, 174, 178-80 (App. Div. 1994) (permitting a developer to assert a CFA claim alleging the defendant supplier falsely represented drywall as inexpensive and easy to install).
103. *See, e.g., Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 19-20 (1994) ("[W]e conclude that the record exposes several bases for the jury's finding of consumer fraud. The jury determined that [defendant's] 'failure to have competent contractors install cabinet work, plumbing and electrical wiring in a safe, professional manner and in accordance with appropriate regulations" constituted consumer fraud in violation of the Act. [Defendant's] noncompliance with the Home Improvement Practices regulations constitutes a clear violation of the Act."). *See also New Mea Constr.*, 203 N.J. Super. at 501 (finding poor workmanship and substitution of substandard materials for those required by the specifications constituted unconscionable commercial practice in violation of the CFA). *But see Hunt Constr. Group, Inc. v. Hun Sch. of Princeton*, Civil Action No. 08-3550, 2009 U.S. Dist. LEXIS 39687, at *19-21 (D.N.J. May 11, 2009) ("[Plaintiff's] alleged misstatement that it would submit a claim for the [defendant's] damages due to the flooding under its insurance policy pursuant to the Agreement is, at best, a misstatement as to an action after the Contract was made and as to what will or will not be done in the future. As such, this alleged misstatement does not constitute an affirmative misrepresentation under the NJCFA even though it may have been

incorrect....[T]he [defendant's] allegation in this connection is that [plaintiff] mislead it with respect to submitting a claim under the insurance policy; not fraud in the inducement, but in the fulfillment of the contract. Accordingly, the [defendant] fails to state a claim under the NJCFA based on this allegation.").