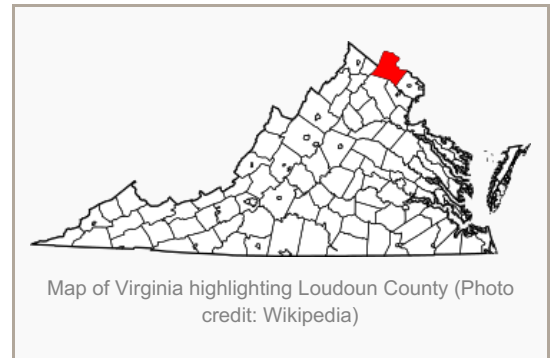


Do Construction Contracts and Fraud Mix After All?

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On several occasions here at [Construction Law Musings](#), I've discussed the fact that, with a few exceptions, [fraud claims and written construction contract based claims do not mix](#). One of the exceptions to the so called "economic loss rule" that would seem to preclude both fraud and contract claims in the same lawsuit is where [fraud is used to induce the contract](#) in the first place. This exception would only apply where an independent duty, wholly outside of the duties created by the contract, is properly plead and proven to the court. For the same reason, namely a separate duty outside of the contract, the [Virginia Consumer Protection Act](#) ("VCPA") [may allow for an exception](#) that would allow a cause of action under this statute.



Up until recently, the courts of Virginia have used these exceptions sparingly. However, the recent [Loudoun County, VA Circuit Court](#) opinion in [Interbuild, Inc. v. Sayers](#) (opinion also found at [Virginia Lawyers Weekly](#)) may signal a broadening of these exceptions. In the Interbuild case, the Court considered a claim for fraud in the inducement and breach of the VCPA. The basic facts plead by the plaintiffs were that Interbuild induced them into the contract through statements that it had been an established business since 1981, the project did not require a building permit, it had obtained all necessary subcontractor prices and would provide full-time project supervision, the project would be completed within 16 weeks, 4000 PSI concrete would be used for the project and that the project would be located in the agreed-upon area depicted and that they reasonably relied on these representations in deciding to enter into the contract to build their recreational facility.

The defendant demurred (moved to dismiss) the fraud claim because of the economic loss rule because any duty to perform in a certain manner arose directly from the contract. The Court disagreed and held that Interbuild misconstrued the fraud in the inducement claim as something else and overruled the demurrer stating:

[a]s a matter of logic, in an actionable claim for fraud in the inducement, the fraud alleged to have been perpetrated occurs before the contract between the parties comes into existence. Thus, by its nature, such a claim cannot be based on a duty that finds its source in the contract. Id. In other words, it sounds in tort, rather than in contract. Accordingly, because the instant actionable claim for fraud in the inducement is based on the alleged breach of a duty arising in tort, rather than in contract, it is not precluded by the economic loss or source of duty doctrines.

As to the VCPA claim, the Court rejected Interbuild's argument that because it is a licensed contractor subject to a separate regulatory scheme and because unlicensed contracting is specifically forbidden by the VCPA, it could not be held liable under the VCPA. Instead, the Court looked at the specific allegations, e. g. that the concrete would have a certain psi, and stated that these are the types of specific misrepresentations that could be actionable under the VCPA and denied the demurrer.

The first lesson of this case is that pleading matters and the help of [experienced construction counsel](#) is essential if you are to make out the types of claims described by the Court. The Court essentially praised the pleading by the owners and stated that they had listed just the right types of facts necessary to at least get past a demurrer.

While the Court's analysis was based upon a demurrer, the implications of its analysis provide a few questions that could cause a large increase in these sorts of construction related claims. Several of the specific "misrepresentations" relied on by the owners sound a lot like specifications or time for completion (e. g. the concrete or the duration of the project). These are the sort of items that are typically negotiated then included in the contract. What is to stop a creative owner from turning the specifications into a claim for fraud in the inducement and claiming that the contractor stated that it would provide a certain specification of material such as concrete and that therefore the contracted specification was therefore subject to a claim for fraud? Did the Court go too far in listing the types of factual allegations that could create fraud claim in the face of a construction contract?

From the owner's side, should you now parse every pre-contract communication to determine if a tort claim can follow? Am I reading too much into this because the Court specifically failed to consider several of the potential arguments due to the procedural posture of the case, namely that Interbuild's counsel did not present any argument regarding fraud in the inducement until it was too late? I'd love to hear your thoughts on these questions after you have had a chance to review the case.

I welcome and encourage your comments below, please share your thoughts. Also, please [subscribe](#) to keep up with the latest Construction Law Musings.

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