

# ***CONTRACTOR ALERT***

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Contractor Alert is a joint publication by this Contractor and the Law Offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esquire. We welcome and appreciate your suggestions for future article topics.

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Richard M. Sissman, Esquire  
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## **A REVISITING OF THE "ECONOMIC LOSS" DOCTRINE IN THE STATE OF MARYLAND**

**If you are a contractor that has performed work in the State of Maryland and/or in the Commonwealth of Virginia, and the person that you have contracted claims faulty workmanship that has purportedly led to economic loss to them, may they sue you for causes of action other than breach of contract; namely a tort claim ie- intentional tort or a negligent cause of action? A "tort" is generally defined as a private wrong or injury other than breach of contract for which the court will provide a remedy in the form of an action for damages. There must be a duty imposed by general law upon the persons occupying the relationship other than a mere entry into a contract.**

If you entered into a construction contract, whether new or rehab., there is no argument that the essence of the understanding between the parties was contractual in nature to perform construction in consideration for financial remuneration. The general rule in Maryland is that a contract cannot be enforced by or against one who is not a party to it. Crane Ice Cream Company v. Terminal Freezing & Heating Co., 147 Md. 588, 128 (1925). If the person that you contracted with sues you for breach of contract along with various intentional and/or negligent tort claims arising out of the purported contractual breach that have resulted in only economic loss, the courts will summarily dismiss the tort claims. The tortious conduct arising out of a breach of contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort. In Heckrotte v. Riddle, 224 Md. 591, 595, 168 A.2d 879 (1961), which distinguished between tort and contract duties:

The mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself is not enough to sustain an action sounding in tort.

It is a settled and "familiar proposition that not every duty assumed by contract will sustain an action sounding in tort." Council of Co-Owners v. Whiting-Turner, 308 Md. 18, 32, 517 A.2d 336, 343 (1986). See also, e.g.; U.S. Gypsum v. Baltimore, 336 Md. 145, 156, 647 A.2d 405, 410 (1994); Decoster v. Westinghouse, 333 Md. 245, 250-251, 634 A.2d 1330, 1332-1333 (1994); A contractual obligation, by itself, does not create a tort duty. Instead, the duty giving rise to a tort action must have some independent basis. As explained by Chief Judge Murphy for the Court in Wilmington Trust Co. v. Clark, 289 Md. 313, 328-329, 424 A.2d 744, 754 (1981),

[w]hile a tort action in favor of a contracting party can be founded upon a duty arising out of the contractual relationship, ... the duty giving rise to the tort cause of action must be independent of the contractual obligation.... Mere failure to perform a contractual duty, without more, is not an actionable tort.

If there is no separate duty owed by the contractor to his client except to perform the work pursuant to industry standard, the tort claims will be dismissed. One of my clients was sued by a homeowner. They claimed that my client "... willfully, deliberately and maliciously, failed to properly measure, fabricate and completely install the counter-tops, the sink and the back splash throughout the kitchen" The thrust of their claim is that my client failed to perform the work in a workmanlike manner. In a leading case on this point, Heckrotte v. Riddle, supra, 224 Md. at 595-596, 168 A.2d at 881-882, Judge Horney for the Court stated:

That the buyers did not ... assert an action in tort independent of contract is [725

A.2d 1059] obvious. And, while there was an allegation of 'carelessness and negligence' on the part of the seller-builder ... it is apparent that the allegations were not so stated as to claim that the asserted negligent breach of contract was also a breach of duty imposed by law. Thus, it is clear that the second count did not state an action ex delicto. The mere negligent breach of a contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort.... For it is only when a breach of contract is also a violation of a duty imposed by law that the injured party has a choice of remedies.

Maryland law, negligent breach of a contract, absent a duty or obligation imposed by a source independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort. When the dispute is over the existence of any valid contractual obligation covering a particular matter, or where Further, "the duty giving rise to the tort cause of action must be independent of the contractual obligation". *Wilmington Trust Co. v. Clark*, 289 Md.313, 424 A.2d 744 (1981). Maryland law prohibits the availability of a tort action in a contractual scenario, and the exceptions to that rule discussed herein, is consistent with the law of other states. As recently as 1990, the Seventh Circuit made the following observation,

An increasing number of jurisdictions hold that tort law provides no remedy in a case in which the plaintiff is seeking to recover for a commercial loss rather than damage to person, property, or reputation.

Miller v. United States Steel Corp., 902 F.2d 573, 574 (7th Cir.1990).

Maryland does not absolutely forbid the recovery of damages in tort for a party in privity of contract with the offending party. *Jacques v. First National Bank of Maryland*, 307 Md. 527, 515 A.2d 756 (1986). To determine whether a tort duty should be recognized in a context, two major considerations are reviewed:

1. The nature of the harm likely to result from a failure to exercise due care.
2. The relationship that exists between the parties. *Id.* at p. 534.

If the resulting harm is only economic loss, the court will require an intimate nexus between the parties as a condition to the imposition of tort liability. *Id.*, at p. 534. In the instant matter there is no such "intimate nexus". As the magnitude of the risk increases, the requirement of privity is relaxed thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury. Conversely, as the magnitude of the risk decreases, a closer relationship between the parties must be shown to support a tort duty. Therefore if the risk created by negligent conduct is no greater than one of economic loss, generally no tort duty will be found absent a showing of privity or its equivalent. *Jacques v. First National Bank of Maryland* at p. 537.

If you should have any questions on this issue please contact Mr. Sissman at his website at [www.contractoralert.com](http://www.contractoralert.com) or by phone at (703) 903-9646 or (301) 762-0402.

