IN THE SUPREME COURT OF GUAM

GOVERNMENT OF GUAM,
Plaintiff-Appellant,

v.

YOUNG C. KIM,
Defendant-Appellee.

OPINION

Cite as: 2015 Guam 15

Supreme Court Case No.: CVA14-023
Superior Court Case No.: CV0783-13

Appeal from the Superior Court of Guam
Argued and submitted on October 28, 2014
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] Plaintiff-Appellant Government of Guam ("Government") appeals the trial court's Decision and Order denying the Government's Motion for Summary Judgment and dismissing the case, *sua sponte*, in favor of Defendant-Appellee Young C. Kim ("Kim"). The Government argues that the trial court erred in *sua sponte* dismissing its claims, and in denying the Government's Motion for Summary Judgment.

[2] First, we find that the Government has standing to bring a claim under Guam's Deceptive Trade Practices Act ("DTPA"). Second, we find that when the economic loss rule applies, it bars claims against both the corporation in privity of contract and the officers of that corporation. Third, we find that the economic loss rule does not bar fraud claims in Guam. Finally, we find that the economic loss rule does not bar claims brought under the DTPA. Therefore, we reverse the trial court's Decision and Order dismissing the DTPA and fraud claims, and remand to the trial court to determine liability and damages pursuant to the Government's Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Department of Public Works ("DPW") contracted with Hubtec International Corporation ("Hubtec") for the repair of roadway infrastructures. Hubtec is a closely held corporation controlled and managed by Kim. Under the contract, Hubtec was to repair several damaged culverts in Agat and Umatac. Hubtec was required to use American-made steel rebar for

permanent structures. The requirement of American steel was imposed by the project's funder, the Federal Highway Administration ("FHWA").

[4] Hubtec submitted proposals to use U.S.-made steel on the project, and DPW's construction manager for the project, Duenas, Camacho & Associates ("Duenas"), approved the submittals. During the construction of the culverts, FHWA visited the project site, where there was both Korean and American steel. Kim stated that American steel was used for permanent structures and Korean steel was used for fences – which would be consistent with the contract. Kim stated that he had rebar tags at his office, and that he would provide the tags to FHWA. Subsequently, Kim gave Duenas a copy of three rebar tags for American steel rebar from Cascade Rolling Mills of Oregon. The tags did not match identification numbers Kim had submitted in his proposal, and Kim could not show he used U.S.-made rebar on the project. Kim submitted a letter on behalf of Hubtec acknowledging foreign-made steel had been used in the project. By that time, DPW had paid Hubtec $108,000.00 for the Cetti Bay slide wall. FHWA notified DPW it would not reimburse for pay items that were constructed with foreign steel on the project and that "any pay items already reimbursed shall be deducted from the next request for reimbursement from the project." Record on Appeal ("RA"), tab 21 at Ex. D (Letter from U.S. Dep't Transp. to Guam DPW, Feb. 18, 2011). The headwall at the Umatac baseball field culvert was removed and reconstructed using American steel.

[5] DPW terminated the contract, following the revelation that Hubtec had submitted false invoices and sales receipts for purchases of American steel.

[6] The federal government indicted Hubtec and Kim for wire fraud, making false statements in connection with a highway project, and major fraud against the United States. Hubtec and

Kim pleaded guilty to two counts of making false statements in connection with a federal highway project; the other charges were dismissed.

[7] Subsequently, Hubtec sought payment for its work performed by filing an administrative appeal with the Office of Public Accountability ("OPA"). The OPA denied Hubtec's claim. Hubtec sued the Government, claiming breach of contract and *quantum meruit* in case number CV1358-12. The Government counterclaimed for breach of contract and for violations of Guam's DTPA. The court dismissed Hubtec's breach of contract and *quantum meruit claim*, and the Government's breach of contract claim.

[8] The Government filed a complaint in this suit (CV0783-13) against Kim, for violations of DTPA and fraud.

[9] The Government moved for summary judgment on both claims. In support of its motion, the Government attached declarations from employees of Duenas; the Department of Administration; Conwood Products, the corporation which sold rebar to Kim; the DPW; and Kenneth Orcutt, who conducted Kim's deposition in Hubtec's suit against the Government (CV1358-12).

[10] Kim filed an opposition to the Government's Motion for Summary Judgment, arguing that the Government did not have standing to assert claims under the DTPA because it was not a "consumer" as required under the act. RA, tab 27 at 2-3 (Opp'n Mot. Summ. J., Feb. 7, 2014). In addition, he claimed there were material disputes of fact that existed as to liability and damages on the DTPA claim. Next, he claimed that summary judgment was improper on the fraud claim because there was no evidence of "knowledge of falsity," an element to the claim,

and that "a breach of contract claim[] disregard[s] the fraud claim as duplicative, especially when the fraud claim simply restates facts of the claim for breach of contract." *Id.* at 4.

[11] The Government filed its reply brief in support of its Motion for Summary Judgment. The Government argued that it had standing to sue under the DTPA, and that the breach of contract claim against Hubtec in case number CV1358-12 did not preclude it from bringing a fraud claim in this action.

[12] The trial court's Decision and Order addressed the issues in Kim's response, and found that the case should be dismissed. Specifically, the court found that the Government did not have standing to sue under the DTPA because it was not a "consumer" within the meaning of the act, RA, tab 38 at 5-12 (Dec. & Order, May 14, 2014), and that the economic loss rule prevented the Government from bringing a fraud claim, *id.* at 14-27. The trial court denied the Government's Motion for Summary Judgment but did not specifically address the Government's arguments. *See generally id.*

[13] The trial court filed its Judgment. The Government timely filed a Notice of Appeal.

II. JURISDICTION

[14] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-296 (2014)), and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[15] Dismissal of a plaintiff's claim for failing to state a claim is reviewed *de novo*. *First Hawaiian Bank v. Manley*, 2007 Guam 2 ¶ 6 (citations omitted). "The interpretation of a statute is a question of law reviewed *de novo*." *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam

14 ¶ 24 (citations omitted). Issues which are purely legal issues are reviewed *de novo*. *See People v. Rios*, 2008 Guam 22 ¶ 8.

[16] We review the trial court's grant or denial of a motion for summary judgment *de novo*. *Torres v. Torres*, 2005 Guam 22 ¶ 8 (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c); *Torres*, 2005 Guam 22 ¶ 8. "There is a genuine issue, if there is 'sufficient evidence' which establishes a factual dispute requiring resolution by a fact-finder." *Torres*, 2005 Guam 22 ¶ 8 (quoting *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 7). Furthermore, the "dispute must be as to a material fact which is a fact that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *Id.* (citations and internal quotation marks omitted).

IV. ANALYSIS

[17] On appeal, the Government argues that the trial court erred in dismissing its DTPA and fraud claims. In addition, the Government requests that this court grant summary judgment on its claims. These issues are addressed below.

A. Whether the Government has Standing to Bring a Claim under Guam's Deceptive Trade Practices Act

[18] The Government first argues that the trial court erred in finding that it did not have standing to bring a claim under the DTPA. Appellant's Br. at 10-14 (Aug. 21, 2014). Kim did not discuss this issue in his brief.

[19] The DTPA is governed by Title 5, Chapter 32 of the Guam Code Annotated ("GCA"). The general purpose of the DTPA is "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection" and is "liberally construed in favor of the consumer." 5 GCA § 32108(a) (2005); *see also Mendiola v. Bell*, 2009 Guam 15 ¶ 15. If a director, officer, or agent of any corporation violates the provisions of Title 5, Chapter 32 of the GCA or "knowingly aids or assists, directly or indirectly, in such violation, knowing that the . . . corporation, or person is violating a law," the director, officer, or agent is equally responsible with the corporation in any civil suit. 7 GCA § 12117 (2005). This court has found that pursuant to section 12117, officers, directors, and agents of a corporation can be held liable equally with the corporation for violations of the DTPA where that director, agent, or officer knowingly aided or assisted in committing the violation. *Mendiola*, 2009 Guam 15 ¶ 26 (citations omitted).

[20] The DTPA specifies what parties have standing under 5 GCA § 32111. Pursuant to section 32111:

> Any *aggrieved consumer or the Attorney General* may maintain an action for any of the following:
>
> > (a) Any prohibited act or practice that is specifically enumerated in this chapter, including but not limited to acts of omissions, failure to honor any warranty or agreement with the consumer, or committing any false, misleading or deceptive acts or practices by a merchant to induce a consumer to purchase goods or services.
> >
> > (b) Any unconscionable action or course of action by any person as to non-business consumers in non-land transactions.
> >
> > (c) If the Attorney General is representing a consumer or consumers not in a class action suit, the court may not award damages

> other than restitution, costs and attorneys[sic] fees unless specifically permitted by statute. If a consumer is not represented by the Attorney General, the court may award the consumer damages, restitution, costs, attorneys' fees, and all other relief permitted at law or equity.

5 GCA § 32111 (2005). The DTPA defines a "consumer" as:

> [A]n individual, partnership, association, corporation, or the government of Guam who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of Twenty-Five Million Dollars ($25,000,000) or more, or that is owned or controlled by a corporation or entity with assets of Twenty-Five Million Dollars ($25,000,000) or more.

5 GCA § 32103(c) (2005).

[21] Here, the trial court recognized that "consumers" have a cause of action under the DTPA. RA, tab 38 at 4 (Dec. & Order). However, the trial court stated that the "broad use of ['consumer' under the DTPA,] is contrary to its ordinary legal meaning: 'A person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business [purposes].'" *Id.* at 5-6 (citing *Black's Law Dictionary* 358 (9th ed. 2009)).[1] The trial court concluded that "[t]he use of the term ['consumer'] that appears in its specific statutory provision contradicts its ordinary meaning, resulting in an ambiguity." *Id.*

[22] We find that the trial court incorrectly found that the term "consumer" was ambiguous. "Statutory interpretation always begins with the language of the statute." *Guam Resorts, Inc. v. G.C. Corp.*, 2012 Guam 13 ¶ 7 (citing *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6). "[W]here a statute is clear on its face, the court shall not read further." *Castino v. G.C. Corp.*, 2010 Guam 3 ¶ 58; *see also Guam Resorts, Inc.*, 2012 Guam 13 ¶ 7 (stating that plain reading construction

[1] The trial court's Decision and Order cited the ninth edition of Black's Law Dictionary, but used the term "purposes" rather than "services" at the end of the definition. *See* RA, tab 38 at 4 (Dec. & Order); *see also Black's Law Dictionary* 358 (9th ed. 2009). Our quotation has been altered to accurately reflect the language of Black's Law Dictionary.

applies when statute is clear on its face); *Core Tech Int'l Corp. v. Hanil Eng'g & Constr. Co.*, 2010 Guam 13 ¶ 19. The definitions for the DTPA clearly state that the term "consumer" includes the Government of Guam. 5 GCA § 32103(c). The trial court had to look outside the statute, at Black's Law Dictionary, in order to find an ambiguity. However, this court will not look at Black's Law Dictionary if the statute is clear. *See In re Request of Gutierrez*, 2002 Guam 1 ¶ 5 (reliance on Black's Law Dictionary definition of "appellate court" was unsound in light of a provision in the Organic Act contrary to the dictionary's definition).

[23] In addition, the trial court reads the term "government of Guam" found within 5 GCA § 32103(c) out of the definition of "consumer." This court has found that "[a] statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant." *Macris v. Richardson*, 2010 Guam 6 ¶ 15 (citations omitted). If this court were to determine that the Government was not a "consumer" under the DTPA despite its inclusion in the definition, this court would be rendering the meaning of "government of Guam" in 5 GCA § 32103(c) superfluous. Therefore, we find that the Government is a consumer under the DTPA and has standing to bring a DTPA claim.

B. Whether the Economic Loss Rule Bars Fraud Claims in Guam

[24] Next, the Government argues that the trial court erred in holding that the economic loss rule precludes the Government's fraud claims against Kim. Appellant's Br. at 14.

1. The Economic Loss Rule in Guam

[25] "The economic loss doctrine is a common law rule that emerged in the field of products liability." *Maeda Pac. Corp. v. GMP Haw., Inc.*, 2011 Guam 20 ¶ 24 (citations omitted). This "judicially created remedies principle that operates generally to preclude contracting parties from

pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Id.* (citations and internal quotation marks omitted). Drawing a legal line between contract and tort liability, the economic loss doctrine forbids tort compensation for "certain types of foreseeable, negligently caused, financial injury." *Id.* ¶ 25 (citing *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 87 (Nev. 2009)).

[26] This court adopted the economic loss rule in *Maeda*. *Id.* ¶ 31. In *Maeda*, a construction company was awarded a contract to build a water supply system, which included a water reservoir tank. *Id.* ¶¶ 2-3. The construction company hired an engineering firm as the lead designer and quality control provider for the project. *Id.* ¶ 2. In addition, the construction company hired a subcontractor to build the tank and a design firm to design the tank. *Id.* ¶ 3. After the tank was constructed, the tank roof collapsed during a test of the water pumping system. *Id.* A subsequent investigation suggested design defects in the tank roof. *Id.* ¶ 4. The construction company filed a complaint in the District Court of Guam against the engineering firm and the design firm, alleging breach of contract and negligence. *Id.* ¶ 6. The engineering firm filed a cross claim against the second design firm and a third party complaint against a subcontractor for contribution. *Id.* ¶ 7. The second design firm and the third party defendant filed motions for summary judgment, claiming that the damages sought by the construction company were "economic losses" which are not recoverable in tort. *Id.* ¶ 8.

[27] The District Court certified two questions to this court: "(1) Does the economic loss doctrine apply in Guam?"; and "(2) If the economic loss doctrine does apply in Guam, does it preclude negligence-based claims against design professionals, such as engineers and architects,

who provide services in the context of commercial property development or improvement, when the plaintiffs seek to recover purely economic losses?" *Id.*

[28] This court adopted the economic loss doctrine, recognizing that "across jurisdictions, the terms and scope of the economic loss rule may be the subject of disagreement, [but] there is no dispute that recovery in tort actions for purely economic losses is often difficult to obtain." *Id.* ¶¶ 27, 31 (citing Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 Am J. Comp. L. 111, 112 (1998)). This court stated that "[t]he vigor with which the economic loss doctrine is now applied suggests that the pendulum of American law has swung far in the direction of favoring resolution of disputes via contract law rather than tort law," which the court hinted might be because of the "preference for private ordering over public regulation." *Id.* ¶¶ 28-29 (citing Vincent R. Johnson, *The Boundary–Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523, 571 (2009); Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 Ariz. L. Rev. 813, 817 (2006)).

[29] We also found that in the commercial construction litigation context:

> where a party in privity of contract with a design professional is seeking to recover economic loss damages, and no personal injury or damage to property other than the subject of the contract is alleged, such a party is limited to contractual remedies, and a negligence action may not be maintained.

Id. ¶ 43 (citing *City Express, Inc. v. Express Partners*, 959 P.2d 836, 839 (Haw. 1998)). We explained that "[t]his appears to be the majority trend, with most jurisdictions applying the economic loss doctrine to bar commercial construction industry plaintiffs from recovering under a negligence-based theory against design professionals, especially when the parties are in privity." *Id.* ¶ 40 (citations omitted). We further recognized that "[i]f tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and

impede future business activity. The construction industry in particular would suffer . . . ." *Id.* ¶ 41 (quoting *City Express*, 959 P.2d at 839-40).

[30] Accordingly, this court held that in the context of commercial construction cases, the economic loss doctrine can apply regardless of whether there is privity between the parties. *Id.* ¶ 49. We noted that in the commercial construction context, "[t]here is no principled reason . . . to establish a bright-line rule dependent solely on privity. Such an approach would ignore the traditional practices of the construction industry. Rather, application of the doctrine should depend on the opportunity a party had to reasonably protect itself through contract." *Id.*

[31] In *Maeda*, we acknowledged our holding was narrowly tailored to the facts of that case. *Id.* ¶ 50. We refused to address the parties' arguments over exactly how far and in what specific circumstances the doctrine should apply, finding that these issues go beyond the District Court's certification to this court. *Id.* ¶¶ 32-33. Specifically, we refused to address whether there was an exception to the economic loss doctrine for claims of negligent misrepresentation because it was not pleaded in the District Court. *Id.* ¶ 34. In addition, we refused to address whether the economic loss doctrine applied when the damages from the tort extends beyond the work product itself to physical property damage resulting from the defect. *Id.* ¶ 35.

[32] However, we emphasized the importance of distinguishing between whether only the product is damaged, and whether "other property" is damaged. *Id.* ¶¶ 35-37 (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871-72 (1986)). We noted that in *East River*, the U.S. Supreme Court found that "[w]hen a product injures only itself, the reason for imposing tort duty are weak and those for leaving the party to its contractual remedies are strong." *Id.* ¶ 35 (quoting *E. River*, 475 U.S. at 871-72). In contrast, "when only the work product itself is

damaged as a result of its defective nature, the damage is defined as 'economic' rather than as 'property damage' and is not recoverable in tort." *Id.* ¶ 36 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 896 (1989)).

[33] In sum, the *Maeda* decision is very limited in its scope. This court adopted the economic loss doctrine, but only applied it (1) to commercial construction cases, (2) in negligence actions, (3) to cases where the damages are purely economic, and (4) regardless of whether or not the parties were in privity of contract. *See id.* ¶ 53.

[34] This case is factually very similar to *Maeda* because it involves a commercial construction case, where the damages are purely economic (i.e., the "cost to repair or replace defective materials, . . . lost revenue, and costs."). *See id.* ¶ 36. However, this case is distinguishable in one major aspect – it is an action for fraud, not negligence.

2. Whether the Economic Loss Rule Applies Where the Officer is a Party, but only the Corporation is in Privity of Contract

[35] As an initial matter, the Government argues that this court should not find that the economic rule applies because there was no contractual relationship between the Government and Kim. Appellant's Br. at 17-18 (citing *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1194 (Colo. App. 2008)). Rather, the Government brings the fraud claim against Kim for statements Kim made on behalf of Hubtec. *Id.* at 5, 14. This court has said that:

> In general, "[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done," but "[t]hey may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation."

Mendiola, 2009 Guam 15 ¶ 28 (alterations in original) (quoting *Michaelis v. Benavides*, 71 Cal. Rptr. 2d 776, 779 (Ct. App. 1998)).

[36] As stated previously, in the context of commercial construction, the economic loss doctrine is applicable regardless of privity of contract. *Maeda*, 2011 Guam 20 ¶ 45. In *Maeda*, this court assessed whether a lack of privity between a commercial party and a design professional precluded the application of the economic loss doctrine. *See generally id.* However, the rationale behind our rule in *Maeda* supports extending the application of the economic loss rule to directors and officers of businesses who are involved in the construction. *See, e.g., Vesta Constr. & Design, L.L.C. v. Lotspeich & Assocs., Inc.*, 974 So. 2d 1176, 1179 (Fla. Dist. Ct. App. 2008) ("[I]t would completely undermine the contractual privity economic loss rule to allow any party which contracts with a corporation to avoid the rule by simply bringing its tort claim directly against the corporate officers or employees tasked with performing the contract on behalf of the corporation."); *Former TCHR, LLC v. First Hand Mgmt. LLC*, 317 P.3d 1226, 1232 (Colo. App. 2012) ("When the economic loss rule bars a claim against a corporate entity, it may also bar claims against that entity's officers and directors, even if the officers and directors were not parties to the contract at issue."). Where the plaintiff has a contract with a construction business, the plaintiff reasonably has an opportunity to protect itself in the contract. *See Maeda*, 2011 Guam 20 ¶ 49. The fact that the defendant was a director of the business does not affect the plaintiff's ability to protect itself. Therefore, we find that where the economic loss rule bars a claim against a business entity, it also bars claims against that entity's officers and directors.

[37] Because we find that the economic loss rule is applicable regardless of whether the defendant is a business or a director or officer of the business, we turn to the issue of whether the economic loss rule bars fraud claims.

3. Fraud and the Economic Loss Rule

[38] Prior to 1995, only a few cases had applied the economic loss rule to bar fraud claims. Katherine Heaton, Comment, *Eastwood's Answer to Alejandre's Open Question: The Economic Loss Rule Should Not Bar Fraud Claims*, 86 Wash. L. Rev. 331, 339 (2011) (citing R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1802 (2000)). Prior to the adoption of the economic loss rule in fraud cases, courts routinely awarded purely economic damages when a defendant's fraud induced a transaction. *Id.*

[39] Today, courts take one of three approaches: (1) the economic loss rule does not bar fraud claims, (2) the economic loss rule does not bar fraud in the inducement claims that are "extraneous to the contract," or (3) the economic loss rule bars all fraud claims. *See, e.g.*, Heaton, *supra*, at 339; Barton, *supra*, at 1803-12; Grant Treaster, Comment, *The Confusion Continues: The New Dynamic of the Economic Loss Doctrine in Kansas*, 62 U. Kan. L. Rev. 1325, 1336 (2014); Johnson, *supra* at 568-70.

a. First approach: The economic loss rule does not bar fraud claims

[40] Courts that take the first approach find that fraud claims are an exception to the economic loss rule "because the duty not to commit fraud is independent of any contract." *See, e.g.*, Heaton, *supra*, at 339-40 (citing *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 843 N.E.2d

327, 333 (Ill. 2006); *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 452 (Ill. 1982)); *Robinson Helicopter Co. v. Dana Corp*, 102 P.3d 268, 273-74 (Cal. 2004).

[41] One rationale for this approach is that fraud is distinguishable from other tort claims because "[a]llegations of fraud . . . are in a class by themselves. . . . Unlike the other theories, in which the safety and efficacy of the product is assailed, the fraud claim impugns defendants' conduct." Barton, *supra*, at 1803-12 (citing *Kahn v. Shiley, Inc.*, 266 Cal. Rptr. 106, 112 (Ct. App. 1990)). Instead, "the viability of a fraud claim rests on the defendant's conduct and not on the type of damage or on the existence of an underlying contract." *Id.* Therefore, the presence or absence of physical injury or the underlying contract makes no difference. *See id.*; *see also Lazar v. Superior Court*, 909 P.2d 981, 990 (Cal. 1990) ("[B]ecause in fraud cases we are not concerned about the need for predictability about the cost of contractual relationships, fraud plaintiffs may recover out-of-pocket damages in addition to the benefit-of-the-bargain damages." (citations and internal quotation marks omitted)).

[42] A second rationale is cited in jurisdictions where fraud in the inducement is a limited exception to the economic loss rule. Fraud in the inducement is "fraud occurring when a misrepresentation leads another to enter into a transaction with a false impression of risks, duties, or obligations involved." *Black's Law Dictionary* 731 (9th ed. 2009). The rationale is that fraud in the inducement arises out of a separate and independent duty from the contract itself. *See* Barton, *supra*, at 1804-05 (citing *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998)). According to the Texas Supreme Court, tort law has "long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Formosa Plastics Corp.*, 960 S.W.2d at 46. As the duty is

"separate and independent from the duties established by the contract itself," the economic loss rule does not apply to fraud claims regardless of whether the duties were subsumed later into the contract, or the losses were purely economic. *Id.* at 46-47.

b. Second approach: Fraud in the inducement claims are an exception to the economic loss doctrine when they are extraneous to the breach of contract claim

[43] Courts taking the second approach recognize an exception to the economic loss rule only in situations where (1) there was fraud in the inducement and (2) the misrepresentations are "extraneous to," as opposed to "interwoven with," the breach of contract. Heaton, *supra*, at 339-40 n.80 (citing *Huron Tool & Eng'g Co. v. Precision Consulting Servs.*, 532 N.W.2d 541, 546 (Mich. Ct. App. 1995); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 884-87 (8th Cir. 2000)). Under this approach, a misrepresentation is "related to an underlying contract if they concern the subject matter of the contract, such as quality or characteristics of the goods." Heaton, *supra* at 340.

[44] The leading case advocating the limited exception for fraud is *Huron Tool*. *Id.* at 339-40 n.68. In *Huron Tool*, a manufacturer entered into an agreement with a consulting service for the sale of a computer software system. 532 N.W.2d at 543. Under the agreement, the consulting service was to provide the manufacturer with "system's design, programming, training and installation services." *Id.* Subsequently the manufacturer sued the consulting service for breach of contract and fraud, alleging that the consulting service supplied defective software. *Id.* The trial court dismissed the action following the consulting service's motion for summary judgment. *Id.* On appeal, the Court of Appeals of Michigan determined whether the economic loss doctrine

precluded the manufacturer from bringing a fraud claim independent of its contractual claim. *Id.* at 544.

[45] The court recognized that the emerging trend, in the handful of jurisdictions who had addressed the issue, "is clearly toward creating an exception to the economic loss doctrine for a select group of intentional torts." *Id.* (citations omitted). The court explained that these jurisdictions have limited the exception to certain types of frauds, and adopted two requirements for a fraud claim to be an exception to the economic loss doctrine. *Id.* at 544-45. The court first looked at other jurisdictions that "have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine" because it is a "pre-contractual conduct which is, under the law, a recognized tort." *Id.* at 544 (citing *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1237-38 (N.D. Fla. 1991)). The court adopted the requirement that only fraud in the inducement claims were not barred by the economic loss doctrine, noting that it "reflects the rule adopted by our Supreme Court ... that the policy behind the doctrine 'encourages parties to negotiate economic risks through warranty provisions and price.'" *Id.* at 545 (citing *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987)). In addition, the court added the requirement that the fraud must be "extraneous to the contractual dispute" and the harm must be "distinct from those caused by the breach of contract." *Id.* at 545-46 (citing *Pub. Serv. Enter. Grp. Inc. v. Phila. Elec. Co.*, 722 F. Supp. 184, 201 (D.N.J. 1989)). The court looked at the complaint and found that the alleged fraudulent representations "concern[ed] the *quality and characteristics* of the software system sold by defendants," which were "indistinguishable from the terms of the contract . . . that the plaintiff alleges [was] breached." *Id.* at 546 (emphasis added). The court concluded that the fraud

allegations were not extraneous to the contract dispute, and were therefore barred by the economic loss rule. *See id.*

c. Third approach: The economic loss rule bars all fraud claims

[46] A few courts have found that the economic loss rule bars all fraud claims. The reasoning behind this approach is that the economic loss rule bars recovery in tort, and because fraud is a tort, recovery of purely economic loss is barred. *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 385-86 (D.N.J. 2004) (applying Pennsylvania law, the District Court of New Jersey followed the Third Circuit's prediction that there is no fraud exception to the economic loss doctrine in Pennsylvania).

[47] In *Werwinski v. Ford Motor Company*, purchasers of automobiles which allegedly contained defective transmissions brought a class action against a manufacturer asserting claims for fraudulent concealment and for violations of state unfair trade practices statutes. 286 F.3d 661, 663 (3d Cir. 2002). The trial court dismissed the fraudulent concealment claim and the statutory unfair trade practices claim, finding that both were barred under the economic loss doctrine. *Id.* at 665. On appeal, the Third Circuit looked at whether the economic loss doctrine barred fraud claims under Pennsylvania law. *Id.* at 670. The court also acknowledged that Pennsylvania law was unsettled on the issue of whether the economic loss doctrine applied to intentional fraud. *Id.* at 675. The court looked to other jurisdictions and found that Michigan and Wisconsin had the most persuasive and developed laws regarding the economic loss doctrine. *Id.* at 676. The Third Circuit noted that it was particularly "influenced by an emerging trend in these and other jurisdictions 'recogniz[ing] a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independent[ly] of the

underlying contract.'" *Id.* (alteration in original) (quoting *Raytheon Co. v. McGraw-Edison Co.*, 979 F. Supp. 858, 870 (E.D. Wis. 1997)). The Third Circuit noted that the leading case in the application of the economic loss rule to fraud claims was the Michigan appellate court's rule in *Huron Tool*, which recognized an exception for fraud in the inducement where the fraud was extraneous to the contract. *Id.* The Third Circuit noted that this approach was "not without its critics" and cited *Budgetel Inns, Inc. v. Micros Systems, Inc.*, 8 F. Supp. 2d 1137 (E.D. Wis. 1998), and *Rich Products Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937 (E.D. Wis. 1999). *Werwinski*, 286 F.3d at 677. Next, the court examined the parties' justifications in support of their competing position. *Id.* at 680. The Third Circuit concluded that under Pennsylvania law the economic loss doctrine applied to fraudulent concealment claims. *Id.* at 681.

[48] The court determined that the need to provide a plaintiff with tort remedies is "diminished greatly when (1) the plaintiff can be made whole under contract law, and (2) allowing additional tort remedies will impose additional costs on society." *Id.* at 679-80. Next, the court reasoned that the "willingness of Pennsylvania courts to restrict intentional tort claims that overlap with contract claims" indicated that the Supreme Court of Pennsylvania would apply the economic loss doctrine to intentional fraud cases. *Id.* at 680. The court found that the "gist of the action" doctrine evidenced Pennsylvania courts' "penchant for dismissing fraud claims that simply restate breach of contract claims."[2] *Id.* The Third Circuit found that even if it were torn between two interpretations of Pennsylvania law, it should "opt for the interpretation that restricts liability rather than expands it, until the Supreme Court of Pennsylvania decides

[2] The "gist of the action" doctrine bars plaintiffs from bringing a tort claim that merely replicates a claim for breach of an underlying contract. *Werwinski*, 286 F.3d at 680 n.8 (citations omitted).

differently." *Id.* (citing *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002); *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 965 (7th Cir. 2000)).

4. Distinction between Fraud in the Inducement and Fraud in the Performance

[49] A majority of courts that recognize fraud as an exception to the economic loss rule distinguish between fraud in the inducement and fraud in the performance. This distinction is important in this case because the Government asserts Kim committed fraud during the performance of the contract rather than in the inducement of the contract. *See* Appellant's Br. at 20-21.

[50] As stated previously, many courts limit the fraud exception to fraud in the inducement. *See, e.g.*, *Huron Tool*, 532 N.W.2d at 544 ("With regard to the specific intentional tort of fraud, courts generally have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine."); *Marvin Lumber*, 223 F.3d at 884-85; *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652, 657 (Wis. 2003) (noting that Wisconsin recognizes a narrow fraud in the inducement exception similar to *Huron Tool*); *see also* Christopher J. Faricelli, Note, *Wading into the "Morass": An Inquiry into the Application of New Jersey's Economic Loss Rule to Fraud Claims*, 35 Rutgers L.J. 717, 739 (2004) (stating that the trend in New Jersey courts has been to bar "fraud-in-the-performance" claims but permit "fraud-in-the-inducement" claims). These courts typically focus on the fact that the duty in fraud in the inducement claims arise from a time before the contract is made, because:

> There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions. . . . Fraud in the inducement, however, addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort.

Huron Tool, 532 N.W.2d at 545 (quoting *Williams Elec.*, 772 F. Supp. at 1237-38); *see also Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 220 (Wis. 2005) (recognizing that the limited fraud in the inducement exception "maintains the fundamental distinction between tort and contract law. Matters that are expressly or implicitly dealt with in the contract, such as the performance or the quality or character of the goods sold, still must be addressed by contract law." (citation omitted)). It appears that a minority of courts, including California and a few Texas courts, have extended this exception to fraud in the performance. *Robinson Helicopter*, 102 P.3d at 270; *Kajima Int'l, Inc. v. Formosa Plastics Corp., USA*, 15 S.W.3d 289, 293-94 (Tex. Ct. App. 2000).

[51] The economic loss doctrine was originally adopted to draw a legal line between contract and strict product liability, *see Maeda*, 2011 Guam 20 ¶¶ 24-25, and many courts have had difficulties applying it outside the strict product liability setting because of the inherent differences between strict product liability and other torts. *See, e.g., Tiara Condo. Ass'n v. Marsh & McLennan Co.*, 110 So. 3d 399, 401 (Fla. 2013) (discussing the concerns with the over-expansion of the economic loss rule, and receding from its "prior rulings to the extent that they have applied the economic loss rule to cases other than products liability"); *Budgetel Inns*, 8 F. Supp. 2d at 1146 (discussing the difficulties of applying the *Huron Tool* rule regarding fraud in the inducement as an exception to the economic loss rule because *Huron Tool* still bars fraud in the inducement claims involving the actual subject matter of the contract); Johnson, *supra*, at 568 ("Courts have struggled with the issue of whether recovery in tort is barred by the economic loss rule when the plaintiff alleges that fraud was committed in the context of a contractual relation.").

[52] Courts that limit the exception to fraud in the inducement have recognized that the tort of fraud is different because unlike strict products liability or negligence, fraud is an intentional tort. *See, e.g., Huron Tool*, 532 N.W.2d at 544 (acknowledging that unlike negligence or strict liability, fraud is an intentional tort). However, in creating an exception for fraud in the inducement, these courts have focused on the fact that fraud in the inducement claims are based on pre-contractual conduct, and thus, are independent of the contract. *See, e.g., id.* at 544-45 (citing *Williams Elec.*, 772 F. Supp. at 1237-38). In doing so, these courts appear to fit fraud within the confines of the economic loss doctrine without fully addressing the inherent conflicts between fraud and contract law.

[53] Therefore, before determining whether to distinguish between fraud in the inducement and fraud in the performance, we feel it is important to analyze the inherent conflict between fraud and contract law to determine whether fraud claims should be subject to the economic loss rule.

5. The Inherent Difference between Fraud and Contract Claims

[54] In contract law, a breach of contract is not inherently wrong. In fact, the doctrine of efficient breach states that the "law should not deter an otherwise socially beneficial, or efficient, breach of contract by forcing the promisor to compensate the promisee for more than the promisee's actual losses." *See Paolella v. Browning-Ferris, Inc.*, 973 F. Supp. 508, 515 (E.D. Pa. 1997) (citations and internal quotation marks omitted). Instead of seeking to punish a party for breach of contract, courts traditionally seek to compensate a plaintiff for the loss resulting from the breach. *See, e.g., Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 676 (Cal. 1995); *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1329 (S.D. Fla. 1999).

Therefore, willful breaches are not generally distinguished from other breaches. *Freeman & Mills*, 900 P.2d at 676; *Allapattah Servs.*, 61 F. Supp. 2d at 1329.

[55] In contrast, the major distinction between fraud and other types of torts, such as negligence and strict liability, is the intent. *Compare Black's Law Dictionary* 1626 (9th ed. 2009) (intentional tort), *with Black's Law Dictionary* 1626 (9th ed. 2009) (negligent tort), *and Black's Law Dictionary* 998 (9th ed. 2009) (strict liability). "In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future." *Robinson Helicopter*, 102 P.3d at 275. Because there is an "extra measure of blameworthiness inher[ent] in fraud," fraud plaintiffs may generally recover punitive damages. *See id.*; *see also Allowance of Punitive Damages in Products Liability Case*, 13 A.L.R.4th 52 (1982).

6. *Robinson Helicopter*

[56] With these conflicting doctrines in mind, we look at the California Supreme Court's decision in *Robinson Helicopter* to determine whether to apply the economic loss rule in fraud cases. In *Robinson Helicopter*, a helicopter manufacturer had an exclusive contract with a parts manufacturer to supply a safety mechanism for its helicopters. 102 P.3d at 270. The contract required the parts manufacturer to adhere to certain specifications when building the safety mechanism. *Id.* at 270-71. For approximately twelve years, the parts manufacturer adhered to the required specifications and provided written certificates that the safety mechanism conformed with the specifications. *Id.* at 271. After this period, the parts manufacturer changed the specifications, but continued to provide written certificates of performance. *Id.* Once the change in specifications was revealed, the helicopter manufacturer was required to recall and

replace the safety mechanisms in each of the helicopters that did not conform to the specifications. *Id.* The helicopter manufacturer sued the parts manufacturer for breach of contract, breach of warranty, and negligent and intentional misrepresentations. *Id.* at 272. The jury found in favor of the helicopter manufacturer on the breach of contract, warranty, and fraud claims. *Id.* The parts manufacturer appealed, and the intermediate court of appeals found that under the economic loss theory, the helicopter manufacturer suffered only economic losses, and therefore, it could not recover in tort. *Id.* The helicopter manufacturer appealed to the Supreme Court of California. *Id.*

[57] In determining whether to find that the economic loss rule bars fraud claims, the California Supreme Court found that the intentional aspect of fraud showed that it was independent of the breach of contract. *See id.* at 273-74. Next, the California Supreme Court looked at public policy which strongly favored exempting fraud from the economic loss rule, stating:

> In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for predictability about the cost of contractual relationships, fraud plaintiffs may recover out-of-pocket damages in addition to benefit-of-the bargain damages. In addition, California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices. Needless to say, [the parts manufacturer's] fraudulent conduct cannot be considered a socially useful business practice. . . . Simply put, a contract is not a license allowing one party to cheat or defraud the other.

See id. at 275 (citations and internal quotation marks omitted). The California Supreme Court found that the economic loss rule does not bar fraud and intentional misrepresentation claims because they are independent of a breach of contract. *Id.* at 274. The court stated that it did not

"believe that [its] decision [would] open the floodgates to future litigation." *Id.* at 276. The court highlighted that its decision was limited to "misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Id.* In addition, the court noted that "[i]n California fraud must be pled specifically; general and conclusory allegations do not suffice." *Id.* (alteration in original) (citations omitted).

[58] In her dissent, Justice Werdegar listed rationales for fully adopting the economic loss rule in fraud cases. She asserted that it is important to limit tort recovery in contract because of "the value commercial parties place on predictable potential costs and the chilling effect tort exposure in routine breach cases would have on commercial enterprise." *Id.* at 278 (Werdegar, J., dissenting). Moreover, the economic loss rule allows contract damages where the damages are purely economic and additional tort liability where the misrepresentation led to actual property damage or personal injury. *See id.* at 279. These damages both sanction and deter the fraudulent conduct while "preserv[ing] the valuable distinction between tort and contract remedies." *Id.* at 279-80. In addition, the dissent stressed the need for a rationale for why tort liability should apply to each specific case rather than broadly allowing tort liability for certain classes of torts. *See id.* at 279-80.

[59] We do not find the dissent persuasive and decide to exempt fraud from the economic loss rule, adopting the rationale set forth by the majority in *Robinson Helicopter*. The economic loss rule has been developed:

> (1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.

Budgetel Inns, 8 F. Supp. 2d at 1142 (alteration in original) (quoting *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998)). With this in mind, we find that the California majority's approach properly balances the purposes of the economic loss rule while recognizing the distinct nature of fraud.

[60] Finding that fraud is an exception to the economic loss rule maintains the fundamental distinction between intentional torts and contract law, negligence, and product liability. A "breach of contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages" resulting from the breach. *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. Dist. Ct. App. 2008) (citations omitted). It is logical to preclude product liability claims and negligence claims under the economic loss rule because the elements within these principles are enveloped by the contract claim. Both product liability and negligence focus on an action or defect which results in damages. The Restatement (Third) of Torts: Products Liability provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Restatement (Third) of Torts: Prod. Liab § 1 (1998). Negligence requires: (1) a duty, (2) breach of the duty, (3) causation, and (4) damages. *See, e.g., Guerrero v. McDonald's Int'l Prop. Co.*, 2006 Guam 2 ¶ 9 (citations omitted). The elements of an action or defect that results in damages are also present in a contract claim. Fraud claims, however, are distinguishable because they involve a "knowledge of falsity (or scienter)" element. *See, e.g., Taitano v. Calvo Fin. Corp.*, 2008 Guam 12 ¶ 12. "Fraud implies bad faith, intentional wrongdoing and a sinister motive . . . [and] is never imputed or presumed." *Davis v. Comm'r*, 184 F.2d 86, 87 (10th Cir.

1950). The scienter element is the major distinction between fraud and contract law, and it is a reason to draw an exception for fraud under the economic loss doctrine.

[61] Recognizing a fraud exception to the economic loss rule also does not violate the rule's purpose of protecting commercial parties' freedom to allocate economic risk by contract. As stated previously, the dissent in *Robinson Helicopter* noted that parties' ability to allocate economic risk by contract is important because of "the value commercial parties place on predictable potential costs and the chilling effect tort exposure in routine breach cases would have on commercial enterprise." 102 P.3d at 277. As the majority explained, however, they "are not concerned about the need for predictability about the cost of contractual relationships" in fraud cases. *Id.* at 275 (quoting *Lazar*, 909 P.2d at 998 (internal quotation marks omitted)). Instead, the focus is on advancing public interest through punishment and deterrence of misrepresentations. *See id.* However, even if we overlook the purpose of fraud actions, recognizing a fraud exception would promote the purpose of the economic loss rule. As the California Supreme Court asserts, "[the state] has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." *Id.* (citing *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 557 (1999)).

[62] By finding that fraud is an exception to the economic loss rule, the potential for punitive damages would discourage companies from committing fraud and deceptive practices. Honest companies would be more willing to enter contracts in a jurisdiction where fraud and deceptive practices are discouraged, and where they have legal protections if they are a victim to fraud. On the other hand, if there were no fraud exception to the economic loss rule, dishonest companies may have incentive, or at least not be discouraged, to commit fraud and deceptive practices.

Dishonest companies may commit fraud or deceptive practices because the potential costs, if they are caught, are predictable. These dishonest companies will know they only have to pay for economic damages or, at the most, additional property damages which actually occur. Honest companies would be less willing to enter into contracts in a jurisdiction where fraud is not discouraged, and where they do not have any legal protections against fraud.

[63] Furthermore, recognizing a fraud exception does not defeat the purpose of encouraging the party best situated to assess the risk of economic loss—the commercial purchaser—to assume, allocate, or insure against that risk. The California Supreme Court recognized that generally in contractual situations, "'it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive; this is the function of contract law.'" *Id.* at 275 (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 461 (1994)). However:

> [A] party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract. No rational party would enter into a contract anticipating that they are or will be lied to. While parties, perhaps because of their technical expertise and sophistication, can be presumed to understand and allocate the risks relating to negligent product design or manufacture, those same parties cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.

Id. (citations and internal quotation marks omitted). Therefore, where the party is deceived by misrepresentation, they are no longer best situated to assess the risk of economic loss, and assume, allocate or insure against that risk.

[64] In holding that fraud is excluded from the economic loss rule, we recognize the concern that this rule may "raise[] the specter that every alleged breach will yield satellite litigation over whether contemporaneous remarks by one side or the other amounted to intentional

misrepresentations about the existence of a breach." *Id.* at 278 (Werdegar, J., dissenting). The majority opinion in *Robinson Helicopter* addressed this concern by limiting the exception to fraud which "expose[s] a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Id.* at 276. However, we are concerned that adopting this limitation may lead to excessive litigation as to whether the plaintiff was exposed to liability for personal damages. To address this concern, we rely on the rule in Guam that fraud claims must be pleaded with particularity. *Taitano*, 2008 Guam 12 ¶ 12 ("To successfully plead actual fraud . . . [the plaintiff] must plead facts with sufficient particularity to demonstrate the elements of fraud." (citing GRCP 9(b))).

[65] In sum, we adopt the *Robinson Helicopter* rule to the extent that we hold fraud claims are excluded from the economic loss rule. However, we do not adopt the limitation that the exception applies only to fraud that exposes a plaintiff to liability for personal damages independent of economic loss. Instead, we believe the fraud exception will be adequately limited by the GRCP pleading requirements. Finally, we find no reason to limit this exception to fraud in the inducement claims.

C. Whether the Economic Loss Rule Bars Claims Under the Deceptive Trade Practices Act

[66] As discussed above, the trial court dismissed the DTPA on the basis that the Government did not have standing. Thus, it did not address whether the economic loss rule precludes claims in dismissing the DTPA claim. However, the trial court did indicate that the economic loss rule

barred tort claims, such as the DTPA, generally.[3] Pure questions of law not addressed by the trial court can be suited for our immediate resolution because we review these questions of law *de novo*. *See Bibeau v. Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999), *amended on denial of reh'g*, 208 F.3d 831 (9th Cir. 2000) (choosing to address issue of qualified immunity, although not considered by the trial court, because it was a pure question of law subject to *de novo* review, and "any decision by the district court would be entitled to no deference."). Furthermore, the issue of whether the economic loss doctrine precludes the DTPA claim was addressed by both parties on appeal. Appellee's Br. at 5; Appellant's Reply Br. at 1-2. We have held an argument may be addressed for the first time on appeal to clarify a significant issue of law. *See Taitano v. Lujan*, 2005 Guam 26 ¶ 15. Accordingly, we can determine whether the economic loss doctrine precludes DTPA claims because this issue presents a pure and significant question of law.

[67] Here, Kim argues this court should find that the economic loss rule also applies in statutory claims under the DTPA. Appellee's Br. at 5-6. Kim relies on *Gadley v. Ellis*, No. 3:13-17, 2014 WL 3696209 (W.D. Pa. 2014), and *Werwinski*, 286 F.3d 661, to support this argument. In *Gadley*, a district court found that the economic loss doctrine precluded fraud claims brought under the state statutory fraud claims act. *Gadley*, 2014 WL 3696209, at *4. The court quoted *Werwinski*, where the Third Circuit found that "exempting [statutory fraud] claims from the effects of the economic loss doctrine would virtually nullify the doctrine since [the statute] is broad enough to encompass nearly every misrepresented claim in the commercial sales

[3] "In short, the prospect that the dollar amount of liability will be different if a suit may only proceed under a contract theory rather than a tort theory is not a reason not to apply the economic loss rule. It is the point of the economic loss rule." RA, tab 38 at 27 (Dec. & Order).

context, and claims arising from product failure can readily be recast as misrepresentation claims." *Id.* (alterations in original) (citing *Werwinski*, 286 F.3d at 681). Other courts have also found that the economic loss rule precludes statutory claims, including those for deceptive or unfair trade practices, in certain circumstances. *See, e.g.*, *Makoto USA Inc. v. Russell*, 250 P.3d 625, 629 (Colo. App. 2009) (the economic loss rule precludes statutory claims unless the legislature intends "to provide a remedy in addition to a contractual one, the statutory remedy would trump the economic loss rule"); *Bussain v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 627 (M.D.N.C. 2006) (finding that the economic loss rule does not bar "all claims of unfair trade practices that allege only economic losses," but does bar unfair trade practices when the claim involves "allegations of a defective product where the only damage alleged is damage to the product itself and the allegations of unfair trade practices are intertwined with the breach of contract or warranty claims.").

[68] In contrast, other jurisdictions have found that statutory causes of action trump the judicially designed economic loss rule. *See, e.g.*, *All Care Nursing Serv., Inc. v. High Tech Staffing Servs. Inc.*, 135 F.3d 740, 745 (11th Cir. 1998) (finding the economic loss rule did not bar federal and Florida RICO claims); *Florian Greenhouse, Inc. v. Cardinal IG Corp.*, 11 F. Supp. 2d 521, 528 (D.N.J. 1998) (finding that the economic loss rule did not preclude a state Consumer Fraud Act claim, and stating that "[t]o hold that this statutory claim is subsumed by plaintiff's breach of contract cause of action would be contrary to legislative intent and would preclude consumer fraud claims in far too many circumstances."); *Ulbrich v. Groth*, 78 A.3d 76, 99-102 (Conn. 2013) (overruling *Flagg Energy Dev. Corp. v. Gen. Motors Corp.*, 709 A.2d 1075 (Conn. 1998), and finding that the economic loss doctrine did not bar statutory unfair trade

practices claims); Christian C. Burden & Sean Trende, *The Economic Loss Rule and Franchise Attorneys*, 27-WTR Franchise L.J. 192, 197 (2008) ("Courts . . . have generally concluded that the economic loss rule does not bar statutory claims despite allegations forming essentially the same basis as breach of contract and even negligence claims." (citations omitted)); Johnson, *supra*, at 532 ("[S]tatutory causes of action, even when based on negligence or strict liability principles, usually trump the judicially designed economic loss rule." (footnotes omitted)).

[69] In this case, we must first look at the legislature's intent to determine whether the economic loss rule precludes a claim under the DTPA. *See Makoto USA*, 250 P.3d at 629; *see also Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 990 (Wash. 1994) (finding that under the Washington Products Liability Act, legislature's intent was to "exclude[] a recovery in tort for economic loses"); *Park Ave. Condo. Owners Ass'n v. Buchan Devs., L.L.C.*, 71 P.3d 692, 698 (Wash. Ct. App. 2003) (finding that the economic loss rule is a judicially created rule which "evolved in arenas in which the legislature had not spoken," and "[w]here the legislature has acted to create rights and remedies, courts cannot enlarge or restrict those rights or remedies unless the statute is unclear and we are confident our interpretation is consistent with legislative intent."). The Guam Legislature's intent appears to be that the DTPA is excluded from the economic loss rule.

[70] In *Abalos v. Cyfred*, the Abaloses purchased land from Cyfred. 2006 Guam 7 ¶ 2. The Land Purchase Agreement provided that Cyfred was to provide sewer, power, and water lines to the property. *Id.* Cyfred failed to connect the water, power and sewer lines when the deed was delivered, but the Abaloses took possession of the property. *Id.* ¶ 3. Subsequently, the Abaloses filed a complaint, and in count one sought rescission of the purchase agreement for breaches of

promises and warranties pursuant to 21 GCA § 60314,[4] and recovery of damages, costs and attorney's fees. *Id.* ¶ 6. In addition, the Abaloses sought damages under the DTPA. *Id.* ¶ 6 n.4. The trial court ordered summary judgment on count one of the complaint. *See id.* ¶ 8. On appeal, Cyfred argued that the claims for damages were inconsistent with a claim for relief by rescission, and the Abaloses could not "rescind for breach of [c]ontract and at the same time recover damages under the breach." *Id.* ¶ 53 (citations omitted). This court found that "the trial court may, in addition to restitution, award money damages or such other relief as justice may require." *Id.* ¶ 54 (citing *Bank of Am. Nat'l Trust & Sav. Ass'n v. Greenbach*, 219 P.2d 814, 827 (Cal. Dist. Ct. App. 1950)).

[71] Next, we assessed the DTPA claims and found that damages sought under the DTPA were not exclusive of the remedy of rescission. *Id.* ¶ 55. Specifically, we looked at 5 GCA §§ 32105 and 32108(a) to find that the DTPA provided non-exclusive remedies. *Id.* ¶ 55. Pursuant to section 32105(a):

> The provisions of [the DTPA] are not exclusive. The remedies specified in [the DTPA] for violation of any section of [the DTPA] or for conduct proscribed by any section of [the DTPA] shall be in addition to any other

[4] Title 21 GCA § 60314 provides in pertinent part:

> (f) If the transferor agrees to make water or power or sewer available to the property, such shall be stated in the document transferring an interest in the property, and such hookup shall be made available to the property by the transferor within one (1) year or such lesser time as may be agreed upon between transferor and transferee. Failure to make power or water or sewer available to the property within one (1) year or such lesser time as agreed upon will result in the transferee being allowed, at his option, to:
>
> (1) rescind the transaction and recover all money paid, reasonable interest, and reasonable costs and attorney's fees; or
>
> (2) recover from the transferor all amounts required to make the promised utilities available on the property, plus all related costs and reasonable attorney's fees.
>
> Failure to put the promise to make a utility available in the document transferring an interest in the property shall not be a defense raised by the transferor.

21 GCA § 60314(f) (2005).

> procedures or remedies for any violation or wrongful conduct provided for in any other law. Nothing in this chapter shall limit any other statutory or any common law rights of the Attorney General, or any other person. If any act or practice proscribed by [the DTPA] is also the basis for a cause of action in common law or a violation of another statute, the person may assert the common law or statutory cause of action under procedures and with the remedies applicable thereto.

5 GCA § 32105(a) (2005). Section 32108(a) provides that the DTPA "shall be liberally construed in favor of the consumer and shall be applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection." 5 GCA § 32108(a).

[72] We then turned to authorities from other jurisdictions that "interpreted their own Deceptive Trade Practices Acts as providing non-exclusive remedies." *Abalos*, 2006 Guam 7 ¶ 2. For example, we noted that "Texas courts permit DTPA . . . plaintiffs to recover both damages and rescission of future obligations . . . caused by deceptive trade practices." *Id.* ¶ 56 (quoting *Nottingham v. Gen. Am. Commc'n Corp.*, 811 F.2d 873, 879 (5th Cir. 1987)). This is because Texas views an "award of damages under the DTPA not exclusive of, but in addition to, other remedies provided by law." *Nottingham*, 811 F.2d at 879 (citations and internal quotation marks). This court concluded that the DTPA claim was "not inconsistent with a claim for rescission." *Abalos*, 2006 Guam 7 ¶ 57.

[73] Although this court in *Abalos* did not specifically address whether the legislature intended that the DTPA be exempt from the economic loss rule, this intent can be inferred. The claim for recession seems to have been for breach of contract. *See, e.g., id.* ¶ 53 (Cyfred argued that "one cannot rescind for breach of contract and at the same time recover damages for the breach." (alterations omitted)). This court found that pursuant to the DTPA, the rescission claim

could be brought at the same time as a DTPA claim without violating the statute. *See id.* ¶¶ 56-58.

[74] The language of the statute also appears to provide that a plaintiff should not be precluded from bringing a DTPA claim because of another claim. Under section 32105(a), "[t]he remedies specified in [the DTPA] . . . *shall be in addition to any other procedures or remedies for any violation or wrongful conduct provided for in any other law*." 5 GCA § 32105(a) (emphasis added). The language "shall be in addition to any procedures or remedies . . . provided for in any other law," seems to indicate that the DTPA can be brought along with any other claims, including contract claims. Therefore, we find that the intent of the Legislature was that the economic loss rule does not preclude a person from bringing a statutory fraud claim under the DTPA.

D. Whether to Grant the Government's Motion for Summary Judgment

[75] Finally, the Government argues that the trial court erred in denying the Government's Motion for Summary Judgment on its DTPA and fraud claims.

[76] "When a trial court erroneously fails to address an issue raised before it, 'an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself.'" *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 16 (quoting *Bank of Guam v. Reidy*, 2001 Guam 14 ¶ 31). Here, the trial court did not address the issues in the Government's Motion for Summary Judgment, instead choosing to dismiss the case. In addition, Kim fails to address the Government's summary judgment arguments on appeal. Therefore, on

remand, the trial court should determine in the first instance whether summary judgment is proper.[5]

V. CONCLUSION

[77] The trial court improperly dismissed the Government's fraud and DTPA claims. We find that the Government has standing to bring a claim under the DTPA. In addition, we find that fraud and DTPA claims are both exceptions to the economic loss rule. Therefore, we **REVERSE** the trial court's Decision and Order dismissing the fraud and DTPA claims, and **REMAND** the case to the trial court to determine liability and damages pursuant to the Government's Motion for Summary Judgment not inconsistent with this opinion.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

APR 28 2015

By: IMELDA B. DUENAS
Assistant Clerk of Court
Supreme Court of Guam

[5] *The Government requests attorneys' fees pursuant to 5 GCA § 32109.* Appellant's Br. at 34. However, we decline to award attorneys' fees under this section because we are remanding the case to the trial court rather than entering judgment in the Government's favor.