

## BUSINESS LITIGATION

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*In the Vermont Supreme Court decision explained in this article, Vermont for the first time recognizes a “special relationship” exception to the economic loss rule – akin to the “professional services” exception recognized by some courts. This article discusses the court’s reasoning for recognizing the exception in the circumstances of this case, and cites other cases around the country that have recognized this exception.*

## Vermont Supreme Court Recognizes Exception to the Economic Loss Rule

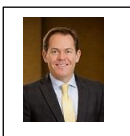
### ABOUT THE AUTHOR



**Walter Judge** represents businesses in the state and federal courts of Vermont, Massachusetts, and Maine in commercial matters (contract disputes, unfair competition, etc.), intellectual property litigation (enforcement of copyright, trademark, and trade secret rights) and in products liability and personal injury defense. He defends retail establishments, premises owners, trucking companies, institutions, and individuals against negligence and personal injury claims. He has conducted over 20 jury trials. In July, 2019 Walter obtained a \$3.66 million jury verdict in federal court on behalf of a Vermont aviation company against a competitor. He has been an IADC member for about 12 years. Walter is a partner at Downs Rachlin Martin PLLC. DRM, originally established in 1950, is Vermont’s largest firm, with offices in Burlington, St. Johnsbury, Brattleboro, and Montpelier, Vermont and Lebanon, New Hampshire. He can be reached at Walter Judge [WJudge@drm.com](mailto:WJudge@drm.com).

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The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee’s planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

Despite its longstanding reputation as liberal and sympathetic to plaintiffs, the Vermont Supreme Court has for a very long time strictly enforced the Economic Loss Rule (prohibiting tort claims to recover for purely economic harms). See, e.g., *Breslauer v. Fayston School District*, 163 Vt. 416, 659 A.2d 1129 (1995) (dismissing tort claim against former employer by disappointed applicant seeking teaching job in new school district, and discussing need to “maintain a dividing line between contract and tort theories of recovery”); *Paquette v. Deere & Co.*, 168 Vt. 258, 719 A.2d 410 (1998) (denying tort claims of purchasers of allegedly defective motor home); *Gus’ Catering, Inc. v. Menusoft Sys.*, 171 Vt. 556, 762 A.2d 804 (2000) (“Negligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one’s conduct has inflicted some accompanying physical harm”). As recently as 2015 the Court reaffirmed its longstanding policy of strong adherence to the rule, as demonstrated by *Walsh v. Cluba*, 2015 VT 2, 117 A.3d 798 (2015), where the Court dismissed a landlord’s tort claims against a tenant even where the claim involved physical damage to the leased property. In a few cases the Court has suggested that there could be an exception to the rule for “professional services” involving a “special relationship” between the parties, *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 779 A.2d 67 (2001) (recognizing possibility of an exception, but holding that it would not apply where

defendants did not hold themselves out as providers of any licensed professional service, and affirming dismissal of tort claims), but to date it has never found such an exception.

Now, in *Sutton v. Vermont Regional Center*, 2019 VT 71 (Oct. 14, 2019), it has done so.

Reversing a dismissal of the plaintiffs’ Complaint, the Court in *Sutton* found, among other things, that the plaintiffs’ negligence claims against the Vermont Agency of Commerce and Community Development (ACCD) were not barred by the rule.

The plaintiffs in this case were investors in Vermont’s EB-5 visa program. They lost their investments due to the now-infamous EB-5 scandal, in which Ariel Quiros, a real estate developer, allegedly used the investors’ money for purposes other than the stated real estate developments. <https://www.burlingtonfreepress.com/story/news/2018/02/02/quiros-reaches-82-million-settlement-jay-peak-fraud-case/301137002/> The EB-5 program is a federal immigration program wherein foreigners can obtain “green card” visas by investing in certain development projects in the United States that create employment for U.S. workers. In this case, the ACCD, an agency of the State of Vermont, was licensed by the federal government to operate the program in Vermont. It emerged that representatives of the ACCD partnered with Quiros and shared a table with his

representatives at development tradeshows, where they would jointly solicit foreign investors for Quiros' development projects in Vermont (the "Jay Peak Projects"). The ACCD employees would represent to potential investors that, unlike EB-5 programs in other states, the development projects in Vermont benefitted from state, i.e., ACCD, approval and oversight, and therefore were sound investments. In fact, however, the State never oversaw, examined, inspected, or audited the projects, and plaintiffs' financial investments were lost. Plaintiffs sued the ACCD and its employees for negligence, negligent misrepresentation, gross negligence, breach of contract, breach of warranty, etc., for soliciting their investments and failing to safeguard them.

The trial court dismissed the plaintiffs' Complaint on grounds, inter alia, of the economic loss rule. Plaintiffs appealed. The Vermont Supreme Court reversed the dismissal. Concluding that the economic loss rule did not bar plaintiffs' claims, the Court stated:

Here, plaintiffs have alleged sufficient facts to make out a special relationship between defendants and plaintiffs such that they may recover for their purely economic losses. ACCD initiated a close relationship with the plaintiffs by recruiting them to invest their life savings in the Jay Peak Projects by promising exceptional oversight and management of the investment. As discussed above, ACCD demonstrated awareness of the risk

that it was inducing plaintiffs to undertake – a risk it represented it would minimize – when it told plaintiffs it would provide a safeguard for their investments. ACCD did not simply endorse the Jay Peak projects to members of the public generally; it personally solicited investors, and entered into individualized relationships with each of the plaintiffs, who paid substantial fees directly to [ACCD] in connection with that relationship. It intended to influence a narrow class of identified people – prospective investors in the Jay Peak Projects – and those who actually invested relied on their representations and promised oversight. This is the kind of relationship that can give rise to liability for purely economic harms. 2019 VT 71 at 12, ¶ 33.

The Court went on to hold that the plaintiffs' negligent misrepresentation claims also were not barred by the economic loss rule because the tort of negligent misrepresentation specifically applies to "pecuniary loss." (For reasons I will not go into here, the Court also found that the ACCD and its employees were not protected from suit by sovereign immunity.)

Thus, the Court reversed the dismissal of the plaintiffs' Complaint.

This decision represents a significant departure from more than two decades of Vermont Supreme Court jurisprudence affirming a strict adherence to the economic

loss rule. It may make it much more difficult, if not impossible, to get a complaint dismissed at the Rule 12(b) stage where the economic loss rule should apply to bar the plaintiff's claims. Superior courts may be more likely to say that the claims should survive a dismissal attempt and that the existence of, and extent of, a "special relationship," as alleged by the plaintiff, should await summary judgment or be decided by a jury.

Sutton also signals that the Vermont Supreme Court may join the courts in a substantial number of states over the past several decades that have, in some circumstances, declined to apply the economic loss rule when where a "special relationship" purportedly justifies an exception to the rule. See, e.g., J'Aire Corp. v. Gregory, 24 Cal.3d 799, 157 Cal.Rptr. 407, 598 P.2d 60 (1979); Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987); Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001); Blahd v. Richard B. Smith, 141 Idaho 296, 108 P.3d 996 (2005); Wyle v. Lees, 162 N.H. 406, 33 A.3d 11387 (2011). But whether this exception actually circumscribes liability for defendants based on the theory that "the special relationship defines the class of potential plaintiffs to whom the duty is owed," 532 Madison Ave., 750 N.E.2d at 1101, or instead, significantly erodes the continued vitality of the economic loss rule, remains to be determined by further development in the case law.

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