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## Double Trouble: Tort Liability is Necessarily Limited in the Lender or Loan Servicer and Borrower Contractual Relationship

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### INTRODUCTION

In the context of the relationship between a lender or loan servicer and a borrower, the intersection of tort law and contract law is at the forefront of every dispute. Because contracts, as a matter of logic and as a practical matter of course, exist between lenders/loan servicers and borrowers, the question becomes: to what extent does the contractual relationship of the parties preclude tort liability? This Article aims to answer this question by first explaining the difference between the two causes of action—breach of contract and tort—and the duties and obligations necessarily entwined within each. Thereafter, the Article will explain that, at a point, a plaintiff cannot assert a cause of action based on both theories of liability for the same injury. Instead, a plaintiff must establish some different or unique circumstance giving rise to a duty of care recoverable in tort outside of the parties' contractual relationship. In so doing, this Article will illustrate that, in the context of the lender/loan servicer-borrower relationship, this is no easy hurdle to overcome.

Because both West Virginia law and public policy alike both highly disfavor double recovery, the body of case law demonstrates that lenders and loan servicers alike are largely insulated from tort liability due to the existence of and remedies provided pursuant to the contracts between the parties. Simply because plaintiffs allege both tort and breach of contract against their lender or loan servicer does not automatically afford them two bites at the same apple. Rather, the goal of foreclosing duplicative recovery and providing certainty in litigation to plaintiffs and defendants alike is preeminent to courts situated in this state. As explained herein, the axiom that a plaintiff is entitled to a singular recovery for a singular injury has guided the courts of West Virginia in analyzing borrowers' claims up until this point. Due to its consistent application and long-established nature, courts will undoubtedly continue to allow it to guide their decisions as to borrowers' claims well into the future.

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### *The Breach of Contract Action*

In order to plead a prima facie case of breach of contract under West Virginia law, certain elements must be met. Specifically, “[a] claim for breach of contract requires”: 1) “proof of the formation of a contract”; 2) “a breach of the terms of that contract”; and, 3) “resulting damages.”<sup>4</sup> Federal courts interpreting West Virginia law have further broken out the second element, and have required the plaintiff to have first performed the contract, stating the elements as: 1) “the existence of a valid, enforceable contract”; 2) “that the plaintiff has performed under the contract”; 3) “that the defendant has breached or violated its duties or obligations under the contract”; and, 4) “that the plaintiff has been injured as a result.”<sup>5</sup>

Nevertheless, within the first element, a valid and enforceable contract must exist if the contracting parties intend to rely on the contractual rights to remedies in suits arising from their contract. Contract is defined as a promise or a set of promises that the law will enforce.<sup>6</sup> As such, “[t]he fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.”<sup>7</sup> As to competency, courts will enforce the contracts of those individuals of “full age and competent understanding . . . when entered into freely and voluntarily.”<sup>8</sup> The subject matter must be legal as well, as courts will contravene any contract that “rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy.”<sup>9</sup> Additionally, only when a promisor has given something in exchange to the promisee, otherwise known as consideration, will a contract become valid and enforceable, as this consideration demonstrates that the parties intend to be bound by the terms.<sup>10</sup> “[V]aluable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.”<sup>11</sup> Lastly, in order for “mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to

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<sup>4</sup> *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015) (citing Syl. Pt. 1, *State ex rel. Thornhill Group, Inc. v. King*, 233 W.Va. 564, 759 S.E.2d 795 (2014)).

<sup>5</sup> *Exec. Risk Indem., Inc. v. Charleston Area Med. Ctr., Inc.*, 681 F. Supp. 2d 694, 714 (S.D. W. Va. 2009) (citing Richard A. Lord, 23 Williston on Contracts § 63:1 (4th ed. West 2009)); *Ballard v. Bank of Am., N.A.*, No. CIV.A. 2:12-2496, 2013 WL 5963068, at \*6 (S.D. W. Va. Nov. 7, 2013), *aff’d sub nom. Ballard v. Bank of Am., NA*, 578 F. App’x 226 (4th Cir. 2014).

<sup>6</sup> RESTATEMENT (SECOND) CONTRACTS § 1 (1981).

<sup>7</sup> *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 37, 614 S.E.2d 680, 684 (2005) (quoting Syl. Pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926)).

<sup>8</sup> *Young v. Young*, 240 W. Va. 169, 808 S.E.2d 631, 645 (2017) (quoting *Wellington*, 217 W. Va. at 38, 614 S.E.2d at 685).

<sup>9</sup> *Young*, 240 W. Va. 169, n.38, 808 S.E.2d at 641, n. 38 (quoting *Franks v. Bowers*, 116 So.3d 1240, 1247 (Fla. 2013)).

<sup>10</sup> E. ALLAN FARNSWORTH, ET AL., CONTRACTS 3 (4th ed. 2004); *see also* RESTATEMENT (SECOND) CONTRACTS § 17 (1981).

<sup>11</sup> Syl. Pt. 3, *Young*, 240 W. Va. 169, 808 S.E.2d at 636 (2017) (quoting Syl. Pt. 1 *Tabler v. Hoult*, 110 W. Va. 542, 158 S.E. 782, 782 (1931)).

contract.”<sup>12</sup> Simply put, the parties must have the “same understanding of the terms of the agreement reached.”<sup>13</sup>

Within the second element, one of the parties must have breached the contract such that the breaching party is liable for the loss suffered by the injured party. At its most basic, when performance is due, any failure to render it is a breach.<sup>14</sup> The party who fails in any respect to perform when performance is due has become liable for breach of contract irrespective of his fault.<sup>15</sup> This can be true even if the breach is minor. However, if the breach is, instead, substantial, then the injured party can even be excused from performance.<sup>16</sup> This rightfully places a weighty burden on parties to contracts because they bargained for the terms and voluntarily undertook the responsibilities therein. Because liability can be found for breach of contract regardless of fault, a breach of contract claim closely tracks a strict liability analysis. This sets breach of contract claims apart from tort claims, as, for most torts, as explained below, liability is principally based upon the fault of the tortious party.

Within the third and final element, injured parties are entitled to two categories of damages in a breach of contract action.<sup>17</sup> The first category includes “those directly flowing from the contract breach.”<sup>18</sup> Relating to these damages, “there is no requirement that the parties must have actually anticipated them because they are a natural consequence of the breach.”<sup>19</sup> However, the second category includes “indirect or consequential damages that arise from the special circumstances of the contract. In order to recover these damages, the plaintiff must show that at the time of the contract the parties could reasonably have anticipated that these damages would be a probable result of a breach.”<sup>20</sup> Generally, whether the type of damages requested, direct or consequential, is a question of law for the court; but, “whether special circumstances exist to show that consequential damages were within the reasonable contemplation of the contracting parties is ordinarily a question of fact for the jury.”<sup>21</sup> It is a fundamental principle of the law of contracts that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed.<sup>22</sup> It follows then that “a plaintiff is not entitled to damages beyond his actual loss attributable to defendant’s breach.”<sup>23</sup>

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<sup>12</sup> *Ways v. Imation Enterprises Corp.*, 214 W. Va. 305, 313, 589 S.E.2d 36, 44 (2003) (quoting *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140, 437 S.E.2d 448, 450 (1993)).

<sup>13</sup> *Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 418, 664 S.E.2d 751, 759 (2008) (citing 17 C.J.S. CONTRACTS § 35 (1999)).

<sup>14</sup> See FARNSWORTH, *supra* note 9, at 535.

<sup>15</sup> *Id.*

<sup>16</sup> *W. Va. Human Rights Comm’n v. Smoot Coal Co.*, 186 W. Va. 348, 353, 412 S.E.2d 749, 754 (1991); *Emerson Shoe Co. v. Neely*, 99 W. Va. 657, 129 S.E. 718, 719 (1925).

<sup>17</sup> *Desco Corp. v. Harry W. Trushel Const. Co.*, 186 W. Va. 430, 434, 413 S.E.2d 85, 89 (1991).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 436, 413 S.E.2d at 91.

<sup>22</sup> *Milner Hotels, Inc. v. Norfolk & W. Ry. Co.*, 822 F. Supp. 341, 344 (S.D. W. Va. 1993), *aff’d*, 19 F.3d 1429 (4th Cir. 1994) (citing *Associated Stations, Inc. v. Cedars Realty & Dev. Corp.*, 454 F.2d 184, 188 (4th Cir. 1972); *Bryant v. Peckinpaugh*, 400 S.E.2d 201, 205 (Va. 1991)); *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S.E. 727, 728 (1914).

<sup>23</sup> *Milner Hotels*, 822 F. Supp. at 344 (citing *Horn v. Bowen*, 136 W. Va. 465, 469, 67 S.E.2d 737, 739 (1951)).

Notably, also, only those in privity of contract may maintain a suit for breach of contract. Logically, “[o]ne not a party to a contract nor in privity with either of the parties thereto may not maintain a suit at law thereon, unless the promise or undertaking relied upon is made for his sole benefit.”<sup>24</sup> “Privity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property.’”<sup>25</sup> This means that “privity refers to those who exchange promissory words or those to whom promissory words are directed.”<sup>26</sup> In essence, “privity of contract is the connection or relationship that exists between two or more contracting parties.”<sup>27</sup> Therefore, those outside the contract who are not in privity with the parties to a contract cannot bring such a claim. The class of plaintiffs is highly limited in such contract actions.

### *The Tortious Action*

Different from a claim for breach of contract, a tort claim takes into account the fault of the tortious party and, because the parties involved did not bargain for the duties owed, the class of plaintiffs is potentially limitless. To that end, “[a] primary purpose of tort law is that those responsible for the wrong should bear the cost of their tortious conduct.”<sup>28</sup> And, “a principal function of tort law is to compensate a victim for the wrongdoing or unreasonable conduct of a tortfeasor.”<sup>29</sup> Therefore, “[t]ort law seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to a person or property.”<sup>30</sup> These principles dictate the elements required to bring a claim sounding in tort. On a foundational level, the four elements of a prima facie case under a tort theory of liability include: duty, breach, causation, and damages.<sup>31</sup>

First exists a duty that is concerned with the idea of avoiding causing harm to others.<sup>32</sup> At its most basic, “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”<sup>33</sup> “Importantly, the determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather, ‘[t]he determination of whether a plaintiff is owed a duty of care by the defendant must be rendered as a matter of law by the court.’”<sup>34</sup> “[W]hile foreseeability of risk is a primary consideration in determining the scope of a duty an actor owes to another, ‘[b]eyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system’s protection[.]’”<sup>35</sup> “Such considerations include the likelihood of injury, the

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<sup>24</sup> *Petty v. Warren*, 90 W. Va. 397, 110 S.E. 826, 828 (1922).

<sup>25</sup> *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558, 558 (1938) (quoting *Edward F. Gerber Co. v. Thompson*, 84 W. Va. 721, 100 S.E. 733, 735 (1919)).

<sup>26</sup> 17A AM. JUR. 2D CONTRACTS § 405 (Westlaw database updated Feb. 2018).

<sup>27</sup> *Id.*

<sup>28</sup> 74 AM. JUR. 2D TORTS § 2 (Westlaw database updated Feb. 2018).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Carter v. Monsanto Co.*, 212 W. Va. 732, 737, 575 S.E.2d 342, 347 (2002).

<sup>32</sup> 74 AM. JUR. 2D TORTS § 11 (Westlaw database updated Feb. 2018).

<sup>33</sup> RESTATEMENT (THIRD) TORTS § 7 (Westlaw databased updated Mar. 2018).

<sup>34</sup> *Aikens v. Debow*, 208 W. Va. 486, 490, 541 S.E.2d 576, 580 (2000) (quoting Syl. Pt. 4, *Jack v. Fritts*, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995)).

<sup>35</sup> *Id.* (quoting *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983)).

magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.”<sup>36</sup>

Therefore, “[t]ort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties.”<sup>37</sup> This breach typically takes the form of “the failure to exercise the degree of care demanded by the circumstances.”<sup>38</sup> “[A] plaintiff must show that a defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff” to establish a *prima facie* case.”<sup>39</sup> And, to form an actionable claim for a tort, there must be “actual and proximate causation.”<sup>40</sup> “A person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person.”<sup>41</sup>

As to damages, “it is the law that every person who suffers detriment from the unlawful act or omission of another arising out of tort may recover from the person at fault compensation for such detriment in money, which is called damages. Detriment is a loss or harm suffered in person or property. Damages may be awarded for detriment which the evidence shows is reasonably certain to result to the person injured in the future.”<sup>42</sup>

Unlike contract claims, liability attaches to a wrongdoer for an action sounding in tort because of a breach of duty which results in an injury to others, rather than the breach of a contractual relationship.<sup>43</sup> Even “[f]rom the earliest days of law school, prospective attorneys are taught that the . . . elements of every tort action are the existence of a legal duty, the breach of that duty, and damage as a proximate result,”<sup>44</sup> which includes an analysis of duty and breach much different than that arising from a breach of contract. Because the duty associated with tort liability is one owed to all reasonably foreseeable plaintiffs, it is not a duty only owed to those in any sort of relationship with the tortfeasor.<sup>45</sup> Thus, the concept of privity is not relevant to tort claims.<sup>46</sup>

### *The Economic Loss Doctrine and the Independent Tort/Duty Doctrine*

As seen, tort and breach of contract claims share many similarities while still maintaining key distinctions that separate them from one another. The most stark differences lie within the element of damages and duty. As to the element of damages, courts use the generally applicable “economic loss doctrine” to draw the line between causes of action for contract and tort. Generally, “[i]f tort claims are based on duties that are imposed by contract, then under the economic-loss

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<sup>36</sup> *Robertson*, 171 W. Va. at 612, 301 S.E.2d at 568.

<sup>37</sup> *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 611, 567 S.E.2d 619, 621 (2002).

<sup>38</sup> 57A AM. JUR. NEGLIGENCE § 5 (Westlaw database updated Feb. 2018);

<sup>39</sup> *McNeilly v. Greenbrier Hotel Corp.*, 16 F. Supp. 3d 733, 738 (S.D. W. Va. 2014) (quoting *Cline v. 7-Eleven, Inc.*, 2012 WL 5471761 (N.D. W. Va. Nov. 9, 2012)); *Neely v. Belk, Inc.*, 222 W. Va. 560, 668 S.E.2d 189, 197 (2008).

<sup>40</sup> *Philyaw v. E. Associated Coal Corp.*, 219 W. Va. 252, 261, 633 S.E.2d 8, 17 (2006).

<sup>41</sup> *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (quoting Syl. Pt. 6, *Puffer v. Hub Cigar Store*, 140 W. Va. 327, 328, 84 S.E.2d 145, 148 (1954)).

<sup>42</sup> 34 AM. JUR. TRIALS § 343 (Westlaw database updated Feb. 2018).

<sup>43</sup> *Sewell v. Gregory*, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988) (citing *Wright v. Creative Corp.*, 498 P.2d 1179, 1181 (Colo. Ct. App. 1972)).

<sup>44</sup> *Id.* (citing *Joseph v. Hustad Corp.*, 454 P.2d 916, 918 (Mont. 1969)).

<sup>45</sup> See 74 AM. JUR. 2D TORTS § 2 (Westlaw database updated Feb. 2018).

<sup>46</sup> *Gregory*, 179 W. Va. at 587, 371 S.E.2d at 84.

[doctrine], contract law provides the remedies for economic losses.”<sup>47</sup> Therefore, “[t]he economic-loss doctrine forbids a party from suing or recovering in tort for economic or pecuniary losses that arise only from breach of contract or are associated with the contract relationship. In other words, tort damages are generally not recoverable unless the plaintiff suffers an injury that is independent and separate from the economic losses recoverable under a breach-of-contract claim.”<sup>48</sup> This doctrine bars tort liability when the plaintiff has a contract with the defendant, and contract law provides an adequate remedy for the type of injury alleged.”<sup>49</sup> As a result, courts have drawn a line between contract and tort actions and have prevented tort claims from becoming contract claims because “there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.”<sup>50</sup>

While similar to the economic loss doctrine, the colloquially termed “independent tort doctrine”<sup>51</sup> or the “independent duty doctrine”<sup>52</sup> unsurprisingly focuses the analysis on the element of duty. Under these doctrines, a plaintiff cannot recover when the liability asserted arises solely as a result of a contractual duty. Rather, a plaintiff must demonstrate that the injury was caused as a result of an independent obligation outside of the contract.

From the name of the doctrine alone, it is obvious that the duty element is the gravamen of the analysis in differentiating a contract and tort claim. To illustrate, contracts provide specifically for the duties of the parties in their express provisions. The duties arise from the bargained-for exchange contained within the final writing. The law of torts, however, “is well equipped to offer redress for losses suffered by reason of a ‘breach of some duty imposed by law to protect the broad interests of social policy. Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.’”<sup>53</sup> Compensation for breaches of contract “necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement.”<sup>54</sup> Thus, breaches of contractual duties and the damages flowing therefrom remain “the particular province of the law of contracts” and cannot be

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<sup>47</sup> 74 AM. JUR. 2D TORTS § 24 (Westlaw database updated Feb. 2018)

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 981 (4th Cir. 2015) (quoting RESTATEMENT (THIRD) TORTS § 3 (2012)) (interpreting West Virginia law).

<sup>51</sup> *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 402 (Fla. 2013); 19 FLA. PRAC., FLORIDA REAL ESTATE § 24:11 (2017 ed.) (Westlaw database updated Mar. 2017) (citing *Jacques v. Equitable Life Assur. Soc. of U.S.*, 972 So. 2d 265, 268 (Fla. Ct. App. 2008); *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So. 2d 74, 78 (Fla. Ct. App. 1997)); 3A WEST’S TEX. FORMS, BUSINESS LITIGATION CH. 9.4 INTRODUCTION (2d ed.) (Westlaw database updated June 2017) (citing *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)).

<sup>52</sup> *Donatelli v. D.R. Strong Consulting Eng’rs, Inc.*, 261 P.3d 664 (Wash. 2013); 22A N.Y. JUR. 2D CONTRACTS § 434 (Westlaw database updated Feb. 2018) (citing *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 516 N.E.2d 190 (N.Y. 1987); *Batsidis v. Wallack Management Co., Inc.*, 126 A.D.3d 551, (N.Y. App. Div. 2015); *Torok v. Moore’s Flatwork & Foundations, LLC*, 106 A.D.3d 1421 (N.Y. App. Div. 2013); *Landon v. Kroll Laboratory Specialists, Inc.*, 91 A.D.3d 79 (N.Y. App. Div. 2011), *aff’d*, 999 N.E.2d 1121 (N.Y. 2013); *Trustees of Columbia University in City of New York v. Gwathmey Siegel and Associates Architects*, 192 A.D.2d 151 (N.Y. App. Div. 1993)); 33 WASH. PRAC., WASH. CONSTRUCTION LAW MANUAL § 16:14 (2017–2018 ed.) (Westlaw database updated Sept. 2017).

<sup>53</sup> *Silk v. Flat Top Const., Inc.*, 192 W. Va. 522, 526, 453 S.E.2d 356, 360 (1994) (quoting *City of Richmond, Va. v. Madison Management Group, Inc.*, 918 F.2d 438, 446 (4th Cir. 1990)).

<sup>54</sup> *Id.*

analyzed under tort concepts and principles.<sup>55</sup> Because contractual duties arise from a bargained-for agreement of the parties, while tort duties arise from common-law societal standards, the specific duty allegedly breached dictates whether the action is one sounding in contract or tort.

In *Lockhart*, the Supreme Court of Appeals of West Virginia determined that West Virginia law has fully adopted an approach focused on the duty element.<sup>56</sup> The court established that “[a] plaintiff cannot maintain an action in tort for an alleged breach of a contractual duty.”<sup>57</sup> Because the “source of the duty is controlling,”<sup>58</sup> “[a]n action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract.”<sup>59</sup> As such, under West Virginia law, “a separate tort claim can go forward only if it would be viable in the absence of a contract between the parties,” precluding any claim where “the plaintiffs would not be able to allege a claim in tort in the absence of the contract.”<sup>60</sup> Therefore, it is clear that, in this state, a breach of a contractual duty cannot support a tort claim. In fact, the Fourth Circuit, when interpreting West Virginia law and citing *Lockhart*, noted that West Virginia has taken the well-established approach on this foundational principle, as “[t]his requirement—that a tort claim must rest on a non-contractual duty—is hornbook law in most jurisdictions.”<sup>61</sup>

### *Election of Remedies*

The requirement of an extra-contractual duty in order to give rise to a tort claim when a contract exists between the parties is underpinned by longstanding concept of election of remedies. Typically, “[i]f the law permits a recovery in a civil action of damages for either the breach of a contract or for the wrongful act of the defendant, that is, either in contract or in tort, the plaintiff may choose which remedy to pursue.”<sup>62</sup> In West Virginia, “[i]t is a well-established principle of law that the injured party is entitled to select his remedy.”<sup>63</sup> Though at the pleading stage, a

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<sup>55</sup> *Id.*

<sup>56</sup> *Lockhart*, 211 W. Va. at 614, 567 S.E.2d at 624.

<sup>57</sup> *Id.*

<sup>58</sup> *CWS Trucking, Inc. v. Welltech E., Inc.*, No. 2:04-CV-84, 2005 WL 2237788, at \*3 (N.D. W. Va. Sept. 14, 2005).

<sup>59</sup> *Lockhart*, 211 W. Va. at 611, 567 S.E.2d at 621.

<sup>60</sup> *McClure v. Elmo Greer & Sons of Kentucky, LLC*, 369 F. Supp. 2d 832, 836 (N.D. W. Va. 2005).

<sup>61</sup> *Dan Ryan Builders*, 783 F.3d at 981 n.6.

<sup>62</sup> 51 AM. JUR. 2D LIMITATION OF ACTIONS § 125 (Westlaw database updated Feb. 2018).

<sup>63</sup> *Mann v. Golub*, 182 W. Va. 523, 526, 389 S.E.2d 734, 737 (1989) (citing *Johnson v. National Exchange Bank of Wheeling*, 124 W.Va. 157, 19 S.E.2d 441 (1942) (finding that at the election of the injured party, the tort involved in the conversion of one’s property can be waived and *indebitatus assumpsit* relied upon for recovery); *Inter-Ocean Casualty Co. v. Lecony Smokeless Fuel Co.*, 123 W.Va. 541, 17 S.E.2d 51 (1941) (finding that a person wronged by conversion of money or property may waive the tort and recover on contract); *Eads v. Marks*, 249 P.2d 257 (Cal. 1952) (finding that contractual negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the tort and sue on contract); *Rawls Bros. Co. v. Paul*, 155 S.E.2d 819 (Ga. Ct. App. 1967) (holding that a party is entitled to elect his remedy); *Community Ins. Agency, Inc. v. Kemper*, 426 N.W.2d 471 (Minn. Ct. App. 1988) (finding that a vendor may elect cancellation of a contract or sue for general damages when a vendee defaults under a contract for deed); *J.M. Hamilton Co. v. Battson*, 44 P.2d 1064 (Mont. 1935) (holding that a party is entitled to pursue any remedy the law affords); *State Mut. Cyclone Ins. Co. v. O & A Electric Co-op.*, 146 N.W.2d 823 (Mich. Ct. App. 1966), *rev’d on other grounds*, 161 N.W.2d 573 (Mich. 1968) (holding that election of a remedy is up to the injured party and his measure of damages depends on the remedy he elects); *Bishop v. Associated Transp., Inc.*, 332 S.W.2d 696 (Tenn. Ct. App. 1959) (holding that where a breach of covenant in a lease also constitutes a tort, the lessor may elect to bring his action in contract rather than in tort)).

plaintiff may plead alternative remedies,<sup>64</sup> ultimately, a plaintiff “may not in the same suit or action seek to recover for a tort and on a contract. He must waive either the tort or the contract, and proceed on a single theory. Unbounded confusion would arise if the rule were otherwise.”<sup>65</sup> This election of remedies equitably limits a plaintiff’s cause of action, for “a plaintiff can have only one ‘recovery’ for an injury.”<sup>66</sup> Even more, recovery on both a theory of contract and tort is impermissible, as these competing claims improperly “seek to recover twice . . . for the same challenged conduct,” “once in contract and once in tort.”<sup>67</sup> The election of remedies doctrine does not seek to limit a plaintiff’s recovery so much as it seeks to make him whole.<sup>68</sup> In so doing, it prevents windfalls and precludes multiple recoveries stemming from the same injury.<sup>69</sup>

### *Applying these Doctrines to Prevent Duplicative Recovery*

In order to prevent double recovery and windfalls, West Virginia courts have fashioned defined methods for analyzing breach of contract and tort claims so as to properly categorize plaintiffs’ theories of recovery and afford them appropriate relief. In that, the courts consider the injury and potential remedies in order not only to afford plaintiffs full recourse for their claims, but also to properly limit plaintiffs’ remedy to one recovery. First, courts have used the judicially created “gist of the action doctrine,” which serves to determine whether the tort and contract claims are separate and distinguishable claims, giving rise to two different cognizable actions and two separate remedies. Additionally, courts use the “special relationship” test in order to determine whether a duty exists sufficient to give rise to tort claims when the parties to the suit are also parties to a contract. In this analysis, courts consider whether an extra-contractual duty, not based on the terms of the contract, existed between the parties such that a breach of that duty can support a separate cognizable tort action that can survive alongside a breach of contract claim.

### *The Gist of the Action Doctrine*

Simply because *Lockhart* established that tort claims cannot be brought on the basis of a contractual duty, the *Lockhart* decision did not absolutely disqualify all claims sounding in tort in the presence of a contract between the parties to the suit. Hence, courts forged the “gist of the action” doctrine.<sup>70</sup> Therein, “whether a tort claim can coexist with a contract claim is determined by examining whether the parties’ obligations are defined by the terms of the contract.”<sup>71</sup> This doctrine largely seeks “to prevent the recasting of a contract claim as a tort claim.”<sup>72</sup>

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<sup>64</sup> *Metro Mgmt., Inc. v. Morgan*, 873 F.2d 1439, at \*2 (4th Cir. 1989).

<sup>65</sup> *Lake O’Woods Club v. Wilhelm*, 126 W. Va. 447, 28 S.E.2d 915, 918 (1944).

<sup>66</sup> *Jones v. Appalachian Elec. Power Co.*, 145 W. Va. 478, 489, 115 S.E.2d 129, 135 (1960)

<sup>67</sup> *Metro Mgmt.*, 873 F.2d 1439, at \*2 (citing *Pemrock, Inc. v. Essco Co.*, 249 A.2d 711, 714 (Md. 1969) (noting that there can be “but one recovery for a single wrong”); *UIV Corp. v. J.R. Oswald*, 229 S.E.2d 512, 514 (Ga. Ct. App. 1976) (disallowing double recovery on slightly different facts)).

<sup>68</sup> *Id.*; *Homes v. Monongahela Power Co.*, 136 W. Va. 877, 884, 69 S.E.2d 131, 136 (1952).

<sup>69</sup> *Metro Mgmt.*, 873 F.2d 1439, at \*2; *Homes*, 136 W. Va. at 884, 69 S.E.2d at 136.

<sup>70</sup> *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Under this doctrine, recovery in tort will be barred when *any* of the following factors is demonstrated:

- 1) where liability arises solely from the contractual relationship between the parties;
- 2) when the alleged duties breached were grounded in the contract itself;
- 3) where any liability stems from the contract; and,
- 4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.<sup>73</sup>

In so doing, the “‘gist of the action’ doctrine requires plaintiffs seeking relief in tort to identify a non-contractual duty breached by the alleged tortfeasor.”<sup>74</sup> In application, it takes aim at clearly defined “contract claims disguised as tort claims,” for the duty involved in breach of contract actions stems from the agreement itself and not “the larger social policies embodied by the law of torts.”<sup>75</sup>

The “gist of the action” doctrine has been applied to prevent plaintiffs from bringing both tort and statutory claims. For example, in *Tinsley*, the United States District Court for the Southern District of West Virginia found that claims centering on the allegedly fraudulent statements made by a lender as to the terms of the contract were prohibited by the “gist of the action doctrine,” as they were “simply breach of contract claims masquerading as fraud claims.”<sup>76</sup> The court found that all of the plaintiff’s fraud claims were “dependent upon the success of the breach of contract claim,” meaning, if the defendant prevailed “upon the contract claim, then none of the representations of which [plaintiff complained] were ‘false.’”<sup>77</sup> Therefore, the court dismissed all of the plaintiff’s fraud claims for failure to state a claim upon which relief could be granted.<sup>78</sup> Additionally, the court dismissed all of the plaintiff’s claims under the West Virginia Consumer Credit Protection Act utilizing a similar analysis and reasoning.<sup>79</sup> The court found that “in order for [the plaintiff] to prevail in showing that [the defendant’s] communications created confusion or misunderstanding, she must prevail on her breach of contract claim.”<sup>80</sup> However, if the defendant prevails, then it is clear that “there was no confusion or misunderstanding created by its communications with [the plaintiff] regarding the Deed; instead, [the defendant] was simply correct. This is precisely the duplication of claims which the ‘gist of the action’ doctrine seeks to prevent.”<sup>81</sup> Therefore, the court denied the plaintiff the ability to obtain “a remedy for a tort claim through the WVCCPA.”<sup>82</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Dan Ryan Builders*, 783 F.3d at 980 (citing *Gaddy Eng’g*, 231 W.Va. at 586, 746 S.E.2d at 577).

<sup>75</sup> *Gaddy Eng’g*, 231 W.Va. at 586, 746 S.E.2d at 577.

<sup>76</sup> *Tinsley v. OneWest Bank, FSB*, 4 F. Supp. 3d 805, 834 (S.D. W. Va. 2014) (quoting *Gaddy Eng’g*, 231 W. Va. at 586, 746 S.E.2d at 577).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

As seen in *Tinsley*, the “gist of the action” doctrine’s objective is to prevent duplicative claims, double recovery, and windfalls. By defining breach of contract and tort actions separately, the doctrine seeks to equitably limit the risk of exposure to the parties to a contract. As discussed, a contract, at its most basic, is a bargained-for exchange of promises that contains obligations and duties that the parties can reasonably rely upon in their performance. Simply by entering into an agreement, the parties do not plan or account for exposure to tort liability. The “gist of the action” doctrine reflects this reality, thereby limiting recovery to confines of the contract absent some distinct extra-contractual circumstance. In so doing, it represents one of the judicially created limitations on contract and tort claims.

### *Special Relationship Required for Extra-Contractual Tort Liability*

In other cases, West Virginia courts have restricted tort claims brought by parties to a contract absent some “special relationship” between the parties, giving rise to a cause of action sounding in tort. As discussed, under West Virginia law, a plaintiff cannot maintain an action in tort for an alleged breach of a contractual duty.<sup>83</sup> Rather, “[t]ort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship between the parties, rather than from the mere omission to perform a contractual obligation.”<sup>84</sup> Therefore, no affirmative legal duty exists that can give rise to a tort claim when no “special relationship” exists between the parties.<sup>85</sup> Such a deficient claim sounding in tort is precluded as a matter of law.<sup>86</sup> Notably, this “special relationship” rarely arises and has only been applied in a narrow set of cases. In fact, the West Virginia Supreme Court of Appeals “appears reluctant to extend the special relationship doctrine.”<sup>87</sup>

Holistically, “[t]he existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general.”<sup>88</sup> While a broad concept, this special relationship rarely arises and has only been applied in a narrow set of cases. For example, in *Eastern Steel Constructors*, the Supreme Court of Appeals of West Virginia found a special relationship in the particular circumstance wherein a “design professional (e.g. an architect or engineer) owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional’s work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two. Consequently, the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional.”<sup>89</sup> The Supreme Court of Appeals allowed the bringing of a tort claim for economic loss “where a special and narrowly defined relationship can be established between the tortfeasor and a plaintiff who was deprived of an economic benefit,” so that “the tortfeasor can be held

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<sup>83</sup> *Lockhart*, 211 W. Va. at 614, 567 S.E.2d at 624.

<sup>84</sup> *Id.*

<sup>85</sup> *HSBC Bank USA v. Resh*, No. 3:12-CV-00668, 2016 WL 4077119, at \*6 (S.D. W. Va. July 29, 2016).

<sup>86</sup> *Id.*

<sup>87</sup> *Bragg v. United States*, 767 F. Supp. 2d 617, 627 (S.D. W. Va. 2011), *vacated on other grounds*, 528 F. App’x 282 (4th Cir. 2013).

<sup>88</sup> *Glascock v. City Nat. Bank of W. Va.*, 213 W. Va. 61, 67, 576 S.E.2d 540, 545 (2002).

<sup>89</sup> Syl. Pt. 6, *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 394, 549 S.E.2d 266, 268 (2001).

liable.”<sup>90</sup> “In cases of that nature, the duty exists because of the special relationship.”<sup>91</sup> Recovery is permitted under these circumstances because “[t]he special class of plaintiffs involved in those cases were particularly foreseeable to the tortfeasor, and the economic losses were proximately caused by the tortfeasor’s negligence.”<sup>92</sup>

In another case, *Glascock*, the Supreme Court of Appeals found a special relationship where “a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project.”<sup>93</sup> The court determined that a special relationship exists in such a case because of the unique position of the lender in this situation, in that, the lender “could reasonably foresee that withholding that information might damage the borrowers.”<sup>94</sup> However, the court noted that its decision is not one of general applicability. In fact, the court limited its holding, stating that the “ruling should not be taken to mean that a traditional lender is in any way the insurer of the property that is the subject of the loan. Nor is the lender an insurer of the work performed or of an inspection or appraisal conducted on its behalf.”<sup>95</sup> A special duty outside of the contract between the lender and borrower is “defined by the risk perceived.”<sup>96</sup> Therefore, even in this unique position, not all lenders have a duty, for “[i]f the lender does not have information critical to the integrity of the construction project, then the lender, of course, could not have a duty to disclose.”<sup>97</sup>

These two cases support the finding of a special relationship so as to give rise to tort liability in a party to a contract. No other authority from the Supreme Court of Appeals has further found that a special relationship exists to give rise to an independent duty. As the Fourth Circuit commented, it does appear that the Supreme Court of Appeals is hesitant to extend this test,<sup>98</sup> and for good reason. Because the Supreme Court of Appeals, and West Virginia public policy on the whole, considers double recovery and properly casting claims preeminent, it appears that special relationships should be found sparingly and only in the most compelling cases.

#### *The Lender or Loan Servicer and Borrower Relationship*

In specifically the context of the relationship between a lender or loan servicer and borrower, courts follow suit and rarely find that a “special relationship” exists between the parties to the contracts at issue, typically the note and deed of trust. This is not to be unexpected, for, as a matter of industry practice, lenders and loan servicers alike typically deal with borrowers in arms’ length transactions and conduct most business remotely via mail, telephone, electronic mail, or similar means. Because the interaction between the parties is typically fairly limited, the opportunities for a “special relationship” to develop are limited as well.

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<sup>90</sup> *Id.* (quoting *Aikens*, 208 W. Va. at 500, 541 S.E.2d at 590).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Glascock*, 576 S.E.2d at 546.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Bragg*, 767 F. Supp. 2d at 627.

As such, in the context of a borrower and lender/loan servicer relationship, a “special relationship” does not arise unless a “a lender<sup>99</sup> performs services not normally provided by a lender to a borrower.”<sup>100</sup> Importantly, in this setting, it is difficult for plaintiffs to identify any special relationship that could potentially give rise to the imposition of a legal duty because the operative contracts, usually the note and deed of trust, already provide the duties under which the parties operate.<sup>101</sup> And, as discussed, the special relationship must exist outside the duties provided for within the contract.<sup>102</sup> Accordingly, in the course of a typical lender-borrower relationship, courts regularly find that no special relationship exists in a typical lender-borrower relationship and that these services are simply those normally provided to borrowers.<sup>103</sup>

For example, in *Gump*, the defendant, the holder and servicer of the plaintiff’s mortgage loan, argued that the plaintiff’s fraud claim should be dismissed, on a Rule 12(b)(6) motion to dismiss, because the plaintiff did not allege that the defendant owed him a duty outside the parties’ contractual relationship.<sup>104</sup> The court agreed, finding that the plaintiff “failed to plead a special relationship which creates a duty sounding in tort” and granting the defendant’s motion to dismiss.<sup>105</sup> Specifically, the court noted that discussions with the defendant regarding the plaintiff’s eligibility for a loan modification, the defendant’s failure to grant the modification, and the subsequent foreclosure on the property, which formed the basis of the plaintiff’s fraud allegations, “are services normally provided by a loan servicer for a borrower” and do not create a special relationship.<sup>106</sup>

Similarly, in *Ranson*, the plaintiff alleged that the defendant, the holder and servicer of the plaintiff’s mortgage, owed the plaintiff a “duty to provide him with accurate information about his loan account and its obligations and rights thereunder.”<sup>107</sup> The plaintiff argued that the defendant

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<sup>99</sup> West Virginia courts do not differentiate lenders and servicers for the purposes of this rule. Therefore, the same is true for loan servicers. See e.g., *Carter v. Nat’l City Mortg., Inc.*, No. 1:14CV70, 2015 WL 966260, at \*7 (N.D. W. Va. Mar. 4, 2015); *Warden v. PHH Mortg. Corp.*, No. 3:10-CV-75, 2010 WL 3720128, at \*9 (N.D. W. Va. Sept. 16, 2010) (applying this principle to an entity that acts as lender and servicer).

<sup>100</sup> *Tinsley*, 4 F. Supp. 3d at 833; see *Ranson v. Bank of Am., N.A.*, No. CIV.A. 3:12-5616, 2013 WL 1077093, at \*5 (S.D. W. Va. Mar. 14, 2013) (quoting *Warden*, 2010 WL 3720128, at \*9).

<sup>101</sup> *Weller v. JP Morgan Chase Bank, Nat’l Ass’n*, No. 3:16-CV-110, 2017 WL 5158681, at \*3 (N.D. W. Va. Jan. 30, 2017).

<sup>102</sup> *Resh*, 2016 WL 4077119, at \*6.

<sup>103</sup> See, e.g., *Daugherty v. Equifax Info. Servs., LLC*, No. 5:14-CV-24506, 2015 WL 6456572, at \*9 (S.D. W. Va. Oct. 26, 2015) (no special relationship when the alleged “significant communications and activities” were simply “routine lender services”); *Carter*, 2015 WL 966260, at \*8 (no special relationship when review of borrower’s loss mitigation application did not go beyond that in a typical relationship); *Warden*, 2010 WL 3720128, at \*9 (refusing to grant a loan modification and foreclosing on the property are “services normally provided by a loan servicer for a borrower”); *O’Brien v. Quicken Loans, Inc.*, No. 2:12-CV-5138, 2013 WL 2319248, at \*10 (S.D. W. Va. May 28, 2013) (no special relationship where defendant did not perform uncustodial services or possessed information of unique relevance to plaintiff); *Ranson*, 2013 WL 1077093, at \*6 (S.D. W. Va. Mar. 14, 2013) (“[A] duty to provide loan information is a normal service in a lender-borrower relationship” and does not create a “special relationship.”); *White v. AAMG Const. Lending Ctr.*, 226 W. Va. 339, 348, 700 S.E.2d 791, 800 (2010) (no special relationship between borrower and lender where lender did not inspect borrower’s home to assess its integrity or withhold information about home’s quality).

<sup>104</sup> *Gump v. JPMorgan Chase Bank, N.A.*, No. 5:17-cv-00122-JPB, at \*3–4 (N.D. W. Va. Sept. 22, 2017).

<sup>105</sup> *Id.* at \*5.

<sup>106</sup> *Id.* at \*4.

<sup>107</sup> *Ranson*, 2013 WL 1077093, at \*6.

“breached that duty by instructing [the p]laintiff not to make payments, advising [the p]laintiff that he would receive a loan modification, and then instead allowing arrears to accrue for months and ultimately denying [the plaintiff] assistance and pursuing foreclosure.”<sup>108</sup> The court found that no special relationship existed between the parties, and, in fact, the court found that this was “normal service in a lender-borrower relationship.”<sup>109</sup>

Indeed, courts situated in West Virginia regularly reject the notion that lenders or loan servicers owe borrowers a duty of care due to a special relationship between the parties. When actions for tort liability in the lender/loan servicer-borrower context are utterly devoid of facts giving rise to special relationship outside the parties’ contractual relationship, no duty of care can exist so as to give rise to liability in tort. Numerous attempts, based on various fact patterns, have endeavored to demonstrate such a relationship, and the overwhelming majority have failed. Briefly, the following case excerpts summarize this pattern: no special relationship where the only activities alleged are those “that are typical of debtor-creditor relationships, such as discussions regarding and consideration for loan modification, correspondence regarding foreclosure proceedings and the handling of mortgage payments”<sup>110</sup>; no special relationship when the alleged “significant communications and activities” were simply “routine lender services”<sup>111</sup>; no special relationship where defendant did not perform uncustomary services or possessed information of unique relevance to plaintiff<sup>112</sup>; no special relationship between borrower and lender where lender did not inspect borrower’s home to assess its integrity or withhold information about home’s quality<sup>113</sup>; no special relationship when defendant simply refused to grant a loan modification and foreclosing on the property, as these are “services normally provided by a loan servicer for a borrower”<sup>114</sup>; no special relationship arises because the “duty to provide loan information is a normal service in a lender-borrower relationship.”<sup>115</sup>

Though this special relationship operates to provide tort liability in certain unique circumstances when there exists a contract between the parties, in the lender/servicer-borrower context, it is a largely unsuccessful and futile argument. The requirement of a special relationship has operated to preclude both the tort claims of negligence<sup>116</sup> and fraud.<sup>117</sup> Though it is common for plaintiffs to plead both a cause of action sounding in tort alongside a breach of contract claim in the context of a lender-borrower relationship, these claims require the showing of an extraordinary relationship between the parties. Because most lenders/loan servicers deal at an arm’s length with borrowers and are not intimately involved with a borrower’s affairs, a study of the case law referenced herein illustrates that courts rarely find such special relationships. As such, courts situated in West Virginia have, time and again, applied this test, in line with the doctrines discussed *infra*, to serve the general public policy interests in precluding duplicative claims and recoveries.

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Weller*, 2017 WL 5158681, at \*3.

<sup>111</sup> *Daugherty*, 2015 WL 6456572, at \*9.

<sup>112</sup> *O’Brien*, 2013 WL 2319248, at \*10.

<sup>113</sup> *White*, 226 W. Va. at 348, 700 S.E.2d at 800 (distinguishing *Glascok*).

<sup>114</sup> *Warden*, 2010 WL 3720128, at \*9.

<sup>115</sup> *Ranson*, 2013 WL 1077093, at \*6.

<sup>116</sup> *Weller*, 2017 WL 5158681, at \*3; *Daugherty*, 2015 WL 6456572, at \*9; *Hanshaw v. Wells Fargo Bank, N.A.*, No. 2:14-CV-28042, 2015 WL 5345439, at \*19 (S.D. W. Va. Sept. 11, 2015).

<sup>117</sup> *Gump*, No. 5:17-cv-00122-JPB, at \*4 (N.D. W. Va. Sept. 22, 2017); *Resh*, 2016 WL 4077119, at \*6–7.

*A Brief Comparison: Common Law Claims and the WVCCPA*

In the same vein, West Virginia courts hold true to their objective to afford plaintiffs only one recovery for each injury when confronted with statutory causes of action as well. To that end, while a plaintiff can pursue claims under the West Virginia Consumer Credit Protection Act (hereinafter the “WVCCPA”) and common law “at the same time,”<sup>118</sup> in order for a common law claim pled alongside the WVCCPA to succeed, the common law claim must exist separate and apart from the WVCCPA.<sup>119</sup> Neither the WVCCPA nor case law “makes a consumer choose” between bringing his claim under the WVCCPA or common law, provided that “‘separate’ claims are set forth in his complaint.”<sup>120</sup> Though both claims can be “based on the same or similar facts,” the common law claim “must be supported by the particular facts of the case, and these claims must be separate or distinct from the claims contained in the Act.”<sup>121</sup> Therefore, without direct allegations relating to common law tort or breach of contract liability that exist separate and apart from the WVCCPA, a common law action cannot be maintained as a matter of law.<sup>122</sup>

Importantly, however, it is worth noting that simply because a plaintiff can bring claims under the WVCCPA and common law based on the same or similar factual predicate, the principles detailed above still prevent the bringing of a tort and contract claim based on the same facts. Such was the case in *Ranson*.<sup>123</sup> Therein, the plaintiff alleged a claim for breach of contract, negligence, statutory violations of the WVCCPA, among other claims, predicated on the same or similar conduct of the defendant lender.<sup>124</sup> The court found that the plaintiff had stated a valid claim for breach of contract when he pled that the defendant breached the contract by: “(1) discouraging him from making payments, (2) returning his payments, (3) allowing the accumulation of arrears until it was impossible for him to reinstate the loan, (4) initiating foreclosure and failing to grant a modification after assuring him it would be granted, and (5) failing to comply with VA regulations and guidance requiring, inter alia, that the Defendants [sic] consider Plaintiff for a variety [of] loss mitigation options, and provide notice of such rejection(s) in writing, prior to foreclosure.”<sup>125</sup> However, the court dismissed the plaintiff’s negligence claim because the plaintiff alleged only that the defendant breached its duty “by instructing Plaintiff not to make payments, advising Plaintiff that he would receive a loan modification, and then instead allowing arrears to accrue for months and ultimately denying [the plaintiff] assistance and pursuing foreclosure.”<sup>126</sup> The court dismissed the negligence claim, finding that the plaintiff’s tort claim was based on an alleged breach of a contractual duty and no special relationship existed between the parties.<sup>127</sup> Additionally, the court found that the WVCCPA claim could survive summary judgment because

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<sup>118</sup> *Ranson*, 2013 WL 1077093, at \*5 (citing *Bailey v. Branch Banking & Tr. Co.*, No. CIV.A. 3:10-0969, 2011 WL 2517253, at \*2 (S.D. W. Va. June 23, 2011)).

<sup>119</sup> Syl. Pt. 1, *Casillas v. Tuscarora Land Co.*, 186 W. Va. 391, 391–92, 412 S.E.2d 792, 792–93 (1991).

<sup>120</sup> *Bailey*, 2011 WL 2517253, at \*2 (citing *Casillas*, 186 W. Va. at 394, 412 S.E.2d at 795).

<sup>121</sup> *Pemberton v. U.S. Bank*, No. 5:11-CV-00630, 2012 WL 37113, at \*3 (S.D. W. Va. Jan. 5, 2012); *see also Baldwin v. Wells Fargo Fin. Nat’l Bank*, No. CV 3:16-4841, 2017 WL 63026, at \*3 (S.D. W. Va. Jan. 5, 2017) (collecting numerous cases requiring these particularized pleadings).

<sup>122</sup> *Casillas*, 186 W. Va. at 391–92, 412 S.E.2d at 792–93.

<sup>123</sup> *Ranson*, 2013 WL 1077093.

<sup>124</sup> *Id.* at \*2.

<sup>125</sup> *Id.* at \*3.

<sup>126</sup> *Id.* at \*5–6.

<sup>127</sup> *Id.*

it stated a distinct and separate cause of action relating to “the delay and improper refusal of payments greatly increased the amount [the plaintiff] was in arrears, which allowed [the defendant] to attempt to collect the debt through foreclosure.”<sup>128</sup>

In requiring particularized pleadings to support separate causes of action when dealing with common law and WVCCPA claims, it is clear that courts strive to limit double recovery for the same harm. The *Ranson* case links together all concepts discussed herein and epitomizes the importance of proportionality as it relates to injuries and recoveries. The court refused to allow the plaintiff to recover in tort on a breach of a contractual duty, but did allow common law claims to survive alongside WVCCPA claims because they represented distinguishable causes of action. So far as recovery is afforded under West Virginia law, courts remain resolute and committed to the prevention of double recovery while affording plaintiffs the ability to appropriately recover.

### CONCLUSION

As seen, though claims for breach of contract and tort claims have many of the same elements in common, they are in fact quite distinct causes of action. In that, they cannot overlap so far as to afford a dual recovery to a plaintiff for his single injury. For a plaintiff to recover under a theory of tort liability in West Virginia when a contract exists between the parties to the action, either the “gist” of the tort action must not relate to the contract or its prescribed duties, or a “special relationship” must exist between the parties so as to give rise to a duty of care permitted recovery in tort.

From the consistent and unwavering application of these doctrines, it is clear that the overriding principle courts aim to accomplish is to provide the plaintiff with a singular recovery. Courts thereby prevent dual liability for the same action and un-bargained-for exposure under the terms of a contract. Should plaintiffs be able to recover endlessly under multiple theories of recovery for one injury, the entire dichotomy of defined causes of action would be swallowed by a sea of uncertainty. This uncertainty would necessarily create windfalls for plaintiffs and excessive, daunting, and never-ending liability for defendants. The body of case law discussed herein demonstrates that this result is undesirable and unacceptable under West Virginia law.

In the context of lender or loan servicer and borrower relationships, recovery in tort comes under particular scrutiny. This is because typically a contract exists between the parties; thus, at least initially, defendants cannot be subject to any tort liability stemming from the parties’ interactions as a result of the contract. “Special relationships,” though required, are exceedingly difficult for plaintiffs to prove due to the nature of the lender/loan servicer-borrower relationships. Lenders and loan servicers typically deal with borrowers using standard, formalized processes, and both sides deal with one another at arms’ length. As such, it is rare that a borrower can allege, much less prove, such an intimate relationship between the parties. Therefore, West Virginia law and public policy alike, dictate that lenders and loan servicers are generally insulated from tort liability in the context of their standard relationships with borrowers. Any result to the contrary would afford plaintiffs windfalls across the board and cause serious and undesirable uncertainty that the principles herein aim to foreclose.

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<sup>128</sup> *Id.* at \*9.