



Tort or Contract? It's All in the Pleading



If you've been reading Musings for any period of time, you've read about the fact that in most instances [tort \(i. e. negligence or fraud\) claims and contract claims do not mix](#). Notice I said rarely. As is usually the case with a blanket statement like the one above, the Courts will tend to come up with

exceptions.

[AIU Ins. Co. v. Omega Flex Inc.](#) out of the Western District Court in Charlottesville, Virginia is just such a case. The facts are these, Omega Flex manufactured metal tubing that was struck by lightning leading to a house fire. The insurance company (stepping into the shoes of its insured, a general contractor) sued Omega Flex under several theories, the key two being breach of warranty and negligence. I know what you're thinking (along with me). The negligence count will be dismissed because of the economic loss rule and prior cases in Virginia and elsewhere. However, we'd be wrong to think this.

The Court upheld *both* counts listed above. The Court held that the insurance company plead the matter in such a way that it could recover under both a contract and a tort theory. The Court made the following strong statement:

Plaintiff does not merely complain about the inability of the steel tubing to attain some preconceived notion of performance or quality; rather, plaintiff alleges substantial consequential damages. Virginia law makes a clear distinction between the two concepts.

Because the plaintiff alleged damage to property and consequential damages from the breach of Omega Flex's warranty, the Court allowed the counts to go forward. Furthermore, AIU did not allege any *specific violation of specifications or that Omega Flex had any idea what the piping would be used for*. Instead, AIU alleged that Omega Flex manufactured a defective product, resulting in property damage through its failure to use reasonable care and failure to warn. Because of the careful pleading by AIU, the Court did not dismiss the the negligence count. As always, I recommend that you read the case for yourself for a more detailed analysis by the Virginia Federal court.

The takeaway? While sometimes [tort and contract are like oil and water](#), proper phrasing of a complaint against the right defendant can help get around this sharp distinction. The courts will look carefully at your pleadings to see if you are trying to avoid the economic loss rule or if you have a legitimate case for both a breach of contract and negligence and thus multiple pools of money for recovery. With the help of an experienced [Virginia construction attorney](#) and the right set of facts, you may be able to present a strong negligence case where you thought none may have existed.

Image via [Wikipedia](#)

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