

## A Construction Law Update

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### Washington Supreme Court Recasts the Economic Loss Rule to Allow Third Party Tort Claims Against Design Professionals

A sharply divided Washington Supreme Court has held that an engineering firm owes a "duty of reasonable care encompassing safety risks of physical damage" to a party not in privity with the engineering firm. The decision in *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, could lead to a departure from what had been known as the "economic loss rule," which courts traditionally interpreted as barring tort claims for any harm not involving physical injury to other property or to a person. Under *LTK Consulting*, the lead opinion of the court said that the economic loss rule (renamed the independent duty rule) would not bar a tort claim based on an engineering firm's duty of care to avoid damages to a third party.

The *LTK Consulting* decision answered a question referred to it by the Ninth Circuit Court of Appeals regarding the economic loss rule under Washington law. LTK Consulting had a contract with the City of Seattle for maintenance on the Seattle monorail; however, the city does not operate the monorail. Instead, the city has a concession agreement with Seattle Monorail Services ("SMS"). In 2004, one of the monorail trains caught fire, resulting in millions of dollars in losses to SMS while the trains were out of service. SMS's insurer sued LTK Consulting, which successfully argued at the trial court level that the claims were barred by the economic loss rule.

All of the justices agreed that the engineering firm owes a duty to SMS even when there was no contract between the parties. The Court, however, could not reach a consensus on why. Six of the nine justices on the Washington Supreme Court, writing in two separate opinions in *LTK Consulting*, agreed that the engineering firm owes a duty to SMS even when there was no contract between the parties. The six justices also argued that the claims should not be barred simply because they assert only "economic losses," and not physical or property losses. The other three justices did not believe that this case implicated the economic loss rule.

The same day that the Court announced the *LTK Consulting* decision, it also released another economic loss decision, *Eastwood v. Horse Harbor Foundation, Inc.*, which held that a tenant, in addition to contractual liability under a lease, owes a separate tort duty to its landlord to avoid waste and is liable in tort damages for the consequences. In the *Eastwood* decision, the Court said that the economic loss rule is not really a rule at all, and in fact is a misnomer that is too broad and should not be applied automatically any time there is a purely economic loss. Instead, the Court in *Eastwood* said that the test is whether an injury is traceable to a breach of tort law

duty of care that arises independent of any contract. If such a duty exists, then the economic loss rule would not apply. Seven of the justices reached a consensus that the economic loss rule should instead be called the independent duty rule.

*LTK Consulting* and *Eastwood* do not overrule any prior precedent that barred claims for negligent misrepresentation in the context of a sale of a home, claims for negligent design against an architect brought by third party purchasers, or claims against design professionals brought by contractors not in contractual privity for economic losses. The decisions, however, more clearly define design professionals' exposure to tort liability and reinforce the importance to use strong limitation of liability provisions in contracts that address both contract and tort claims.

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