

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

[A Busy Month For the Economic Loss Rule](#)

November 22, 2010 by [Kirk Jenkins](#)

In the first three weeks of November, we've already seen two major decisions on the economic loss rule from two state Supreme Courts. The economic loss rule provides in most states that a plaintiff cannot sue in tort for disappointed commercial expectations, regardless of whether he had a contractual agreement with the defendants.

On November 4, a badly fractured Washington Supreme Court filed three separate opinions in [Eastwood v. Horse Harbor Foundation, Inc.](#) [pdf]

Eastwood arose from a lease on a horse farm. The owner accepted rent below the market rate in return for a promise to maintain, a covenant the lessee allegedly failed to keep. The owner sued for breach of the lease, negligence and waste. Nobody raised the economic loss rule before the trial court, and plaintiffs won. On appeal, nobody argued the economic loss rule. Nevertheless, the Court of Appeals held that the economic loss rule barred the negligence and waste claims.

The Supreme Court reversed. According to the plurality, the economic loss rule -- which the Court renamed the "independent duty rule" -- isn't a rule at all. It simply means that a court decides on a case by case basis whether there is an independent tort duty involved under the facts presented:

An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent duty of care, and 'the existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.'

The plurality acknowledged that some courts have established a bright-line rule dividing economic losses from personal injury and property damage, but at least according to the plurality -- despite having apparently received the negotiated rent payments -- *Eastwood* hadn't received the benefit of its economic bargain. The plurality concluded that waste was a duty independent of the contract, so the "independent duty rule" didn't bar the claim.

Both concurrences argued that the plurality's analysis was largely unnecessary. According to [Chief Justice Barbara Madsen and Justice Gerry Alexander](#) [pdf], the case should have been easy: first, separation of powers barred the court from using the economic loss rule to wipe out a statutory cause of action for waste, and second, since *Eastwood* had received the benefit of the bargain -- rent payments -- the suit didn't seek economic loss anyway. In a concurrence signed by four members of the Court, [Justice Tom Chambers](#) wrote that a lot of the confusion surrounding the economic loss rule could be traced to the definition of "economic loss" in the Washington Product Liability Act, which encompassed virtually anything that could be expressed in dollars and cents. Justice Chambers wrote that Washington had never applied the rule outside the context of products liability, real property construction and property sales.

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On November 15, the New Jersey Supreme Court weighed in with [Dean v. Barrett Homes, Inc.](#) [pdf] The homeowners bought a house fitted with synthetic stucco walls. A year after buying the house, the owners noticed damage to the walls; they hired an industrial hygienist, who found toxic mold. Plaintiffs sued, arguing that the synthetic stucco was defective. The trial court granted summary judgment, holding that plaintiffs' claims were barred by the economic loss rule, and the Appellate Court affirmed.

The Supreme Court reversed in part. Although the economic loss rule applied to plaintiffs' claims, the Court held that the doctrine did not fully bar the claim. The Court held that the integrated product doctrine -- which provides that the economic loss rule bars a claim for damage to a product where a component has been fully integrated into the whole -- did not apply to the synthetic stucco and home. Nevertheless, the Court held that the economic loss rule limited plaintiff's claim to damages caused to elements of the home outside of the synthetic stucco system itself.

Justice Roberto Rivera-Soto filed a spirited dissent. Quoting from a lengthy explanation of how a synthetic stucco system is installed on a house, Rivera-Soto concluded that the product "can only be removed by extensive demolition work." He labeled the majority's refusal to apply the integrated product rule as:

... so fanciful, so nonsensical, that it beggars the imagination. It is a conclusion that can germinate only in the minds of lawyers and can find root only in the rarified environment of this Court's decisions; it cannot, however, long survive in the atmosphere of the real world.