

Colorado Court of Appeals Recognizes Economic Loss Rule as Defense to Contractor's Fraud Claims Against Engineer

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HAMON CONTRACTORS, INC. V. CARTER & BURGESS, INC., AND CRAIG KITZMAN, 2009 WL 1152160 (Colo.App.), the Colorado Court of Appeals, Div. VII ("Court") was a case in which the disputes arose out of a Denver, Colorado project involving the installation of drainage pipe underneath a roadway. The contractor asserted claims for several hundred thousand dollars against the city, the assistant city engineer, and the Engineer based on cost increases and liquidated damages assessed against the contractor during the course of the project. The Court applied the Economic Loss Rule to shield a municipal owner's project administration engineer (the "Engineer") from a contractor's post-contractual fraud claims and claims of deliberate concealment and/or misrepresentation.¹ The Court further ruled that the Engineer had no independent duty to inform the contractor of design flaws during the project's bidding phase.

The contractor's claims against the Engineer were twofold. The contractor asserted claims of fraudulent misrepresentation arising after the city and contractor executed their contract, alleging that the Engineer knew defects in the project plans caused delays. Secondly, the contractor asserted negligence and negligent misrepresentation claims against the Engineer for failing to warn the contractor of the alleged project design defects during the bidding phase, prior to the contractor's execution of its contract with the city.

The Court found that the Economic Loss Rule barred the contractor's post-contractual fraud claims, rejecting the contractor's argument that the Economic Loss Rule applied only to certain types of torts. The Court reasoned that, because the duties the Engineer allegedly violated arose out of only the contractor's contractual relationship with the city, the Economic Loss Rule barred

torts claims based on those duties. In making this determination, the Court considered, first, whether the relief sought in tort is the same as the contractual relief sought; second, whether there is a recognized common law duty of care; and third, whether the tort duty differs in any way from the contractual duty.

Regarding the first factor, the Court found that any obstacle to the contractor's recovery of its damages from the city would turn on adequacy of proof, not the nature of the action. The second factor tilted in the Engineer's favor because the Court found any obligations as to the information at issue existed only because of the parties' interrelated contracts. Finally, the Court found that the tort duty alleged by the contractor did not differ from the contractual duties of the Engineer. Accordingly, the Court found that there were no extra-contractual duties relative to the alleged post-contractual fraudulent conduct, and thus the Economic Loss Rule barred the fraud claims against the Engineer.

The Court also dismissed the pre-contract negligence claims against the Engineer on the grounds that the claims alleged only "nonfeasance" by the Engineer. Under Colorado Law, to substantiate a "nonfeasance" claim, there must also be an allegation of a special relationship between the parties. Here, the Court found that the contractor did not adequately allege the existence of any special relationship.

This case will benefit design professionals because it clarifies that, under Colorado law, the Economic Loss Rule will be based on the nature of damages alleged in conjunction with the source of the duties allegedly violated. The Court rejected the potentially more restrictive view of the Economic Loss Rule that, if applied, would have narrowed the Rule by excluding certain tort-based claims from its application. ■

¹ The Colorado Court refers in this case to the "Economic Loss Rule." The Economic Loss Rule is similar to the "Economic Loss Doctrine," as it is referred to in Massachusetts Courts. Jurisdictions that recognize the Economic Loss Rule or Economic Loss Rule typically use one of the two foregoing terms to refer to the same legal rule, subject to differences in whether, how, and to what extent a particular jurisdiction enforces the rule.