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Drowning in a Sea of Tort: The Florida Supreme Court Reels in the Economic Loss Rule

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On March 7, 2013, the Florida Supreme Court in *Tiara Condominium Assoc., Inc. v. Marsh & McLennan Companies, Inc*. expressly limited the application of the economic loss rule to products liability cases. 2013 WL 828003 (Fla. Mar. 7, 2013). In that case, the condominium association contracted with an insurance broker to secure condominium insurance coverage. *Id*. at *1. When the condominium association learned that its loss limit coverage was less than what had been advised by the insurance broker, the condominium association sued the insurance broker for breach of contract, negligence and breach of fiduciary duty, among others. *Id*. Thus, the issue before the court was whether the economic loss rule barred the condominium association's negligence and breach of fiduciary duty claims, where the parties were in contractual privity and the damages sought were only for economic losses. *Id*.

In reaching its opinion, the *Tiara* court traced the origins of the economic loss rule and its development under Florida law. The economic loss rule is a judicially created doctrine that "sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." *Id*. at *2. The doctrine is rooted in products liability and was first applied by Florida courts in *Florida Power & Light Co. v. Westinghouse Elec. Corp*. In that case, Westinghouse contractually agreed to manufacture two nuclear steam supply systems, including six generators, for Florida Power & Light ("FPL"). 510 So. 2d 899, 900 (Fla. 1987). After FPL discovered leaks in the generators, FPL sued Westinghouse for negligence and breach of express warranties in the contracts. *Id*. The Florida Supreme Court, however, concluded that contract principles were more appropriate than tort principles for allowing recovery for economic losses that did not have accompanying personal or property damage. *Id*. at 902. The court explained that when the damage is the failure of the product to function properly, such damage "is the essence of a warranty action, through which a contracting party can seek to recoup the benefits of its bargain." *Id*. at 901 quoting *East River Steamship Corp. v. Transamerica Delaval, Inc*., 476 U.S. 858, 868 (1986).

Since *Florida Power*, the economic loss rule has expanded beyond the products liability context. For instance, in *AFM Corp. v. Southern Bell Tel. & Tel. Co*., another Florida Supreme Court case, AFM contracted with Southern Bell to provide a referral service. 515 So. 2d 180, 180 (Fla. 1987). However, Southern Bell mistakenly listed the wrong telephone number for AFM in the yellow pages and disconnected the referral system. *Id*. Although this case did not involve products liability, the court applied the economic loss rule to bar Southern Bell's negligence claim. The court explained that because AFM's damages resulted from a breach of the underlying contract, AFM could not recover economic damages due to negligence absent proof that the tort was independent of the breach. *Id*. at 181.

Following *AFM* and its progeny, the Florida Supreme Court expressed concern that the economic loss rule had become overly expansive. *Moransais v. Heathman*, 744 So. 2d 973, 981 (1999); *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*., 891 So. 2d 532, 542 (Fla. 2004). Yet, despite the expressed

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concern, the Florida Supreme Court kept intact the extension of the rule with limited exceptions, such as professional malpractice,[1] fraudulent inducement,[2] and negligent misrepresentation.[3] *American Aviation*, 891 So. 2d at 543. As such, the economic loss rule continued to be employed in non-products liability cases, unless an exception applied.

Concluding that it "simply did not go far enough" in reining in the "unprincipled extension" of the rule, the *Tiara* court expressly held that "the economic loss rule applies only in the products liability context" and receded from "prior rulings to the extent that they have applied the economic loss rule to cases other than products liability." *Tiara*, 2013 WL 828003, at *7. Thus, the court specifically limited the application of the economic loss rule to products liability and did away with the exceptions created over the last twenty-six years. *Id*. Given the newly limited application of the rule, the court determined that the economic loss rule did not foreclose the condominium association's tort claims against the insurance broker. *Id*. at *8.

In light of the *Tiara* opinion, it appears that the framework of the economic loss rule has changed from "the economic loss rule bars a tort claim arising from a breach of contract, unless an exception applies" to "the economic loss rule only applies to products liability cases." Thus, it seems that litigants now "face the prospect of every breach of contract claim being accompanied by a tort claim." *Id*. at *14 (J. Canady, dissenting). This is significant because it increases a litigant's exposure to liability in a case that, before *Tiara*, may have been considered a simple breach of contract action. Besides the increased cost of litigating a tort claim, a litigant may also be exposed to punitive damages, which are generally available for a tort claim, but generally unavailable for a breach of contract claim. Therefore, while the economic loss rule has been reeled in, we can expect to see a boatload of contract actions "drowning in a sea of tort." *Id*. at *13 (J. Canady, dissenting) (noting that the economic loss rule was specifically designed to prevent contract actions from drowning in a sea of tort).

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[1] *Moransais*, 744 So. 2d at 983.
[2] *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996).
[3] *PK Ventures, Inc. v. Raymond James & Assoc.*, 690 So. 2d 1296 (Fla. 1997).

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