BURR ALERT

The Emperor's New Economic Loss Rule

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For years, litigating breach of contract cases in Florida meant having to struggle with the array of cases dealing with the Economic Loss Rule. In its simplest form, the Economic Loss Rule is a judicially created principle that prohibits tort damages in a breach of contract action where the damages are limited to an "economic loss." Breach damages are typically limited to the amount of expectation damages one would normally anticipate from contractual non-performance. In a simple breach, therefore, one could calculate the cost to cure the breach and measure the damages. Tort damages, in contrast, are not necessarily constrained to strict formulas or calculations. As a result, a negligent driver causing an injury can expect to pay damages, whereas a grossly negligent driver causing the same injury may end up paying higher damages. The possibility of seeking negligence damages in an amount higher than otherwise available for contract damages was a plaintiff's dream.

Construction lawyers have always struggled with this concept. For one thing, many insurance policies will cover negligent acts, whereas they do not necessarily cover contractual breaches. So the question often arose, can a contractor negligently build, or is the improper construction merely a breach of the agreement to build according to the plans and specifications? How is the situation complicated if the contractor builds according to the plans and specifications, only to find out later that the project was negligently designed?

In March 2013, the Florida Supreme Court – once again – attempted to clarify the usage of the Economic Loss Rule. See *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, (Fla. 2013). The "clarification" resulted in a lengthy opinion, a separate concurring opinion, and a dissent (in which the Chief Justice joined). The flurry of online discussion among Florida's construction lawyers immediately following the decision was wildly varied as to the opinion's interpretation and whether or not it actually changed the manner in which practitioners will file lawsuits and advise their clients.

The facts of *Tiara* help little to focus the impact of the ruling. The very short version of the facts shows that the condominiums suffered a severe loss during the 2004 hurricanes Frances and Jeanne. The insurance coverage question that followed was whether the condominium had $50 million or $100 million ($50 million per occurrence) available to remediate. Tiara proceeded to move forward with remediation efforts under the premise that $100 million of coverage was available (and apparently spent the full $100 million in remediation). Citizens insurance took the position that only $50 million was available. Ultimately Tiara and Citizens entered a compromise settlement. Tiara sued its insurance broker for the difference between the amount its insurance reimbursed and the amount spent in remediation (alleging that the broker indicated that the full $100 million was available for the effort).

After considerable litigation in federal court, the 11th Circuit Court of Appeals certified a question to the Florida Supreme Court. The federal court asked whether an insurance broker provided a "professional service" that would render the broker unable to assert an Economic Loss Rule defense? The Florida Supreme Court restated the question to ask whether the Economic Loss Rule barred an insured's suit against its broker (with whom it has contractual privity) seeking solely economic losses? So from the outset, it appears the question answered was framed differently than the question asked.

Answering their restated question, the Florida Supreme Court held that "the application of the economic loss rule is limited to product liability cases." The court then receded from any previous opinions that are "inconsistent" with its holding.

HERE'S WHAT ELSE THE OPINION STATED:

The majority opinion determined that a "legacy of unprincipled expansion" allowed the economic loss rule to expand beyond the product liability context. The majority concluded that its "experience with the economic loss rule over time, which led to the creations of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice." And so the economic loss rule in the construction litigation context is over. What remains is the question of whether or not the disappearance of the label "economic loss rule" alters the advice to clients in any way whatsoever.

In a separate opinion, Justice Pariente essentially stated her opinion that the majority merely clarified the usage of the "economic loss rule" without in any way changing the developed jurisprudence on the issue. "Our decision is neither a monumental upsetting of Florida law, nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the economic loss rule was always intended to apply only to products liability cases."

The dissents saw it differently. In a separate opinion concurring with Chief Justice Polston's dissent, Justice Canady stated that "the majority repudiates our case law and sets a new course for the expansion of tort law at the expense of contract law." Chief Justice Polston's dissent states that now "there are tort claims and remedies available to contracting parties in addition to the contractual remedies which, because of the economic loss rule, were previously the only remedies available." Chief Justice Polston concludes that "[i]nstead of simply answering the certified question that our cases clearly control, the majority obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available without deference to contract claims. Florida contract law is seriously undermined by this decision."

Thus, the highest state court cannot agree on the meaning of its own majority opinion. Florida's construction law practitioners anticipate that litigants will continue to raise the same defenses against a litany of new legal arguments, although practitioners will avoid the term "economic loss rule." In the complicated worlds of construction documentation, construction insurance coverage, and construction litigation it is necessary to understand what remedies are available when things go awry and how to calculate damages. Unfortunately, the *Tiara* opinion does not particularly simplify or clarify those fundamental questions.

The majority's *Tiara* opinion may not have intended to create new calculations for typical contractual breaches. However, significant litigation is likely to result in the ongoing attempts to increase the damages available to parties who suffer these losses.

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