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Supreme Court of Florida Holds that Economic Loss Doctrine Applies Only to Product Liability Cases

By Alison C. Finnegan and Gordon S. Woodward

In a recent decision likely to significantly expand the use of tort law in areas previously restricted to contract law, the Supreme Court of Florida limited application of the economic loss doctrine to product liability cases. On March 7, 2013, the Supreme Court of Florida answered questions certified by the United States Court of Appeals for the Eleventh Circuit in *Tiara Condominium Association v. Marsh & McClennan Companies, Inc. et al.*, No. SC10-1022.

Background

Tiara Condominium Association ("Tiara") retained Marsh & McClennan ("Marsh") as its insurance broker. According to the opinion, Marsh secured windstorm coverage through Citizens Property Insurance Corporation, which issued a policy that contained a loss limit of approximately $50 million. In September 2004, the condominiums were damaged by hurricanes Frances and Jeanne and Tiara began the process of loss remediation. Tiara "proceeded with more expensive remediation efforts" because it had been "assured by Marsh that the loss limits coverage was per occurrence … rather than coverage in the aggregate." Slip Op. at 3. When Tiara sought payment from Citizens, however, Citizens claimed the loss limit was $50 million in the aggregate, not per occurrence. Ultimately, Tiara and Citizens settled for approximately $89 million — an amount less than the $100 million spent by Tiara in its remediation efforts.

Tiara sued Marsh in federal court for breach of contract, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, negligence, and breach of fiduciary duty. The trial court granted summary judgment to Marsh on all claims. Tiara appealed to the Eleventh Circuit, which affirmed on all counts except for the negligence and breach of fiduciary duty claims. On those two counts, the Court certified to the Supreme Court of Florida the question of whether the economic loss doctrine barred recovery or whether "an insurance broker falls within the professional services exception" previously established under Florida law.

The Supreme Court's Analysis

The Supreme Court of Florida noted it previously had defined "economic loss" as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits — without any claim of personal injury or damage to other property." Slip Op. at 5. The Court then analyzed the origin and background of the economic loss doctrine, explaining that the rule "appeared initially in both state and federal courts in products liability type cases" and was "introduced to address attempts to apply tort remedies to traditional contract law damages." Slip Op. at 4. According to the Court, "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," and "was primarily intended to limit actions in the products liability context." *Id.* at 5. Florida's courts adopted the products liability economic loss rule in *Florida Power & Light Co. v. Westinghouse Electric Co.*, 510 So. 2d 899, 901 (Fla. 1987), where the Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." *See also* Slip. Op. at 13 (describing holdings in *Indem Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), and *Casa Clara Condominium Ass'n Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993)).

Notwithstanding its origins, the economic loss doctrine had been expanded and applied in many cases not involving

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product defects, including torts committed independently of the contract breach, claims alleging neglect in providing professional services, negligence claims arising from a breach of service contract in a nonprofessional service context, and cases in which there was no personal injury or damage to property other than to the product itself. Slip Op. at 7, 8, 14, 15. Application of the economic loss doctrine in such cases, however, resulted in what the Court described as an "over-expansion" and "unprincipled extension" of the economic loss rule. *Id.* at 16, 18. Thus, the Court "recede[d] from [its] prior rulings to the extent that they have applied the economic loss rule" in other cases and "return[ed] the economic loss rule to its origin in products liability cases." *Id.* at 18.

In a concurring opinion, Justice Pariente described the Court's holding as "clear guidance to the lower courts as to the meaning of the economic loss rule in Florida," as well as "doctrinally principled and consistent with the trajectory of [the Court's] prior precedent." Slip Op. at 20. The dissent by Chief Justice Polston described the majority opinion as an "expan[sion of] the use of tort law at a cost to Florida's contract law" that had no justification. *Id.* at 26. A separate dissent by Justice Canady described the majority opinion as a "repudiat[ion of] our case law" and "a new course for the expansion of tort law at the expense of contract law." *Id.* at 28.

Conclusion

While the holding in *Tiara* confirms the continued viability of the economic loss doctrine in products liability cases, the practical effect of the decision could be (as observed by Chief Justice Polston's dissent) to "obliterate" the use of the doctrine when the parties are in contractual privity, thus greatly expanding tort claims and remedies available without deference to contract claims." *Id.* at 28. ◆

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