The economic loss rule has traditionally prohibited most tort actions when the only damages suffered are economic losses. The rule prevents parties from circumventing the allocation of losses set forth in the contract by bringing a tort action rather than a breach of contract suit. The general view is that contract principles, as opposed to tort, are more appropriate for determining remedies in a breach of contract action. However, in a recent decision, the Florida Supreme Court held that the economic loss rule applies only in the products liability context. Thus, the Florida high court has severely limited the economic loss rule, which will inevitably result in an increase in the number of tort claims.

*Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, No. SC10-1022, 2013 WL 828003 (Fla. March 7, 2013) came before the Florida Supreme Court for review of a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit certified the following question:

Does an insurance broker provide a “professional service” such that the insurance broker is unable to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?

The Florida Supreme Court restated the question as follows:

Does the economic loss rule bar an insured's suit against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely for economic losses?

The Court answered this question in the negative, holding that the application of the economic loss rule is limited to products liability cases.

*Tiara Condominium Association* retained Marsh & McLennan as its insurance broker. Marsh was hired to secure condominium insurance coverage for Tiara, which it did through Citizens Property Insurance Corporation. Citizens issued a policy that contained a loss limit of approximately $50 million. Subsequently, Tiara's condominium sustained significant damages from two different hurricanes. Before beginning the process of loss remediation, Tiara received assurance from Marsh that the loss limits coverage was per occurrence. But when Tiara eventually sought payment from Citizens for its
remediation efforts, Citizens claimed that the loss limit was $50 million in the aggregate, not per occurrence.

Tiara filed suit against Marsh alleging both breach of contract and tort claims. After the trial court granted summary judgment in favor of Marsh on all claims, Tiara appealed to the Eleventh Circuit. The Eleventh Circuit concluded that summary judgment was proper as to certain claims, but not others. Specifically, the appeals court did not affirm summary judgment as to the negligence and breach of fiduciary duty claims, which were based on Tiara’s allegations that Marsh failed to advise Tiara of its belief that Tiara was underinsured.

In reaching its holding that the economic loss rule applies only in products liability cases, the Florida Supreme Court thoroughly reviewed the origin and development of the economic loss rule. According to the Court, the rule is rooted in the products liability arena and was originally intended to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. But the Court acknowledged that, over time, the economic loss rule has been extended to the contractual privity context.

From the inception of the economic loss rule up until its decision in Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899 (Fla. 1987), the Florida Supreme Court adhered strictly to the reasoning of its early cases, which applied the economic loss rule to damages resulting from product defects. However, after the Florida Power ruling, the Florida Supreme Court began expanding the application of the economic loss rule. In one case, the Court extended the economic loss rule to preclude a negligence claim arising from the breach of a nonprofessional service contract. In another case, the Court held that the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses where the only damages was to the buses themselves.

Over time, the Court began to recognize its unprincipled extension of the economic loss rule and expressed, in dicta, its desire to reign in the rule. Despite this realization, the Court continued to recognize certain exceptions to the products liability economic loss rule. The Tiara Condominium decision leaves no doubt that the Florida Supreme Court has returned the economic loss rule to its original purpose—to limit actions in the products liability context. With this limitation in place, the Court concluded that Tiara’s tort claims against its insurance broker are not barred.

The Tiara Condominium decision marks a very abrupt departure from precedent for the Florida Supreme Court. In its opinion, the Court states that expansion of the economic loss rule beyond its origins was unwise and unworkable, but as the dissent highlights, this decision sets a new course for the expansion of tort law, which may come at the expense of contract law, and represents a “dramatic unsettling of Florida law.” In light of the Tiara Condominium decision, insureds in Florida would be wise to consider a tort claim to accompany any breach of contract claim.
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