Client Alert

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Florida Supreme Court Limits the Economic Loss Rule to Products Liability Cases

The Florida Supreme Court issued an opinion on March 7, 2013 that eliminated an oft-used tool in the defense arsenal by limiting application of the economic loss rule to products liability cases.

The Decision

In a 5-2 decision authored by Justice Jorge Labarga, the court held unequivocally that "the application of the economic loss rule is limited to products liability cases." *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, __ So.3d __, 2013 WL 828003, *8 (Fla. Mar. 7, 2013). In doing so, the court rejected the "contractual privity" branch of the rule, under which courts routinely held that parties in privity of contract were barred from asserting tort claims for purely economic loss where the defendant had not committed a breach of duty apart from a breach of contract. *Id.* at *2. The court explained that it had adopted the contractual privity rule in the first place "to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Id.*

Post-*Tiara*, the economic loss rule now applies only in the products liability context, "precluding recovery of economic damages in tort where there is no property damage or personal injury." *Id.* at *5. The majority opinion explained that the court originally had intended the economic loss rule to apply only to products liability cases, but acknowledged that the rule had expanded far beyond that to include the contractual privity arm, as well as several other exceptions. After reviewing a string of its own decisions that slowly expanded the rule across more than 20 years, the majority held:

Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context …. Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that the expansion of the rule beyond its origins was unwise and unworkable in practice.
Id. at *7.

Implications Going Forward

The holding, while plainly a significant pronouncement on Florida law, left some justices in disagreement over its practical effect. Since commercial litigation often involves parties in some contractual relationship with one another, the contractual privity arm of the economic loss rule had become an important tool for defendants to limit claims at early stages of litigation. As one justice noted in her concurring opinion, "the contractual privity form of the economic loss rule has provided a simple way to dismiss tort claims interconnected with breach of contract claims." *Id.* at *9 (Pariente, J., concurring).

Chief Justice Ricky Polston, writing in dissent, opined that the *Tiara* decision "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." *Id.* at *11 (Polston, C.J., dissenting). In defending the majority opinion, however, Justice Barbara J. Pariente argued that defendants can still avoid duplicative contract claims dressed up as tort claims, even though such a defense plainly can no longer be asserted under

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the "economic loss rule." *Id.* at *9 (Pariente, J., concurring). Rather, she argued, that "[b]asic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in the dissent, our clarification of the economic loss rule's applicability does nothing to alter these common law concepts." *Id.* Indeed, one of the cases that Justice Pariente cited for this principle affirmed the dismissal of a negligence claim on grounds that are identical to the contractual privity branch of the economic loss rule, but without referring to the rule at all — which, in fact, had not yet been adopted by the supreme court. *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So.2d 518, 519 (Fla. 3d Dist. Ct. App. 1986) ("It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence.").

In that sense, Florida law is consistent with the law in several other states, where courts apply the same principle, but without employing the term "economic loss rule" or "economic loss doctrine." *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law Of Torts (2d ed. 2011), § 613 at p. 482 ("Even today, the rule or its principles may be applied without referring to the economic loss rule by name, or even by identifying some versions by other names entirely or by deciding that the 'gist' of the action is contract, not tort"; citing decisions from Minnesota, New York, Pennsylvania and Vermont).

Going forward, defendants seeking to eliminate tort claims formerly barred under the rule will now have to rely on the "basic common law principles" to which Justice Pariente referred. The open question is how receptive lower courts will be to such arguments now that they no longer can be asserted under the "economic loss rule" label following the Florida Supreme Court's holding in *Tiara*. At the very least, the court's limitation of the economic loss rule to products liability cases and its overt rejection of the contractual privity branch of the rule will require defendants to be much more precise in framing their arguments. They must be abundantly clear they are not relying on the now-rejected rule, but rather on the "basic common law principles" that ostensibly have been resurrected to replace the former rule.

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