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A Year After Tiara, How Much Has Changed?

by Jamie Zysk Isani

In March 2013, the Florida Supreme Court issued a seminal decision for businesses and commercial litigators, Tiara Condominium Association Inc. v. Marsh & McLennan Companies, 110 So. 3d 399 (Fla. 2013), in which it expressly limited the applicability of the economic loss rule to products liability cases. For decades, Florida courts had applied the economic loss rule to prohibit a party in contractual privity from seeking to recover economic damages arising from the contract. Tiara removed this quiver from the commercial litigator's arsenal.

The dissenting justices in Tiara and some commentators grimly predicted that the court had opened the floodgates to negligence and fraud claims, while others cautioned restraint, citing to Justice Barbara Pariente's concurring opinion, in which she explained that basic common law principles already restricted the remedies available to contracting parties. A little over a year later, who has been proven correct?

Analysis of post-Tiara decisions reflects that courts have begun applying the common law principles identified by Justice Pariente. This requires a fact-intensive, case-by-case analysis. A defendant can no longer simply argue that the fact of a contractual relationship relating to the issue bars a tort claim. Going forward, a plaintiff must show that the defendant committed some "other conduct" that amounts to an independent tort under Florida law and that the contract itself does not bar liability for such conduct. The results under these cases have been mixed, and reasonable legal minds certainly could differ as to the results in many of these cases. Unsurprisingly, that is one thing that has not changed in the wake of Tiara!

What is the "Economic Loss Rule" Anyway?

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. Though it originated in the products liability context, Florida courts also applied the economic loss rule to circumstances when the parties were in contractual privity and one party sought to recover damages in tort for matters arising from the contract. In order to prevent parties from circumventing the contractual remedies that they negotiated amongst themselves, the contractual privity economic loss rule barred a tort action where a defendant had not committed a breach of duty apart from a breach of contract.

The rule had important practical consequences in the contractual privity context, because punitive damages ordinarily are not available unless a party to a contract proves a tort independent from the acts that breach the contract. In addition, contracts may contain liquidated damage provisions or jury trial waivers that limit the parties' rights if tort claims are barred by the existence of the contract.

Although the rule was intended to create a bright line between tort and contract law, it proved to be easier to articulate in theory than to apply in practice. Over time, Florida courts developed

numerous "exceptions," allowing claims for torts committed independently of the breach of contract, such as fraudulent inducement and negligent misrepresentation, and claims for which they found public policy prohibits limiting liability, such as claims for professional negligence.

The Tiara Upheaval

In Tiara, the U.S. Court of Appeals for the Eleventh Circuit sought guidance from the Florida Supreme Court as to whether an insurance broker provided a "professional service," to determine whether it qualified for the professional service exception to the rule. The Florida Supreme Court did not answer that question but, instead, took the opportunity to eliminate the economic loss rule outside of the products liability context. The majority explicitly stated that the Court was receding from its prior decisions "to the extent that they have applied the economic loss rule to cases other than products liability."

Justice Pariente concurred separately to express her view that the majority's decision was "not a departure from precedent," but rather, merely clarified that the economic loss rule was always intended to apply only to products liability cases. The Court's decision would not undermine Florida's contract law or result in an expansion in viable tort claims, she opined, because basic common law principles – such as the requirement that a tort is independent of any breach of contract claim – already restricted the remedies available to parties who have specifically negotiated for those remedies. Though the contractual privity economic loss rule had provided a simple way to dismiss tort claims interconnected with breach of contract claims, she believed, it was neither a necessary nor a principled mechanism for doing do, and common law contract principles would produce the same result.

In dissent, Justices Polston and Canady lamented that the majority decision "seriously undermined" Florida's contract law and would "make available a wide arsenal of tort claims previously barred by the economic loss rule."

A Year After Tiara, Who Was Right?

A year after Tiara, it is clear that a contracting party can no longer defend a tort claim simply by invoking the "economic loss rule" talisman. Numerous post-Tiara state and federal decisions have rejected parties' pre-Tiara arguments based solely on the economic loss rule, often without analyzing whether the same result would follow from basic common law principles. As parties have developed more nuanced arguments in the wake of Tiara, however, courts have begun considering more carefully whether tort claims are merely repackaged contract claims and whether the defendant owes the plaintiff any duty independent of the parties' negotiated agreement.

The case-by-case analysis required by common law principles makes it difficult to generalize regarding the post-Tiara landscape without delving into the facts of each case. Justices Ricky Polston and Charles Canady could point to a number of state intermediate appellate court decisions to suggest that tort claims have expanded to some extent in the aftermath of Tiara. The First and Third Districts have reversed trial court findings that negligent and fraudulent misrepresentation and inducement claims were barred by the economic loss rule without

explicitly analyzing whether the representations at issue were independent of the contract.[1] The Second and Fifth Districts have reversed dismissal of claims for negligence and negligent misrepresentation, finding that the conduct alleged was independent of the contract between the parties.[2]

In US Fire v. ADT, the plaintiff's insured contracted with ADT to install a security system with a wireless backup that would activate if the hard wire was disabled. The plaintiff alleged that ADT failed to disclose that the FCC was transitioning from analog to digital signals, which would render the backup system useless. The trial court entered judgment for the pleadings for ADT, finding that the plaintiff's action was premised upon negligent performance of the contract, and thus was barred by the provisions of the contract. The Second DCA reversed, finding that the plaintiff had alleged an independent tort for negligent misrepresentation based on ADT's alleged failure to warn of the transition from analog to digital signals and failure to notify the insured when the analog-based system ceased transmitting signals to ADT's monitoring service. The court noted that the first of these representations went to the formation of the contract and concluded that this was a sufficient allegation of "other conduct" combined with the breach of contract to state an independent tort claim. This result is not entirely surprising, as negligent misrepresentation was considered an "exception" to the economic loss rule prior to Tiara, although ADT argued that the plaintiff had not pleaded this claim, and the Second DCA appeared to be rather forgiving in its interpretation of the complaint.

In Marian Farms, the trial court dismissed negligence claims by a bank customer alleging it suffered damages when its bank negligently allowed fraudulent or unauthorized conduct of an employee. The Fifth DCA reversed, finding this was "not a case" where the plaintiff merely attempted to recast a breach of its contractual relationship with the bank based on the depository agreement by asserting claims that the bank negligently performed its contractual duties to its depositor by wrongfully disbursing monies in reliance on forged instruments. The court found that the plaintiff alleged independent torts based on the bank's alleged acceptance of forged documents, though it did not offer a principled analysis to explain how the bank's failure to verify the authenticity of documents constitutes anything other than negligent performance of its contractual duties. A possible explanation is that section § 674.103(1), Florida Statutes, prohibits banks from disclaiming responsibility for failure to exercise ordinary care with respect to bank deposits and collections; however, the court did not discuss the application of this statute or otherwise identify a noncontractual source of the duty. The result was significant because, in addition to reversing dismissal of the negligence claims, the court held that the jury waiver contained within the bank's deposit agreement did not apply.

In the first published decision of the Eleventh Circuit Court of Appeals to analyze Tiara, the court found that although the economic loss rule no longer barred a customer's tort claims against his bank, Tiara "may have left intact a separate hurdle" in the form of the independent tort requirement." Lamm v. State Street Bank and Trust, No. 12–15061 (11th Cir. Apr. 14, 2014). Though the court found the "exact contours of this possible separate limitation, as applied post-Tiara, are still unclear," it interpreted US Fire v. ADT and Marian Farms as establishing that where a breach of contract is combined with some "other conduct" amounting to an independent tort, the breach can be considered negligence. Because the law is "still somewhat unsettled" in this area and, importantly, the custody agreement between the parties specifically left open the

possibility that the bank could be liable for losses caused by its own negligence, the court addressed the substance of the plaintiff's tort claims. Ultimately, the court concluded that the bank did not owe its customer a duty to protect him from an ill-intentioned investment adviser, nor did the plaintiff identify any statutory or regulatory source of the duties he alleged. Lamm demonstrates that after Tiara, courts must look to the parties' contract to determine the scope of their rights and obligations, and that a plaintiff must be able to identify a specific source of an extra-contractual duty.

Federal trial courts applying Tiara have reached mixed results. Some courts have dismissed tort claims at the pleading stage, finding them barred by the terms of the contract, while others have held that factual development regarding the scope and interpretation of the contract is needed before they can determine whether the tort claims are distinguishable from the contract claims. The post-Tiara decisions reflect that it is more important than ever for parties entering a contract to fully document their understandings regarding the parties' respective responsibilities and to explicitly disclaim the existence of earlier agreements or misrepresentations. Though the presence of a merger clause is not always dispositive, it may override a claim that representations were made outside the contract, particularly where the representations at issue are addressed in the contract. The law prior to Tiara was inconsistent as to whether a party could go behind a clear expression of what it had agreed to by claiming that the agreement was procured by fraud. The law undoubtedly will continue to develop on this point.

Conclusion

The fact-specific analysis required by the independent tort doctrine ensures that there will be plenty more litigation in the wake of Tiara. The floodgates have not opened as wide as the dissenting justices predicted, but the tides have risen. The waters may be choppy for some time while the courts sort out the aftermath and refine the rules in the face of various fact patterns.

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[1] Alpha Data Corp. v. HX5, LLC, No. 1D12-2885, 2013 WL 5663214 (1st DCA Oct. 18, 2013); Munoz Hnos, S.A. v. Editorial Televisa In'tl, No. 3D12-2688, 2013 WL 4823150 (3d DCA Sept. 11, 2013).

[2] United States Fire Insurance Company v. ADT Security Services, 134 So. 3d 477 (Fla. 2d DCA 2013); Marian Farms, Inc. v. SunTrust Banks, Inc., 135 So. 3d 363 (Fla. 5th DCA 2014).