Farewell, Contract Economic Loss Rule?

As most practitioners know, the Economic Loss Rule (“ELR”) limits the circumstances in which a tort claim will lie if the only losses suffered by the plaintiff are economic. Since its adoption by Florida courts in the late 1980s, the ELR has had a tangled history, and its application has been labeled everything from “somewhat ill-defined” *(Moransais v. Heathman*, 744 So. 2d 973, 979 (Fla. 1999) to a “confusing morass” by the Florida Supreme Court. *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, (Fla. 2004) (Cantero, J., concurring).

In the near decade since *Indemnity Insurance Co. of North America, Inc. v. American Aviation, Inc.*, Florida’s application of the ELR was fairly clearly limited to circumstances where: (1) the plaintiff and defendant are in contractual privity; or (2) the defendant manufactures or distributes a defective product that damages only itself (subject to several established exceptions, such as claims for professional negligence).

On Thursday, March 7, 2013, the Florida Supreme Court again made a substantial shift in Florida’s application of the ELR. Specifically, in *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, the Court expressly held that the application of the ELR is limited to products liability cases.

Tiara arose from the Eleventh Circuit’s certification of a question to the Florida Supreme Court inquiring about the professional services exception to the ELR. In a 5-2 decision authored by Justice Jorge Labarga, the Court largely ignored the Eleventh Circuit’s inquiry, and focused on addressing perceived problems in the development in the ELR in Florida. Specifically, the Court rejected the “contractual privity” aspect of the ELR clarified in *Indemnity Insurance*, and stated that “the application of the **economic loss rule** is limited to products liability cases.” As such, the long standing principle that parties in privity of contract are 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 appears to have been completely abandoned.

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.” The majority continued to state that that the expansion of the rule beyond these origins was unwise and unworkable in practice.

Justice Parente concurred and further stated explained that, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied – including meeting the requirement that the tort is independent of any breach of contract claim. Justice Parente ‘s concurrence further stated that when parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain by turning a breach of contract claim into a tort claim. The majority only determined that it is common law principles of contract, rather than the economic loss rule, that produces this result.

Justices Polston and Canady disagreed. In dissent, Justice Polston stated that, “without justification, the majority greatly expands the use of tort law at a cost to Florida’s contract law.” He further stated that the ruling “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.”

Justice Canady further noted that the majority’s opinion unsettled Florida law, and suggested that the majority failed to explain how the economic loss rule is workable and wise in the products liability context, but unworkable and unwise in the context of contract-based relationships.

The effects of this decision remain to be seen. There has been discussion of legislative imposition of the ELR, but this has not yet come to fruition. Defendants seeking to challenge tort claims previously covered by the ELR will now have to rely on the “basic common law principles” to which Justice Pariente referred. This may result in confusion at the lower court level if arguments based on these principles are adopted unevenly. At a minimum, for the time being, counsel will need to be watchful to prevent “contract law from drowning in a sea of tort” as the Tiara dissenters warned against.