

## Florida's Economic Loss Rule Comes Full Circle in *Tiara Condominium Association v. Marsh & McLennan*

In the recent case of *Tiara Condominium Association, Inc. v. Marsh & McLennan*, 2013 WL828003 (Fla. 2013), the Supreme Court of Florida answered a certified question asking whether the economic loss rule bars an insured's suit against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely economic losses. The court answered the question no and further held that:

The application of the economic loss rule is limited to product liability cases. Therefore, the Court recedes from prior case law to the extent inconsistent with this holding.

This decision will now provide subrogating carriers, and others damaged in Florida, with the opportunity to pursue negligence claims against all individuals and entities where a breach of duty exists – as long as the claim does not involve a product that only damages itself.

### The Facts of the Case

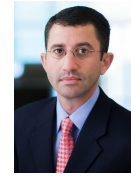
The underlying litigation arose from Tiara Condominium Association's retention of Marsh & McLennan as its insurance broker. Marsh obtained insurance for Tiara, and after damages from two hurricanes, advised Tiara that the coverage was per occurrence (meaning Tiara could be entitled to the full policy limits for each hurricane). However, Tiara's insurer claimed that the limits were aggregate – not per occurrence. Tiara filed suit against Marsh for its alleged failure to procure the necessary insurance. The trial court granted summary judgment in favor of Marsh on all claims, and Tiara appealed to the 11th Circuit. The appeals court concluded that summary judgment was proper as to the breach of contract, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing claims. However, as for the negligence and breach of fiduciary duty claims, which were based on Tiara's allegations that Marsh failed to advise Tiara of its complete insurance needs, the question was certified to determine whether the economic loss rule precluded the claims. After reviewing in its opinion the history of the economic loss rule, the Supreme Court of Florida held that the economic loss rule did not apply.

### Florida's Economic Loss Rule

The economic loss rule is a judicially created doctrine setting forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla.2004). Despite its origin from products liability claims, the rule expanded to preclude claims where parties were in contractual privity and one party sought to recover damages in tort for matters arising from a contract.

The development of Florida's products liability economic loss rule can be traced to two cases: *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145, 149 (1965), and *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

In *Seely*, the California Supreme Court held the doctrine of strict liability had not replaced causes of action for breach of express warranty. In that case, plaintiff sought recovery for economic losses resulting from a purchase of a truck that failed to perform. *Id.* The California Supreme Court held there could be a recovery of the money paid on the purchase price of the truck and for lost profits on the basis of breach of express warranty, but rejected the argument that warranty law had been superseded by the doctrine of strict liability. *Id.* at 148-149. The court concluded that the strict liability doctrine was not intended to undermine the warranty provisions of sales or contract law, but was designed to govern the wholly separate and distinct problem of physical injuries to



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persons or other property caused by defective products. *Id.* at 149–50.

In *East River*, the U.S. Supreme Court adopted the reasoning in *Seely* in an admiralty case. According to the U.S. Supreme Court, when the damage is to the product itself, “the injury suffered — the failure of the product to function properly — is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.” *Id.* at 868.

Relying on the reasoning in *Seely* and *East River*, the Supreme Court of Florida adopted the products liability economic loss rule, precluding recovery of economic damages in tort where there is no personal injury or damage to other property. See *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899 (Fla.1987),

### The Expansion of the Economic Loss Rule

Florida Courts adhered strictly to the reasoning of *East River* and *Seely* through its ruling in *Florida Power*. However, after that, courts “appeared to expand the application of the rule beyond its principled origins ...” *Moransais v. Heathman*, 744 So.2d 973, 980 (Fla.1999). For example, the economic loss rule precluded a negligence claim arising from breach of a service contract in a nonprofessional service context (*AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180); the economic loss rule barred a cause of action in tort for providing defective concrete (*Casa Clara Condominium Ass’n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244); and the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses (*Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628).

### The Contraction of the Economic Loss Rule

Starting with *Moransais*, several justices on the Supreme Court of Florida supported limiting the economic loss rule’s application. Justice Wells stated, “that it is [his] view that the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product.” *Moransais*, 744 So.2d at 984 (Wells, J., concurring). Two justices subsequently joined Justice Wells when he reiterated this position in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219, 1227 (Fla.1999)(Wells, J., concurring with an opinion in which Justices Lewis and Pariente joined).

In *Am. Aviation, Inc.*, the Supreme Court of Florida recognized the expansion of the rule’s application and concluded that it should be limited to the original rationale and intent of *Seely*, *East River*, and *Florida Power*, and held that a manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Am. Aviation*, 891 So.2d at 542. Despite this recognition, the court did not go far enough, and noted that various exceptions remained viable, such as the “other property” exception, and cases involving professional malpractice, fraudulent inducement, negligent misrepresentation, and statutory causes of action. *Am. Aviation*, 891 So.2d at 543.

### Conclusion

Now, with *Tiara*, the Supreme Court of Florida has brought the economic loss rule back to its origin – holding that the application of the economic loss rule is limited to a product liability case where the product damages only itself.

*Cozen O’Connor has been successfully litigating cases involving the economic loss rule, and we stand ready to address this issue in all states. We are available for further consultation.*

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To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact: Joshua Goodman at [jgoodman@cozen.com](mailto:jgoodman@cozen.com) or 305-704-5940.