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Summaries Through January 21, 2014

CASE SUMMARIES – THE INDEPENDENT TORT DOCTRINE POST *TIARA*

- 1. *Tiara Condo. Assoc., Inc. v. Marsh & McLennan Co.*, 110 So. 3d 399 (2013)**
Supreme Court of Florida
March 7, 2013

Facts:

Marsh, an insurance broker, secured for Tiara a windstorm policy. After Tiara's condominium sustained significant damage caused by two hurricanes, Marsh informed Tiara that the loss limits coverage was per occurrence, meaning Tiara would be entitled to \$100 million. Following Marsh's assurances, Tiara proceeded with expensive remediation efforts. Later, Tiara found out that the loss limit was actually \$50 million in the aggregate, not per occurrence as represented by Marsh. Tiara brought an action against Marsh for Marsh's failure to advise Tiara of its complete insurance needs, and for Marsh's failure to advise Tiara of its belief that Tiara was underinsured. The trial court granted summary judgment in favor of Marsh on all claims, and Tiara appealed to the Eleventh Circuit. The circuit court certified the question of the viability of the economic loss rule to the Florida Supreme Court.

Majority Opinion: (Labarga, J.)

The Court held that the application of the economic loss rule is limited to products liability cases. The Court receded from its prior rulings to the extent that they applied the economic loss rule to cases other than products liability. Because this case does not involve products liability, the Court did not decide whether the economic loss rule applied.

Concurrence: (Pariante, J.)

Justice Pariante opined that the Court's decision was not a departure from precedent, but instead clarified that the economic loss rule was always intended to apply only to products liability cases. Justice Pariante further opined that tort claims interconnected with breach of contract claims should be analyzed and dismissed based on common law principles of contract, rather than the economic loss rule. Instead, "fundamental contractual principles" already restrict remedies in situations involving contractual privity.

2. ***Atlenel, Inc. v. Millenium Partners, LLC*, 947 F.Supp.2d 1357 (S.D. Fla. 2013)**
S.D. Florida (Williams, J.)
March 12, 2013

Plaintiff purchased hotel condominium units through a real estate project owned and operated by Defendants. Plaintiff alleges that Defendants represented that Plaintiff's hotel units would be integral to a hotel operation unit with the Four Seasons, and that Plaintiff's hotel units would be profitable. Plaintiff asserted that Defendants' misrepresentations induced Plaintiff to purchase units at an inflated price and to execute the voluntary rental agreement. The court held that Plaintiff's claims cannot be dismissed on the basis of economic loss rule because *Tiara* limited the economic loss rule to products liability cases. However, Justice Pariente's concurrence makes clear that other common law principles may bar tort claims. Because the misrepresentations are contradicted by contracts and because the fraud claims are time barred, the court held Plaintiff's fraud claims are dismissed.

3. ***Wiand v. Wells Fargo Bank, N.A.*, 938 F.Supp. 2d 1238 (M.D. Fla. 2013)**
M.D. Florida (Whittemore, J.)
April 5, 2013

Nadel orchestrated a massive Ponzi scheme by purporting to deposit money into hedge funds from investors. Plaintiff is the receiver for the hedge funds. Plaintiff alleges that Defendant, the bank where the hedge funds were maintained, had knowledge of Nadel's scheme and assisted Nadel in stealing the money. The customers alleged the bank was negligent and owed a duty to the hedge fund customers. The Defendant argued the negligence claim was barred by the economic loss rule. The court held that the Defendant's argument that the Plaintiff's negligence claim is barred by the economic loss rule must be rejected after *Tiara* because the economic loss rule only applies to products liability cases.

4. ***F.D.I.C. v. Pearl*, No. 8:12-cv-1813-T-30TBM, 2013 WL 1405941 (M.D. Fla. Apr. 8, 2013)**
M.D. Florida (Moody, J.)
April 8, 2013

Plaintiff is the receiver for Colonial Bank. Defendant was contracted to appraise a property. The appraisal was used for a refinance transaction with Taylor, Bean, & Whitaker Mortgage Corp. ("TBW"). TBW used its line of credit at Colonial Bank to fund the loan. Plaintiff alleges that Defendant's appraisal was negligently prepared and contained material misrepresentations, and that the loan was funded in reliance on the appraisal. Plaintiff alleges that if TBW knew the true market value of the property, the loan would not have been funded. Defendant argued that Plaintiff's claim for negligent misrepresentation should be dismissed under the economic loss rule. The court held that *Tiara* limited the application of the economic loss rule to products liability cases and, therefore, the economic loss rule does not apply to Plaintiff's negligent misrepresentation claim. Furthermore, the court held that the economic loss rule has never barred traditional tort claims such as professional negligence or fraud.

5. ***Kuehne v. FSM Capital Management*, No. 12-80880-CIV, 2013 WL 1814903 (S.D. Fla. Apr. 29, 2013)**

S.D. Florida (Rosenbaum, J.)
April 29, 2013

Plaintiff, a professional golfer, hired Defendant to manage Plaintiff's increasingly complex finances based on Defendant's representation that he possessed expertise in accounting. After the parties' relationship ended, Plaintiff learned that he had income-tax liabilities and penalties. Plaintiff alleges that Defendant breached its Management Agreement, made fraudulent misrepresentations to Plaintiff, and was grossly negligent in managing Plaintiff's tax accounts. Defendant argued that Plaintiff's claims should be dismissed under the economic loss rule. The court held that Defendant cannot use the economic loss rule as a basis to dismiss Plaintiff's claims because this case is not a products liability case.

6. ***LBCMT 2007-C3 W. Broad Street, LLC v. WSG Development Co.*, No. 3:12-cv-455-JAG, 2013 WL 1897128 (E.D. Va. May 6, 2013)**

E.D. Virginia (Gibney, J.)
May 6, 2013

Sheppard and Wolman set up WSG Development Inc. to manage several retail projects, and separate corporations for the various projects. The Lenders controlled separate loans to each of Sheppard and Wolman's corporations (the "Borrowers"). Some of the Borrowers defaulted on their loans, and under the loan agreements were supposed to forward their rent payments to the Lenders. Instead, Defendant took and kept the Borrower's collected rents rather than transmitting the payments to Plaintiff. Plaintiff filed suit for conversion of the rents. Defendant argued that Plaintiff's conversion claim is barred by the economic loss rule. The court found that because the economic loss doctrine applies only to product liability cases, the rule does not bar Plaintiff's claim.

7. ***B&E Gibson Enterprises, Inc. v. Darngavil Enterprises, LLC*, No. 6:12-CV-1865-Orl-31GJK, 2013 WL 1969288 (M.D. Fla. May 13, 2013)**

M.D. Florida (Presnell, J.)
May 13, 2013

Plaintiff was granted leave to amend its complaint in light of *Tiara*. Plaintiff claims that Defendant falsely represented the amount of profit it would earn if it entered into a lease with Defendant. The Lease Agreement stated that compensation was expressly tied to the number of shipments and contained a merger clause. The claims of fraudulent misrepresentation and civil conspiracy that were previously dismissed based on the economic loss rule were replead. The court found that the express terms in the contract render Plaintiff's alleged reliance unjustifiable and, accordingly, dismissed the counts for fraudulent misrepresentation and civil conspiracy.

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8. ***F.D.I.C. v. Group One Mortgage, Inc.*, No. 12-81300-CIV, 2013 WL 2035150 (S.D. Fla. May 14, 2013)**
S.D. Florida (Marra, J.)
May 14, 2013

Plaintiff was appointed as receiver for AmTrust. AmTrust and Defendant entered into a loan purchase agreement, in which Defendant sold and/or delivered to AmTrust mortgage loans. Bashwiner, Defendant's loan officer, made several misrepresentations in the underwriting package for a loan. Plaintiff filed suit for negligent supervision. Defendant argued that Plaintiff's claim for negligent supervision was barred under the economic loss rule. The court rejected Defendant's argument on the basis that the economic loss rule applies only in products liability cases.

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9. ***Freeman v. Sharpe Resources Corp.*, No. 6:12-cv-1584-Orl-22TBS, 2013 WL 2151723 (M.D. Fla. May 16, 2013)**
M.D. Florida (Conway, J.)
May 16, 2013

Plaintiff claimed he lost \$1.3 million dollars based on Defendants' misrepresentations. Defendants asked Plaintiff to loan money to develop coal mineral rights that they owned in West Virginia. Defendants also represented that they would hold Plaintiff's money in escrow and would return the money in 60 days if the loan did not close. The loan never closed, and despite repeated demands, Plaintiff's money was not returned. Plaintiff alleges in his complaint that Defendants converted his money and made false misrepresentations to induce the loan from Plaintiff. Defendants argued that Plaintiff's complaint was barred by the economic loss rule. The court adopted and confirmed Magistrate Judge Smith's Report and Recommendation. Judge Smith found that fundamental contractual principles continue to bar tort claims where there is no independent breach of contract. Under common law, fraud in the inducement is a tort distinct from breach of contract. Judge Smith held that Defendants' statement that Plaintiff's \$1.3 million would be held in escrow are intertwined with the Agreement, but Defendants' other representations are independent torts, and, therefore, not barred under contract law.

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10. ***In re Mouttet*, 493 B.R. 640 (Bankr. S.D. Fla. 2013)**
U.S. Bankruptcy Court, S.D. Florida (Isicoff, J.)
May 16, 2013

Debtor Mouttet and a group of individuals decided to bring the lottery to Jamaica. Debtor sought loans to obtain a lottery and gaming license in Jamaica, which were guaranteed by Debtor. Debtor also obtained a loan to expand lottery business in Central America, which was guaranteed by Debtor. The loans were assigned to Talisman, and Talisman brought action against the Debtor seeking recovery based on the guarantees because the loans were never repaid. Among other claims, the Plaintiff alleged fraud. The court dismissed the causes of action for fraud because the complaint lacked the specificity required under Rule 9. The court,

however, noted that the Defendant's argument that the claim of fraud would be barred by the economic loss rule was not valid after *Tiara* because the economic loss rule only applies to products liability cases.

- 11. *Continent Aircraft Trust v. Diamond Aircraft Indus., Inc.*, No. 11-61663-CIV, 2013 WL 2285539 (S.D. Fla. 2013)**
S.D. Florida (Moreno, J.)
May 23, 2013

Plaintiff owns an aircraft manufactured by Defendant. Plaintiff claims it relied on statements made by Defendant that the engines would be covered by warranty when purchasing the aircraft. Plaintiff seeks to recover from Defendant damages it suffered for to the loss of the warranty, including value of the engines, expenses incurred in repairing the engines, and the diminution in value of the aircraft. Defendant argued that Plaintiff's claim for fraud should be dismissed under the economic loss rule. The court held that Florida law allows claims for torts committed independent of the contract breach, such as fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment. Here, the intentional tort is independent from the breach of the aircraft sales agreement. Additionally, *Tiara* limited the economic loss rule to products liability cases. Therefore, the court held that rule did not apply in this case.

- 12. *Deman Data Systems, LLC v. Schessel*, No. 8:12-cv-2580-T-24EAJ, 2013 WL 2708538 (M.D. Fla. June 11, 2013)**
M.D. Florida (Bucklew, J.)
June 11, 2013

Defendant was employed by Plaintiff. As a condition of employment, Defendant executed a restrictive covenant. The employment of the Defendant was terminated and the Defendant violated the restrictive covenant by deleting and storing certain confidential information from Plaintiff's server, contacting and soliciting Plaintiff's customers, utilizing Plaintiff's trade secrets in forming his own company, and accessing, without authorization, confidential information. Plaintiff claimed a breach of fiduciary duty, but Defendant argued that the claim was barred by the economic loss rule because the only source of fiduciary duty was the employment agreement. The court rejected Defendant's argument because *Tiara* limited the economic loss rule to products liability cases.

- 13. *Thermal Dynamics Intern., Inc. v. Safe Haven Enterprises, LLC*, No. 13-721 (CKK), 2013 WL 3379306 (D.D.C. July 8, 2013)**
District of Columbia (Kollar-Kotelly, J.)
July 8, 2013

Defendants subcontracted with Plaintiff to perform work at the United States Embassy in Yemen. Plaintiff contended that Defendants breached its duty by misrepresenting that it would pay Plaintiff when it received payment from the State Department. Defendants received

payment from the State Department, but never paid Plaintiff's final invoice. Plaintiff alleged that Defendants breached their duty by representing that Defendants would pay Plaintiff upon receipt of payment from the State Department. The Defendants moved to dismiss Plaintiff's claims for fraudulent misrepresentation. The court held that Plaintiff cannot sustain a claim for negligent or fraudulent misrepresentation based on misrepresentations that are inseparable from the subcontract. The court further noted that Plaintiff could not sustain a claim under Florida law either. Under *Tiara*, a party may bring a claim based on negligent or fraudulent misrepresentation made prior to the formation of the contract, but not for misrepresentations made after the contract.

- 14. *Lehman Brothers Holdings, Inc. v. Campbell*, No. 3:12-cv-259, 2013 WL 3479525 (E.D. Tenn. July 10, 2013)**
E.D. Tennessee (Campbell, J.)
July 10, 2013

Defendant was hired by a mortgage lender to appraise two condominium units in Florida. Plaintiff later purchased the mortgages underlying the properties on the secondary mortgage market. The loans went into default. Plaintiff claimed that its loss was the direct result of Defendant's overvaluation of the properties in the appraisal. Plaintiff did not assert that it was in privity of contract with Defendant and did not assert a breach of contract claim. Defendant moved to dismiss Plaintiff's negligent misrepresentation claims under the economic loss rule. The court held that because the parties were not in privity, the economic loss rule does not apply. Additionally, because *Tiara* limits the application of the economic loss rule to products liability claims, Defendant could not use the rule to challenge Plaintiff's negligence claims.

- 15. *Smith v. Questar Capital Corp.*, No. 12-cv-2669 (SRN/TNL), 2013 WL 3990319 (D. Minn. Aug. 2, 2013)**
D. Minnesota (Nelson, J.)
August 2, 2013

Defendant sold securities that were issued by DBSI to Plaintiff, an investor. DBSI is a now defunct Ponzi-Scheme. Plaintiff alleged that Defendant should have known that DBSI was a Ponzi scheme and should have informed customers. Defendant also made assurances that DBSI was a safe and well-established company that would provide reliable returns. Plaintiff alleged that he relied on Defendant's misrepresentations about DBSI. Defendant argued that the economic loss doctrine barred Plaintiff's negligence claims. The court held that the economic loss rule does not preclude recovery on Plaintiff's negligence claims under either Florida or Minnesota law. As to Florida law, the court held that the economic loss rule applies only to products liability cases, and the instant case is not a products liability case.

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16. ***Burns v. Winnebago Industries, Inc.*, No. 8:13-cv-1427-T-24MAP, 2013 WL 4437246 (M.D. Fla. Aug. 16, 2013)**
M.D. Florida (Bucklew, J.)
August 16, 2013

Plaintiff bought from a dealer an RV manufactured by the Defendant. Plaintiff discovered corrosion on the RV. Plaintiff contended that Defendant failed to make numerous disclosures to him about the RV, including the RV being prone to corrosion. Plaintiff filed suit for negligent misrepresentation and fraudulent concealment. Defendant argued that Plaintiff's claims were barred by the economic loss rule. The court found this case to be a products liability case. After *Tiara*, the court found it was unclear whether the economic loss rule still applied to negligent misrepresentation and fraudulent inducement claims in the products liability context. The court held that the exceptions to the economic loss rule for fraudulent inducement and negligent misrepresentation do not apply.

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17. ***Winn Dixie Stores, Inc. v. Apsen Transportation, LLC*, No. 6:13-cv-791-Orl-31GJK, 2013 WL 4780125 (M.D. Fla. Sept. 5, 2013)**
M.D. Florida (Presnell, J.)
September 5, 2013

Plaintiff alleged that Defendants accepted a shipment, which Defendants agreed to transport to Winn Dixie in Orlando, Florida. Winn Dixie argued that the Defendants failed to deliver the shipment. Plaintiff filed suit for: (1) breach of contract; (2) breach of bailment obligation; (3) torts claims; and (4) alternative breach of contract claims. Defendants argued claims 2 and 3 should be dismissed under the economic loss rule. The court held claims 2 and 3 cannot be dismissed based on the economic loss rule because the doctrine is now only applicable to products liability cases.

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18. ***Munoz Hnos, S.A. v. Editorial Televisa International*, No. 3D12-2688, 2013 WL 4823150 (3d DCA Sept. 11, 2013)**
3rd DCA (Rothenberg, J.)
September 11, 2013

Plaintiff entered into a settlement agreement with Defendant, wherein Plaintiff received advertising credits. Plaintiff argued that Defendant breached the agreement by not approving the assignment of Plaintiff's advertising credits. Plaintiff also alleged that Defendant materially misrepresented that the credits could be assigned to any third party in order to induce Plaintiff to settle. Plaintiff filed suit for: (1) breach of contract; (2) breach of implied covenant; (3) negligent misrepresentation; and (4) fraud. The trial court initially dismissed Plaintiff's claim for negligent misrepresentation and fraud based on the economic loss rule. The court, however, found that Plaintiff's claims were not barred by the economic loss rule based on *Tiara*, and reversed and remanded.

19. *F.D.I.C. v. Floridian Title Group, Inc.*, No. 12-21890-CIV, 2013 WL 5237362 (S.D. Fla. Sept. 17, 2013)

S.D. Florida (Moreno, J.)
September 17, 2013

FDIC is the receiver for BankUnited. Defendant served as the closing agent on five mortgage loans made by BankUnited. Plaintiff alleged that Defendant knew that four of the five mortgages were not made at arms-length, and that Defendant did not report this to BankUnited even though it was required to do so as the closing agent. Defendant argued that Plaintiff's breach of fiduciary duty and negligent misrepresentation claims are barred by the economic loss rule. The court held that because this case is not a products liability case, the economic loss rule does not apply. Defendant also asserted that the tort claims were inextricably intertwined with the breach of contract claims. The court, however, found that the economic loss rule was not rebranded as the "Inextricably Intertwined Rule."

20. *Tews v. Valdeon*, No. 12-23026-CIV, 2013 WL 5333205 (S.D. Fla. Sept. 23, 2013)

S.D. Florida (Moreno, J.)
September 23, 2013

The parties entered into an oral agreement to form Florida Discount Properties. Under the agreement, Plaintiff was to provide capital to purchase properties, and the initial investment would then be returned to the Plaintiff. Plaintiff provided \$400,000 in capital, but Defendant only returned \$250,000. Plaintiff demanded the remaining capital, but it was never returned. Plaintiff filed suit against Defendant for: (1) breach of fiduciary duty; (2) conversion; (3) unjust enrichment; (4) civil theft; and (5) constructive trust. Defendant argued that claims 1, 2, and 4 are barred by the economic loss rule. The court held that under *Tiara* the economic loss rule applies only to products liability cases, and because this is not a products liability case, the economic loss rule does not apply.

21. *Stonecreek-AAA, LLC v. Wells Fargo Bank N.A.*, No. 1:12-cv-23850-MGC, 213 WL 5416970 (S.D. Fla. Sept. 26, 2013)

S.D. Florida (Cooke, J.)
September 26, 2013

Plaintiff entered into an agreement with trustee to prepare and submit an application for mortgage insurance to HUD. Defendant was to arrange for placement of the resulting loan after approval of the application. Plaintiff alleged that Defendant falsely misrepresented that Plaintiff would receive approval within 90 days, but Defendant never completed the application. Defendant moved to dismiss Plaintiff's complaint, arguing that Plaintiff's tort claims were barred by the economic loss rule. In ruling on the motion to dismiss, the court looked to Justice Pariente's concurrence in *Tiara*. The court found that although the economic loss rule may not apply here after *Tiara*, the Plaintiff may still bring a valid tort claim based on breach of contract if the tort is distinguishable from the breach. The court held it could not dismiss Plaintiff's tort

claims because (1) the contract claims may be dismissed on standing, and (2) it is unclear whether the tort claims are distinguishable from the contract claims based on the amended complaint.

22. *Alpha Data Corp. v. HX5, LLC*, No. 1D12-2885, 2013 WL 5663214 (1st DCA Oct. 18, 2013)

1st DCA (Per Curiam)
October 18, 2013

Appellant is a government contractor that provided information technology and engineering services. Appellant filed a complaint against Appellees for: (1) theft of trade secrets; (2) breach of teaming agreement; (3) breach of “Mentor-Protege Agreement;” (4) promissory estoppel; (5) breach of fiduciary relationship; (6) unjust enrichment. The court reversed the trial court’s decision dismissing the fraudulent inducement claim under the economic loss rule, because under *Tiara* the economic loss rule is limited to products liability cases.

23. *Zoom Tan, LLC v. Heartland Tanning, Inc.*, No. 2:12-cv-684-FtM, 2013 WL 5720140 (M.D. Fla. Oct. 21, 2013)

M.D. Florida (Steele, J.)
October 21, 2013

Plaintiff operates a high end tanning salon. Defendant marketed to Plaintiff a line of commercial tanning beds, stating that the beds were precision engineered and would provide flawless tanning. Relying on these representations, Plaintiff ordered a large quantity of the tanning beds. The tanning beds, however, had a number of defects. Plaintiff sued for: (1) breach of contract; (2) breach of express warranties; (3) breach of implied warranties; and (4) negligent misrepresentation. Defendant moved to dismiss the negligent misrepresentation claim based on the economic loss rule. The court held that Defendant’s argument was without merit because the Supreme Court of Florida in *Tiara* limited the economic loss rule to products liability, and this case was not a products liability case.

24. *Aprigliano v. American Honda Motor Co., Inc.*, No. 13-22066-CIV-ALTONAGA, 2013 WL 5788771 (S.D. Fla. Oct. 28, 2013)

S.D. Florida (Altonaga, J.)
October 28, 2013

Defendant manufactured a motorcycle, the GL 1800, and marketed the motorcycle as a luxury motorcycle that has a smooth, vibration free ride. The GL 1800, however, suffered from a defective design. Plaintiffs sought monetary compensation for the cost of repairs and the diminution in value of their GL 1800, alleging: (1) strict liability; (2) negligent misrepresentation; (3) negligent failure to warn; (4) breach of express warranty; and (5) fraudulent concealment. Defendant argued that claims 1, 2, and 3 are barred by the economic loss rule. The court recognized that *Tiara* limited the economic loss rule to products liability

cases, and that this case is clearly a products liability case. As to claim 1, the court held that Plaintiff may not recover purely economic losses under a strict liability theory because the Plaintiff did not allege any damage to people or property besides the GL 1800. As to claims 2 and 3, the court noted that negligent misrepresentation claims were barred by the economic loss rule in the products liability context in *Burns*. In addition, the court stated that the exception to the economic loss rule for negligent misrepresentation developed in contractual privity cases, not products liability cases. Therefore, the court barred claims 1, 2, and 3 under the economic loss rule.

- 25. *Joyeria Paris, SRL v. Gus & Eric Custom Svcs., Inc.*, No. 13-22214-CIV, 2013 WL 6633175 (S.D. Fla. Dec. 17, 2013)**
S.D. Florida (O’Sullivan, J.)
December 17, 2013

Plaintiff and Defendants made an oral agreement that the Defendants would sell Plaintiff’s gold to customers in Florida, and in exchange, Defendants would receive half of one percent of each sale as their commission. Plaintiff discovered that the Defendants were keeping the entire proceeds of the sale. Plaintiffs filed claims for breach of contract and fraud. Plaintiffs alleged that the Defendants had induced them to enter into a business relationship by misrepresenting that they would accept a half percentage commission. Defendants argued that Plaintiff’s claim for fraud should be dismissed based on the economic loss rule. Plaintiff argued that the economic loss rule was not applicable to this case after *Tiara*, because this case was not a products liability case. The court, however, noted Justice Pariente’s concurrence, which found that common law concepts were not altered by *Tiara*, and, therefore, a tort claim is not barred if it is independent from the breach of contract. The court held that the Plaintiff failed to plead a proper cause of action for fraud because the alleged fraud was based on misrepresentations that made up the same conduct as the breach of contract claim.

- 26. *BVI Marine Const. Ltd. v. ECS-Florida, LLC*, No. 12-80225-CIV, 2013 WL 6768646 (S.D. Fla. Dec. 20, 2013)**
S.D. Florida (Marra, J.)
December 20, 2013

Plaintiff entered into a Charter Party with the Defendant to furnish the Defendant with vessels and equipment in order to drill holes as part of a pier-building project. Because the Defendant did not get paid for the drilling, the Defendant failed to pay the Plaintiff under the terms of the Charter Party. Plaintiff initially brought a single breach of contract claim, but the Plaintiff later amended the Complaint to add tort claims due to *Tiara*. Plaintiff alleged that Florida law governed the case, and, therefore, the economic loss rule did not bar Plaintiff’s tort claims because *Tiara* limited the economic loss rule to products liability cases. Defendant, on the other hand, argued that maritime law governed this case, and, therefore, the maritime economic loss rule precluded the Plaintiff’s tort claims. In order to determine whether Florida law or maritime law applied, the court first analyzed whether there was a conflict between the Florida economic loss rule and maritime law. After determining that there was a conflict

between Florida's economic loss rule and the maritime economic loss rule, the court examined whether the maritime law was weak or strong. Because there was no indication that admiralty law will follow the direction of the Florida economic loss rule, the court held that maritime law applied and barred the Plaintiff's tort claims.

- 27. *Tiara Condo. Assoc., Inc. v. Marsh, USA, Inc.*, No. 08-80254-CIV-HURLEY, 2014 WL 109140 (S.D. Fla. Jan. 13, 2014)**
S.D. Florida (Hurley, J.)
January 13, 2014

Marsh renewed its motion for summary judgment, which required the court to determine whether Marsh breached its fiduciary duty to Tiara by not notifying Tiara of its complete insurance needs. Originally, the court granted summary judgment in favor of Marsh on all claims. The Eleventh Circuit affirmed summary judgment, but as to the extent the claims were based on Marsh's failure to advise Tiara on its coverage, the circuit court determined that reliance on the economic loss rule, which would bar the tort claims, raised an unsettled question of Florida law and certified the question to the Supreme Court of Florida. The Florida Supreme Court limited the economic loss rule to products liability cases. Relying on the Florida Supreme Court's decision, the Eleventh Circuit held that the economic loss doctrine did not preclude Tiara's tort claims and remanded these claims for further consideration.

In its renewed motion for summary judgment, Marsh contended that it had no extra-contractual duty, and, also, that Florida's independent tort rule precluded these claims. Under the independent tort rule, a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. The court noted that the independent tort rule is a predecessor of the economic loss rule. Therefore, the court reasoned that the Florida Supreme Court's restriction of the economic loss rule would also impact the independent tort rule and "arguably" restrict the application of the independent tort rule in the same way that it limited the application of the economic loss rule. The court held that it did not need to reach a decision on the issue because the independent tort rule did not apply in this case. The court found that Tiara's tort claims were based on a breach of duty which was not contractually based, and, therefore, outside the reach of the independent tort rule. In addition, the court found there were genuine issues of material fact as to: (1) whether a special relationship existed between Marsh and Tiara, which would create an enhanced duty; (2) whether Marsh breached the duty by failing to advise Tiara of its complete coverage needs; and (3) whether Tiara would have modified the terms and conditions of the coverage had Marsh properly advised Tiara.

- 28. *F.D.I.C. v. Lennar Corp.*, No. 2:12-CV-595-FTM-38, 2014 WL 201663 (M.D. Fla. 2014)**
M.D. Florida (Chappell, J.)
January 17, 2014

Plaintiffs alleged that Defendants operated a mortgage-fraud scheme by recruiting passive investors to use their identities and credit profiles to apply for mortgages and

purchase residential property. Plaintiffs alleged that Defendants induced the Plaintiff Taylor Bean into funding sham mortgage loans to finance their fraud scheme by providing Taylor Bean with false valuations and false written certifications. Defendants moved to dismiss the Plaintiffs' Amended Complaint by arguing that Taylor Bean's claims were barred by the economic loss rule. The Court held that the Florida Supreme Court recently curtailed the economic loss rule in *Tiara* so that it had no relevance to the claims at issue in this case. The Court also found that even prior to the Court's decision in *Tiara*, the economic loss rule would not have barred the Plaintiffs' claims because the economic loss rule has never barred traditional tort claims such as professional negligence or fraud.