IN THE
SUPREME COURT OF FLORIDA
CASE NO. 68,540

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation,
Petitioner/Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a Pennsylvania corporation qualified
to do business in Florida,
Respondent/Appellee.

ON CERTIFICATION FROM THE UNITED
STATES COURT OF APPEALS
ELEVENTH CIRCUIT

BRIEF OF RESPONDENT/APPELLEE WESTINGHOUSE ELECTRIC CORPORATION

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OTHER AUTHORITIES

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STATEMENT OF CERTIFIED QUESTIONS

WESTINGHOUSE ELECTRIC CORPORATION (WESTINGHOUSE) is in agreement with the Statement of Certified Questions contained in the Brief of FLORIDA POWER AND LIGHT COMPANY (FPL) at 1.

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STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE FEDERAL COURTS.

WESTINGHOUSE is in agreement with the Statement of Proceedings and Disposition in the Federal Courts contained in the Brief of Appellant at 2-3.

B. STATEMENT OF THE FACTS[1/]

Effective on November 15, 1965, FLORIDA POWER AND LIGHT (FPL) and WESTINGHOUSE ELECTRIC CORPORATION (WESTINGHOUSE) entered into a contract under the provisions of which WESTINGHOUSE agreed to furnish to FPL a nuclear steam supply system, including three steam generators for what is now known as the Turkey Point Unit 3 in Dade County, Florida. The parties also entered into a nuclear fuel contract for Turkey Point Unit 3 effective on November 15, 1965.

The system contract contained a provision whereby FPL was given the option to purchase another nuclear steam supply system including three steam generators for a second plant. This second plant is what is now known as Turkey Point Unit 4. This system contract also contained an option

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[1/] All citations to the record on appeal will be designated "R. _____."

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provision for the purchase of nuclear fuel for a second plant. FPL exercised these options in February of 1967.

The negotiations leading up to the execution of the contract took place over a two-year period. FPL received proposals from four different vendors. The contract in question was not a form contract but rather was vigorously negotiated and specifically tailored for this particular negotiation. It reflected a bargain between two sophisticated businesses dealing at arm's length in a commercial setting and defined the obligations of the parties should the plant not perform as expected.[2/] *See* Order of June 22, 1982. (R. 751) The district court specifically found as to the contract at issue in this case:

2/ These statements regarding the negotiations of the contract are based upon the findings of the United States District Court with respect to the contract here in question. FPL inexplicably relies instead upon findings, since changed, by another court on a different contract in a different context set forth in ***Florida Power & Light Co. v. Westinghouse Electric Corp.***, 517 F. Supp. 440 (E.D. Va. 1981). That case relates solely to nuclear fuel contract issues and has seen the trial court render three different opinions on the same question. ***See Florida Power & Light Co. v. Westinghouse Electric Corp.***, 597 F. Supp. 1456 (E.D. Va. 1984). The case is presently on appeal. Since that case involves a different contract regarding a different subject matter, the findings of fact there must necessarily be read in conjunction with the subject matter of that contract. FPL disregards the facts regarding the negotiation of the instant contract found by the district court in this case. Those facts are far more pertinent to the instant cause.

> FPL's submission of similar contracts executed by WESTINGHOUSE clearly demonstrates that the contract entered into between FPL and WESTINGHOUSE was tailored for this particular negotiation and was not a form contract submitted by WESTINGHOUSE. (R. 754)

According to the Complaint, in August of 1974 FPL discovered leaks in certain tubes of the Turkey Point Unit 4 steam generators. In September of 1974, FPL discovered similar leaks in the Turkey Point Unit 3 steam generators. (R. 2) On April 25, 1978, FPL gave WESTINGHOUSE notice of breach of the contract in question. (R. 3) Less than one month later, the instant suit was filed.[3/] Not satisfied to rest upon the remedies and allocation of risk expressly provided for in the Turkey Point purchase contracts, FPL sought in its complaint as well to assert a tort theory of lack of due care.

3/ FPL's STATEMENT OF THE CASE, while conceding there has been only limited discovery regarding the merits, contains numerous erroneous assertions regarding the merits of the instant cause. These are merely allegations and have been vigorously denied by WESTINGHOUSE. In fact, were this case to proceed to trial, it would be established that the alleged problems resulted from FPL's own repeated failures in the operation and maintenance of the units. In any event, non-record assertions by Plaintiff can have no bearing upon the legal issues certified to this Court.

The damages requested in the complaint are plainly for economic loss[4/] alone. Whatever labels are used to describe these economic type damages -- direct, consequential, or the broader term, economic loss -- their foundations lie in FPL's underlying assertion that the product is defective (whether in design or manufacture or otherwise) and has failed to perform as expected. No allegation is made that any action of WESTINGHOUSE has caused either an accidental, sudden or violent failure of the plant to operate or damage to other property.

Thus, the sole legal issue presented for resolution here is whether FPL, as the purchaser of a product pursuant to a contract, may recover damages under a negligence theory of liability for the alleged failure of the product to perform properly and for the alleged passive deterioration or

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4/ Direct economic loss represents the difference between the actual value of the goods received and their contracted-for value. Economic loss has also been defined as "damages for inadequate value, costs of repairs and replacement of the defective product, or consequent loss of profits -- without any claim of damage to other property..." Economic loss has been held in some cases to extend to goodwill and other indirect losses which may be associated with the failure of the product to function as warranted. *See* J. White & R. Summers, ***Uniform Commercial Code***, § 11-5 at 406 (2d Ed. 1980); Note, ***Economic Loss in Products Liability Jurisprudence***. 66 COLUM.L.REV. 917, 918 (1966).

damage to the product itself unrelated to any personal injury or property damage.[5/]

[5/] Simply stated, the economic loss rule precludes recovery of economic loss in tort absent personal injury or property damage. The term "property damage" is a term of art as used with regard to the economic loss rule. One view interprets the term as requiring damage to "other" property; that is, damage to property other than the defective product itself. ***See East River Steamship Corp. v. Transamerica Delaval***, 54 U.S.L.W. 4649, 4651-52 (U.S. June 16, 1986) (No. 84-1726). The other view is that "property damage" includes loss resulting from sudden, violent or accidental events as opposed to gradual deterioration which may ultimately render the product useless; that is, results of product defects that cause accidents "of violence or collision with external objects." ***See Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.***, 652 F.2d 1165, 1169-70 (3d Cir. 1981). Under either view, it is clear that no property damage exists in the present case.

The belated assertions in FPL's brief as to the "safety" of the steam generators (Brief of Appellant at 3 n.1, 47) is an apparent attempt to raise for the first time in eight years the spectre that the damages sought here are not for economic loss but for property damage under the ***Pennsylvania Glass*** view. First, the assertions are unsupportable and without merit. FPL itself has repeatedly assured the Florida Public Service Commission, the United States Nuclear Regulatory Commission and the public that the problems it alleges at Turkey Point do not affect safety. (R. 437) This Court should disregard this false spectre raised by FPL since the parties have been proceeding through this litigation on the basis that the damages sought are for economic losses, as the questions certified by the Eleventh Circuit demonstrate.

SUMMARY OF ARGUMENT

As FPL freely concedes, it seeks here to recover ***both*** for alleged breach of warranty and negligence. The essential nature of FPL's complaint is familiar under the law of sales: the buyer is dissatisfied with the goods it received and with the bargain it struck. The damage sought to be recovered is solely for economic loss allegedly sustained as a result of the "defects."

This case does not involve a purchase of a mass-marketed product by an unsophisticated consumer lacking bargaining power. At issue here are warranty limitations and other contractual provisions which were the result of arm's length negotiations between two sophisticated commercial entities. The relevant contractual provisions here represent the normal give and take (and the trade-offs on price and other terms) which may be found in any contract for the sale of a large and complicated piece of equipment.

The federal district court in this litigation, following Florida case law as well as universal precedent set around the country, recognized that in the context of claims for economic loss arising from the sale of power plant equipment, a public utility cannot be viewed in the same light as an individual "consumer," who, lacking meaningful

bargaining power, is unable to determine the conditions of his purchases. (R. 751-58;1091-94) Courts have repeatedly found as a matter of law that sophisticated purchasers like FPL must be held to the terms of the bargain they struck and not be permitted through artful pleading to circumvent written agreements which expressly set forth their rights.

The vast majority of courts throughout the country considering the issue, including most recently the United States Supreme Court, have precluded recovery of economic loss in tort cases where there has been no personal injury or property damage. The rule precluding such recovery is the better reasoned rule: there is a fundamentally sound policy basis for permitting sophisticated buyers and sellers to allocate risks of loss and to hold those parties to their bargains once struck. Furthermore, three Florida intermediate appellate court decisions have expressly precluded recovery of economic loss in tort cases while there are no Florida cases which support FPL's contrary view. Accordingly, this Court should adopt the majority and better reasoned rule and hold that a party may not recover economic loss under a tort theory where there has been no personal injury or property damage.

Finally, the long-standing doctrine barring recovery of economic loss in tort does not represent a new principle of

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law and, therefore, the retroactivity issue is not implicated in this case. Furthermore, even under retroactivity principles, neither Florida law nor federal standards of retroactivity present any impediment to applying a rule which, as here, merely affects one of several remedies to the transaction at issue.

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ARGUMENT

I.

FLORIDA LAW PRECLUDES THE RECOVERY BY FPL OF THE ECONOMIC LOSS IT SEEKS UNDER A NEGLIGENCE THEORY

INTRODUCTION

In this cause FPL seeks recovery from WESTINGHOUSE for the costs associated with the replacement of six steam generators in FPL's nuclear Turkey Point Units Three and Four. These costs are properly defined as "economic loss" as they arise solely due to the alleged "failure of a product to perform as it was expected." ***Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.***, 626 F.2d 280 (3d Cir. 1980). Accordingly, pursuant to the economic loss rule, FPL is precluded from recovering the damages it seeks under a negligence theory.

FPL's assertion that the economic loss rule is a "relatively recent judicial creation" (Appellant's Brief at 11) is plainly wrong. Authority precluding the recovery of economic loss in tort can be traced back to at least 1935 in this country. ***See Creedon v. Automatic Voting Machine Corp.***, 243 A.D. 339, 276 N.Y.S. 609 (1935). Furthermore, the underpinnings of the rule are based in the privity doctrine as enunciated in the early English case of ***Winterbottom v. Wright***, 152 Eng. Rep. 402 (Ex. 1842). ***See***

Probert, ***Negligence and Economic Damage: The California-Florida Nexus***, 33 U. FLA. L. REV. 485 (Summer 1981).

FPL agrees that the economic loss rule is a proper limitation on recovery in a strict liability in tort case. Nevertheless, it argues that a distinction should be made between strict liability and negligence, and that the economic loss rule should not apply in negligence cases. The arguments raised by FPL in this regard have been rejected by most courts, whose decisions indicate that the proper distinction to be made is not between negligence and strict liability, both torts, but rather between torts and contracts.

A. Facts in the Instant Record Fully Support the United States District Court's Exclusion of Economic Loss in Tort.

FPL and WESTINGHOUSE engaged in lengthy and substantial negotiations leading up to the execution of the contract in question. In its Brief, FPL quotes extensively from the opinion of a district court in Virginia[6/] in litigation

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6/ While dealing extensively with this dissimilar Virginia case, FPL ignores two recent federal district court decisions in cases involving identical products (steam generators) and legal theories (recovery of economic loss). In rejecting such a claim, the court in ***Consolidated Edison Co. v. Westinghouse Electric Corp.***, 567 F.Supp. 358, 365-366 (S.D. N.Y. 1983) held:

claims concerning defects in a product which
(Footnote continues)

regarding a different contract. In so doing, FPL suggests that it did not bargain on an equal footing with WESTINGHOUSE on this contract due to FPL's lack of nuclear experience and WESTINGHOUSE's commercial rationale for the sale in the first instance. The findings in the Virginia case, however, have no bearing on the relationship evidenced by the carefully crafted contract involved in the present case.[7/] FPL totally disregards the federal district court's findings with regard to the contract at issue in this case. Those findings squarely rejected the suggestion of FPL that the parties' contract is not the best barometer of their respective obligations.

In the present litigation, the federal district court found in its Order dated June 22, 1982 that the negotiations took place over a period of more than two years. (R. 754)

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have simply deprived the purchaser of the benefit of its bargain do not state a cause of action in negligence.

Accord Southern California Edison Co. v. Westinghouse Electric Corp., Case No. CV-83-1805 CMB (C.D. Cal. 1984).

7/ The Virginia case dealt with the commercial feasibility of the disposal of spent nuclear fuel. Specifically it focused on the intentions and expectations of the parties at the time of signing a separate contract with regard to reprocessing of spent fuel. ***See supra*** note 2.

FPL received proposals from four vendors. The court therefore concluded that the executed contract was specifically "tailored for this particular negotiation and was not a form contract submitted by WESTINGHOUSE." (*Id.*) In addition, the court confirmed the obvious - that the negotiators were two "sophisticated industrial parties." (*Id.*)

The district court also determined that FPL's lack of experience in the nuclear field offered no assistance in avoiding the contract it negotiated. In fact, the court considered material that FPL has taken the position in other areas that it had "out-negotiated" WESTINGHOUSE due to the desire of WESTINGHOUSE for the contract and the knowledge of WESTINGHOUSE of the competition for the contract. Counsel for FPL confirmed this in argument in the Virginia case:

> So it [FPL] used the bargaining power that flows from the fact [WESTINGHOUSE's desire for contract] to protect its innocence. It [FPL] drafted the contract, negotiated the contract that took into account its lack of knowledge and its innocence.
>
> * * *
>
> They [FPL] were aware of their weakness and they negotiated around it.
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> * * *
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> ...Westinghouse is intending to insinuate into the contract terms it couldn't get past McGregor Smith [FPL President] in the first place.

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(R. 522) As a result of these concessions, the district court concluded, "FPL's lack of experience in the subject matter of the contract does not impugn the experience or astuteness of its negotiator. ***See, e.g., Earman Oil Co. v. Burroughs Corp.***, 625 F.2d 1291, 1299 (5th Cir. 1980)." (R. 754)[8/]

Given the findings of the district court regarding the contract which is the subject of this action, both the law and common sense exclude an action based upon negligence. As a foundation, an important consideration arises from the relationship between tort and contract. A manufacturer's product should not be held to a level of economic performance unless he covenants that such will be the case. Standards of safety applied in personal injury cases are obviously known to a manufacturer while a particular buyer's economic needs can only be ascertained through some form of bargaining. The terms of this bargain, therefore, should create the manufacturer's required level of performance. This is especially true in the case of a fully integrated

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8/ Throughout this case FPL has attempted to avoid the terms of the contract it executed. The district court has previously granted motions for summary judgment in favor of WESTINGHOUSE enforcing a disclaimer of implied warranties and FPL's agreement to exclude consequential damages. (R. 754) FPL has repeatedly contended that it is not bound by the terms of the contract it signed.

contract between sophisticated parties.

In language which has formed the basis of numerous decisions precluding the recovery of economic loss in tort cases, Justice Traynor opined:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 151-52 (1965). The identical rationale precludes economic loss recovery here. The parties entered into a complex contract growing out of long and detailed negotiations. (R. 753-

54) The parties thus bargained for specifics which ultimately appeared in the contract. Obviously, they balanced items such as price, warranties, limitations of liability and damages as well as numerous other provisions in arriving at the final agreement. The final contract contained all of the agreement between the parties. Given this background, the district court's conclusion barring FPL from going beyond its fully integrated contract and seeking damages from its contracting partner for negligence on the very items covered in detail by the contract is imminently correct. FPL's attempt to avoid the bargain it made by resorting to a negligence theory should not be permitted.

B. The Majority Rule Provides a Better Reasoned Approach to the Handling of Economic Loss

The policy of encouraging negotiated risk allocation underlying all contract law is served by the majority rule confirmed by the district court in this case. The position advanced by FPL renders such negotiated allocations at best unpredictable and at worst meaningless. It would inject the chaotic element of uncertainty into commercial dealings between contracting partners. Although products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by contract law, "[i]t is clear . . . that if this development

were allowed to progress too far, contract law would drown in a sea of tort." ***East River Steamship Corp. v. Transamerica Delaval Inc.***, 54 U.S.L.W. 4649, 4651 (U.S. June 16, 1986).

Accordingly, the majority of courts to consider the issue have found that contract principles are more appropriate than tort principles for resolving claims for economic loss. Most recently, the United States Supreme Court, in a unanimous decision, rejected arguments identical to those raised by FPL in the instant case, and adopted the majority rule as set forth in ***Seely***. ***East River***, 54 U.S.L.W. at 4652-53. The plaintiffs in ***East River*** sought recovery of economic loss resulting from a defective component of a high-pressure turbine that had disintegrated, causing extensive damage to the turbines and loss of power to the supertankers powered by the turbines. The plaintiffs sued the manufacturer on theories of negligence and strict liability seeking damages for costs of repairs and lost profits. After "charting a course" between tort and contract law, the Supreme Court affirmed the summary judgment entered in favor of the manufacturer, holding that no claim lies in either negligence or strict liability when the only injury claimed is economic loss. 54 U.S.L.W. at 4654.[9/]

In ***East River***, the Supreme Court identified three categories of cases involving the recovery of economic loss in tort. 54 U.S.L.W. at 4652. The first, emanating from ***Seely***, represents the majority view that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely economic loss. ***See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.***, 626 F.2d 280, 287 and n.13 (3d Cir. 1980) and cases cited. The second category, emanating from ***Santor v. A&M Karagheusian, Inc.***, 44 N.J. 52, 207 A.2d 305 (1965), represents the minority view that purely economic loss is recoverable in tort in the same manner as damages for personal injury or property damage, regardless of whether the product's defect created an unreasonable risk of harm. This is the position advanced by FPL in the present case. The final category includes those cases which fall somewhere between the majority and minority views. These cases permit reco-

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9/ Although ***East River*** is an admiralty case, the Supreme Court explicitly relied upon and utilized the "land-based" decisions of various states concerning common law tort doctrines in formulating its rationale and decision. 54 U.S.L.W. at 4652-54. Thus, the unanimous decision of the Supreme Court is persuasive authority for this Court to consider in determining what the law in Florida should be. Further, in both the federal courts as well as in this Court, FPL has relied extensively upon the very same admiralty cases which were plainly rejected by the Supreme Court in ***East River***.

very of economic loss in tort when the defect presents an unreasonably dangerous condition, although no personal injury or property damage actually results. ***See Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.***, 652 F.2d 1165, 1173 (3d Cir 1981).[10/]

The Supreme Court in ***East River*** rejected both the intermediate and minority positions on the recovery of economic loss in tort. Finding the intermediate position, which turns on the degree of risk, too indeterminate to enable manufacturers to structure their business behavior, the Court held that "[e]ven when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain -- traditionally the core concern of contract law." 54 U.S.L.W. at 4652.[11/] The

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[10/] These intermediate cases, such as ***Pennsylvania Glass***, can also be viewed as applying the majority rule, but defining "property damage" to include losses resulting from sudden and violent events which present dangers to persons or other property. ***See supra*** note 5. However interpreted, the gravamen of these cases is the presentation of an unreasonably dangerous condition to persons or other property through the happening of a sudden, violent event caused by the product defect. Thus, even under the rationale of these intermediate cases, FPL is precluded from recovering economic loss in negligence in the present case involving a passive, internal deterioration of the product itself which presents no danger to persons or other property. ***See supra*** note 5.
(Footnote continues)

Court also rejected the minority position, advanced by FPL in the present case, finding that it failed to account for the need to keep tort and contract law "in separate spheres and to maintain a realistic limitation on damages." ***Id.*** at 4652-53. Instead, the Court adopted the majority view emanating from ***Seely***, that a manufacturer in a commercial relationship has no duty under either a negligence or strict liability theory to prevent a product from causing purely economic loss. ***Id.*** at 4653, 4654.

When a defective product causes only economic loss and no personal injury or property damage, the policy reasons for imposing a tort duty are weak while those for leaving the aggrieved purchaser to its contractual remedies are strong. ***East River***, 54 U.S.L.W. at 4653.

> The tort concern with safety is reduced when an injury is only to the product itself. . . .[W]hen a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified. [citations omitted]

11/ ***See supra*** notes 5 and 10.

Id. Although standards of safety are known to a manufacturer, a particular purchaser's economic needs can only be ascertained through some form of bargaining. *Seely.* The terms of this bargain, therefore, should control with regard to a product's expected level of performance vis-a-vis the purchaser's economic needs.

Economic loss resulting from a defective product is most naturally understood as a warranty claim. Such loss simply indicates that the product has not met the customer's economic expectations, or that the customer has received "insufficient product value." *East River,* 54 U.S.L.W. at 4653 (citing J. White and R. Summers, Uniform Commercial Code 406 (2d ed. 1980). The maintenance of product value and quality is precisely the purpose of express and implied warranties.[12/] *Id.* Accordingly, the law of warranty should

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[12/] The Uniform Commercial Code (UCC) contains a finely tuned and comprehensive statutory mechanism for dealing with economic loss under warranty law. *See Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 792-93 (1978). *See, e.g.,* §§ 672.313-.318, Fla.Stat. (1985). Numerous courts have found that, due to the comprehensive nature of the UCC statutory scheme, "courts should pause before extending judicial doctrines that might dislocate the legislative structure" and, thereby, undermine the provisions of the UCC. *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660, 671 (1985). *See also Moorman Manufacturing Co. v. National Tank Co.*, 91 I11.2d 69, 435 N.E.2d 443, 453 (1982); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784, 793 (1978).

control a claim for purely economic loss. Indeed, FPL is vigorously pursuing warranty claims on the steam generators against WESTINGHOUSE in this case.

Contract law, more precisely the law of warranty, is particularly well-suited to controversies involving, as here, contracting parties who are of comparable economic strength, are both sophisticated corporate entities, dealt at arm's length in an exclusively commercial setting and vigorously negotiated the terms of the bargain. ***East River***, 54 U.S.L.W. at 4653; ***Hart Engineering Co. v. FMC Corp.***, 593 F.Supp. 1471, 1484 (D. R.I. 1984). A purchaser can obtain a product at a lower price if it agrees to allow the manufacturer to limit its liability by disclaiming warranties or limiting remedies as permitted by law. ***East River***, 54 U.S.L.W. at 4653; ***Jones & Laughlin***, 626 F.2d at 280; ***Seely***; §§ 672.316, .719, Fla. Stat. (1985). Permitting recovery of purely economic loss in tort in contravention of such an agreement would "undermine the very foundations upon which business transactions have historically been built." ***Hart***, 593 F.Supp. at 1484. ***See also Moorman***, 435 N.E.2d at 447-48. Thus, as between commercial parties, "the allocation of risk in accordance with their agreement . . . serves the public interest [better] than an allocation achieved as a matter of policy without reference to that agreement."

Spring Motors Distributors, Inc. v. Ford Motor Co, 98 N.J. 555, 489 A.2d 660, 671 (1985). The Supreme Court agreed, noting:

> While giving recognition to the manufacturer's bargain, warranty law sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain. The expectation damages available in warranty for purely economic loss give a plaintiff the full benefit of its bargain by compensating for forgone business opportunities. [citations omitted]

East River, 54 U.S.L.W. at 4653. Where, as here, there is no disparity in bargaining power, there is no reason or policy basis to intrude into the parties' allocation of the risk through imposition of a judicially created tort duty. ***Id.***

Permitting recovery of purely economic loss in tort would expose a manufacturer to an indeterminable amount of liability, thus making it impossible to structure business dealings in a commercial setting. FPL argues that a manufacturer's "tort liability is not unlimited" under the theory it advances contending that the negligence concept of foreseeability is an adequate limitation. (Brief of Appellant at 29) Thus, FPL argues that "[n]egligence law imposes upon manufacturers a duty of due care to avoid all foreseeable damages to the users of its products," including purely economic loss. (Brief of Appellant at 45)

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As the Supreme Court has recognized in rejecting this precise argument, allowing "recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums." ***East River***, 54 U.S.L.W. at 4654. Thus, the Court held that foreseeability is an "inadequate brake" where, as in tort, there is a duty to the public generally. ***Id.*** at 4653. In contrast to tort law, warranty law has a built-in limitation arising from "the agreement of the parties." ***Id.*** To avoid open-ended liability, it is necessary that the recovery of purely economic loss be had under principles of contract and not tort.

As FPL asserts, the key in any negligence action is whether injury results from a defendant's violation of a legal duty owed to the plaintiff, such duty arising outside a contract and in favor of the public generally. The principle behind the rule precluding recovery of purely economic loss in tort is that there is no general duty to exercise reasonable care to avoid causing economic loss to others where such loss is not associated with personal injury or property damage. Prosser & Keeton, ***Law of Torts*** § 92 at 657 (5th ed. 1984). As the Supreme Court of New Jersey recently held:

> [A] seller's duty of care generally stops short of creating a right in a commercial buyer to recover a purely economic loss. Thus viewed, the definition of the

> seller's duty reflects a policy choice that economic losses inflicted by a seller of goods are better resolved under principles of contract law. In that context, economic interests traditionally have not been entitled to protection against mere negligence.

Spring Motors, 498 A.2d at 672.[13/] ***Accord East River***, 54 U.S.L.W. at 4654; ***Monsanto Agricultural Products Co. v. Edenfield***, 426 So.2d 574, 576 (Fla. 1st DCA 1982); ***Clark***, 581 P.2d at 794. Accordingly, since WESTINGHOUSE did not owe a general duty (outside the contract) to provide a product which would meet FPL's individual economic expectations, there is no basis on which to sustain FPL's negligence claim.

FPL concedes that recovery of purely economic loss is properly precluded in strict liability in tort cases. Nevertheless, it argues that a distinction should be made between strict liability and negligence, and that the economic loss rule should not apply in negligence cases.

13/ ***Cf. People Express Airlines, Inc. v. Consolidated Rail Corp.***, 100 N.J. 246, 495 A.2d 107 (1985) (permitting action between parties not in privity (no allocation of, and no opportunity to allocate, risks between the parties) for economic loss resulting from the puncturing of a tank car that resulted in a fire from the ignition of a dangerous chemical, threatening the safety and health of persons in the area and requiring evacuation); ***Consumers Power Co. v. Curtiss-Wright Corp.***, 780 F.2d 1093 (3d Cir. 1986) (permitting action for economic loss resulting from a "sudden, violent and calamitous accident").

(Brief of Appellant at 34-48) The arguments raised by FPL have been rejected by the great majority of courts; most recently, in the unanimous decision of the Supreme Court in ***East River***.

The principles of economic loss recovery are applied regardless of the nature of the tort pursued. Whether the party seeks recovery of economic loss in strict liability or negligence, such recovery is foreclosed. The principles that foreclose recovery in strict liability likewise apply in negligence actions. ***See, e.g., East River***, 54 U.S.L.W. at 4652-54; ***Diatom, Inc., v. Pennwalt Corp.***, 741 F.2d 1569 (10th Cir. 1984); ***Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.***, 626 F.2d 280 (3rd Cir. 1980); ***Hart Engineering Co. v. FMC Corp.***, 593 F. Supp. 1471 (D.R.I. 1984); ***Clark v. International Harvester Co.***, 99 Idaho 326, 581 P.2d 784 (1978); ***Moorman Manufacturing Co. v. National Tank Co.***, 91 Ill.2d 69, 435 N.E.2d 443 (1982); ***Spring Motors Distributors, Inc. v. Ford Motor Co.***, 98 N.J. 555, 489 A.2d 660 (1985). The "vast bulk of decided cases" is in accord; only "meagre authority" exists supporting the distinction urged by FPL. ***See Hart Engineering***, 593 F. Supp. at 1484. ***See also Clark***, 581 P.2d at 793-94. In 1982, the Supreme Court of Illinois held:

> Our conclusion that qualitative defects are best handled by contract, rather than

> tort law applies whether the tort theory involved is strict liability or negligence. Tort theory is appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence of the nature described above. The remedy for economic loss, loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, on the other hand, lies in contract.

Moorman, 435 N.E.2d at 450. As the court in ***Hart Engineering*** held, recovery of economic loss should "flow from the terms of the bargain, not from the vagaries of negligence law." 593 F. Supp. at 1484.

In the present case, the nature of the injury (passive internal deterioration of the product itself) and the resulting damage (purely economic loss) is most naturally thought of in terms of warranty. ***See East River***, 54 U.S.L.W. at 4653. A commercial product injuring itself is not the type of harm the public policy behind tort law requires a manufacturer to protect against. ***Id.*** at 4651, 4654. Although damage to the product itself has certain attributes of a products liability claim, "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 4652. As recognized recently by the Supreme Court of New Jersey:

> [T]ort principles, such as negligence,

> are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

Spring Motors, 489 A.2d at 672. Accordingly, in the present case, FPL should be limited to its contractual remedies and be precluded from pursuing recovery of purely economic loss on a negligence theory.

C. Florida Cases have Precluded the Recovery Sought by FPL

The legal principle that a manufacturer owes no tort duty to prevent economic loss to a purchaser of its product is not new to Florida. While this Court has not previously dealt with the issue, the issue has been unequivocally decided by Florida intermediate appellate courts in three separate cases. Each of these cases involved products sold which did not meet the economic expectations of the purchasers. The claims made were for economic loss. There was no personal injury or property damage. These cases thus squarely support the view that Florida law precludes recovery of economic loss under a products liability tort theory. FPL has cited no Florida case to the contrary.

In ***Monsanto Agricultural Products Co. v. Edenfield,*** 426 So.2d 574 (Fla. 1st DCA 1982), a purchaser of herbicide sued

a remote manufacturer alleging negligence when a defect in the product resulted in the failure of plaintiff's crop. Following a jury verdict for direct and consequential damages based upon negligence and breach of express and implied warranties, the Court of Appeal reversed all except that portion awarding the purchase price (direct damages) based upon breach of express warranty.

The similarities between ***Monsanto*** and the case at bar are striking. In both cases the disclaimer of liability for breach of implied warranties was enforced. ***See*** Order of June 22, 1982. (R. 751) Likewise, both cases exclude consequential damages due to a contractual clause. (***Id.***) The remaining theory, the recovery of economic loss on a negligence claim, received similar treatment as well. The holding in ***Monsanto***, eliminating the negligence claim, is peculiarly applicable to the instant cause:

> Tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property. However, tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as part of his bargain with the purchaser, or where implied by law, but the duty arises under the law of contract, and not under tort law. ***Prosser***, Law of Torts sec. 101 (4th Edition 1971); ***Seely v. White Motor Co.***, 63 Cal. 2d 9, 403 P.2d 145 (1965); ***Clark***

v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).

426 So.2d at 576. Even more noteworthy is the fact that ***Monsanto***, unlike the present case, does not even deal with parties who are in privity. The ultimate purchaser there had no ability to bargain with the manufacturer regarding the terms of the contract. In the instant cause, the parties are substantial corporate entities with the ability to bargain on an equal footing. If recovery of economic loss is not permitted with a non-negotiated contract between unequal parties not in privity (***Monsanto***), then clearly FPL should not be permitted such recovery with a carefully negotiated contract between two corporate giants.

Slightly more than a year after the ***Monsanto*** decision, a second Court of Appeal in Florida utilized identical reasoning in a defective product case. ***GAF Corp. v. The Zack Co.***, 445 So.2d 350 (Fla. 3d DCA 1984), concerned a suit for economic loss brought on negligence and implied warranty theories. The court found that since no personal injury or property damage was involved, "the law of torts affords no cause of action for the plaintiff . . . to recover for its purely economic losses in this case." 445 So.2d at 351 (citing W. Prosser, ***Law of Torts***, § 101 at 665 (4th ed. 1971)). In reversing a verdict of over $600,000, the court held:

> A negligence action against the defendant GAF cannot lie herein because no cognizable tort damages were sustained by the plaintiff Zack, ***see McIntyre v. McCloud***, 334 So.2d 171, 172 (Fla. 3d DCA 1976); stated differently, no personal injury or property damage was sustained by the plaintiff Zack as a result of its purchase and installation of the defective roofing materials manufactured by the defendant GAF and therefore no negligence action is maintainable herein. ***See*** W. Prosser, ***Law of Torts*** § 30 at 143 (4th Ed. 1971).

445 So.2d at 351-52. The court further held that the plaintiff's sole remedy would be a breach of contract or implied warranty action against the seller with whom privity existed.[14/]

FPL attempts to avoid the clear impact of ***GAF Corp.*** by noting the Court's citation to ***McIntyre v. McCloud***, 334 So.2d 171 (Fla. 3rd DCA 1976) and Prosser. (Brief of Appellant at 31-32) These arguments are without merit.

As FPL notes, ***McIntyre*** stands for the proposition that liability cannot be established in tort without proof of damages. The ***GAF Corp.*** court's citation to ***McIntyre*** and W. Prosser, ***Law of Torts*** § 30 (4th ed. 1971) is an assertion of this principle as controlling in the case. Simply stated,

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[14/] While the parties in ***GAF Corp.*** were not in privity, this language confirms the view that in an action where the parties are in privity a negligence claim for economic loss would all the more not be permitted.

the court held that since the plaintiff was seeking recovery of solely economic losses in the absence of personal injury or property damage, liability could not be established in negligence because there were no "cognizable tort damages." This same approach to applying the economic loss rule was utilized by the court in ***Hart Engineering***, 593 F. Supp. at 1480-81. Thus, although the court in ***GAF Corp.*** did not expressly set forth the duty analysis in precluding recovery of economic loss in the negligence action, as did the court in ***Monsanto*** and the supreme courts of New Jersey and Idaho, ***see Spring Motors***; ***Clark***, it is clear that the court did accept and apply the economic loss rule to the case before it.

Furthermore, aside from the fact that Prosser is cited simply as a summary of the majority rule, FPL's assertion that the economic loss rule was abandoned in the new edition of Prosser is inaccurate. In fact, the New Jersey Supreme Court quoted from the new edition in holding that the "UCC 'is generally regarded as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself.'" ***Spring Motors,*** 489 A.2d at 673 (quoting Prosser & Keeton, ***Law of***

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Torts § 95A at 680 (5th ed. 1984)). In addition, the following provision appears in the latest edition of Prosser:

> ***Recovery of intangible economic losses is normally determined by contract law.*** Generally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.

Prosser & Keeton, ***Law of Torts*** § 92 at 657.

The most recent application of the economic loss rule by a Florida court was in a tort case involving strict liability where the parties were in privity. ***Cedars of Lebanon Hospital v. European X-Ray Distributors of America, Inc.,*** 444 So.2d 1068 (Fla.3d DCA 1984). Relying upon ***West v. Caterpillar Tractor Co.,*** 336 So.2d 80 (Fla. 1976), the court held "that strict liability should be reserved for those cases where there are personal injuries or damage to other property only." 444 So.2d at 1070-71. This case relies upon the very same rationale as ***Monsanto*** and ***GAF Corp.*** in precluding the recovery of economic loss in tort.[15]/

All three Florida cases reveal the traditional dicho-

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[15]/ Aside from these three cases, ***dicta*** in ***General Dynamics Corp. v. Wright Airlines, Inc.,*** 470 So.2d 788 (Fla. 3d DCA 1985), distinguishing ***GAF Corp.*** and ***Cedars,*** clearly indicates that the lower courts in Florida have been correctly applying the economic loss rule. 470 So.2d at 789 n. 1.

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tomy between tort and contract claims. So long as there is no alleged sudden or violent failure resulting in personal injury or property damage, Florida products liability law precludes recovery of economic loss in negligence (***Monsanto***; ***GAF Corp.***) or strict liability (***Cedars***), whether the parties are in privity (***Cedars***), not in privity (***Monsanto***), possess equal bargaining power (***GAF Corp.***), or have no ability to bargain (***Monsanto***). Further, the rule applies to economic losses evidenced by indirect economic loss, replacement costs, repair costs, deterioration or disappointed economic expectations. ***See Monsanto***, 426 So.2d at 576; ***GAF Corp.,,*** 445 So.2d at 351; ***Cedars,*** 444 So.2d at 1069. Thus, Florida case law has specifically precluded recovery in tort of the same damages sought by FPL in the instant cause.

The exclusion of tort remedies does not eliminate the opportunity of an aggrieved party to recover. Where the loss is economic, the injured party is virtually always the owner of the product. The owner thus has the ability to protect himself from the loss experienced:

> The original purchaser, particularly a large company . . . , can protect itself against the risk of unsatisfactory performance by bargaining for a warranty. Alternatively, it may choose to forego warranty protection in favor of a lower purchase price for the product.

Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.,

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626 F.2d 280, 288 (3d Cir. 1980). The extension of products liability tort theories to economic losses would make the manufacturer a guarantor of its products, guaranteeing that they would continue to perform satisfactorily throughout their productive lives. ***Daitom, Inc. v. Pennwalt Corp.***, 741 F.2d 1569, 1582 (10th Cir. 1984). Such a notion was initially rejected by Justice Traynor in ***Seely***, 403 P.2d at 151, and has been rejected by numerous courts thereafter. ***See***, e.g., ***Daitom***, 741 F.2d at 1582. In fact, this Court, in adopting the theory of strict liability in tort in Florida, was careful to reject any notion that a manufacturer was an insurer of its product even against personal injury or property damage. ***West v. Caterpillar Tractor Co.***, 336 So.2d 80, 90 (Fla. 1976). Likewise, this Court should reject the notion that a manufacturer is a guarantor of its product against economic loss where there is no personal injury or property damage and, thus, where the policy considerations of protecting potential plaintiffs are not as strong as those involved in ***West***.

Turning to the instant case, it is clear that the loss claimed is based upon diminished economic expectation, not a sudden and calamitous event. The operating licenses for the units in question were granted in 1972 and 1973. The plants operated until replacement of the steam generators except

for normal periods of repair or maintenance. Even though some tubes were repaired, the United States Nuclear Regulatory Commission (NRC) did not require either Turkey Point unit to reduce its maximum operating power. FPL has told the public that through mid-1981 these units had saved ratepayers in excess of $1,170,000,000.00, or nearly five times the original cost of the plant. (R. 437) FPL likewise has assured the Florida Public Service Commission, the NRC and the public that the problems it alleges at Turkey Point do not affect safety. (***Id.***) The bottom line is that FPL is suing WESTINGHOUSE because FPL believes the steam generator tubes did not last long enough -- they did not save FPL (or its consumers) ***enough*** money. FPL claims that its expectation of economic gain was not met. The ***Monsanto*** court was obviously thinking about just this type of situation when it held:

> [T]ort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers.

426 So.2d at 576. Florida law therefore limits FPL to its contract and the bargain it made.

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D. The "Professional Service" Cases Relied Upon by FPL are Inapposite

FPL argues that a series of cases,[16] beginning with ***Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc.***, 168 So.2d 333 (Fla. 2d DCA 1964), define the law of Florida regarding the recovery of economic loss. (Brief of Appellant at 21-26) These cases deal with professional service contracts and are thus based upon an entirely different rationale from the instant product liability case. Florida law clearly distinguishes between service cases and product cases. The cases relied upon by FPL,

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[16] ***A.R. Moyer, Inc. v. Graham***, 285 So.2d 397 (Fla. 1973); ***Navajo Circle, Inc. v. Development Concepts Corp.***, 373 So.2d 689 (Fla. 2d DCA 1979); ***Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.***, 406 So.2d 515 (Fla. 4th DCA 1981); ***First American Title Ins. Co. v. First Title Service Co.***, 457 So.2d 467 (Fla. 1984).

FPL refers to the case of ***Tampa Electric Co. v. Stone & Webster Engineering Corp.***, 367 F.Supp. 27 (M.D. Fla 1973) as "unusually instructive . . . because of the obvious similarities it bears to the instant litigation." (Brief of Appellant at 20) Any ***relevant*** similarity, however, is lacking. ***Tampa Electric*** was decided long before ***Monsanto*** and involved a violent explosion and fire relating to a piece of equipment. For that reason alone, the case is inapposite since there are no allegations here of a sudden calamitous event. Further, while that case suggests certain economic loss would be a foreseeable item of damage, there seems to have been no argument raised that such recovery would not be permitted under tort theories. ***Tampa Electric*** cites no Florida authority which supports the current position of FPL and can therefore have no effect on the determination of Florida law today.

therefore, do not answer the question certified to this Court.[17]

Cedars contains a thorough analysis of Florida product liability law. In that decision, which ultimately applied the rule precluding the recovery of economic loss in a strict liability case, the court considered the impact of ***Audlane*** and its progeny. In refusing to permit recovery on tort theories, the court noted, "[T]hese cases [***Moyer, Navajo Circle***, etc.] involve only the negligent performance of a contract for professional services." 444 So.2d at 1071.[18]

FPL's reliance upon recent California cases is indicative of its approach of combining service and product cases. ***J'Aire Corp. v. Gregory***, 24 Cal.3d 799, 598 P.2d 60 (1979), indicates that California permits the recovery of economic loss due to negligence of a general contractor in

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[17] Some states, such as Georgia, have applied the rule precluding economic loss in tort cases to both product and service cases. ***See Flintkote Co v. Dravo Corp.***, 678 F.2d 942, at 949-50 (11th Cir. 1982). Florida, however, has not adopted this approach.

[18] In ***Nortek, Inc. v. Alexander Grant & Co.***, 532 F.2d 1013 (5th Cir. 1976), ***cert. den.*** 429 U.S. 1042 (1977), the Fifth Circuit noted in its discussion of privity that ***Moyer*** "may be limited to the architect-general contractor situation." 532 F.2d at 1015. Certainly, after this Court's decision in ***First American***, the continued viability and applicability of ***Moyer*** has been extremely limited. ***See infra*** notes 20 and 22.

providing services. Such liability arises, however, only where a "special relationship" exists between the parties.[19/] Florida, to the contrary, has not combined the

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19/ In urging its reasoning, FPL asserts that "the most instructive . . . rejection of the economic loss rule in negligence is that of the California courts." (Brief of Appellant at 38) It then discusses ***J'Aire*** and its progeny. FPL seems to place great stock in the fact that the California courts have arguably modified the views expressed in ***Seely v. White Motor Co.*** The cases cited by FPL do not undermine the status of ***Seely*** in California or elsewhere in a case, like this, involving goods sold pursuant to a contract. ***J'Aire*** was a professional service case and relied upon ***Biakanja v. Irving***, 49 Cal.2d 647, 320 P.2d 16 (1958), another service case. Further, ***J'Aire*** deviated from the ***Seely*** rule only where a "special relationship" between the parties existed. At present there are intermediate appellate decisions in California which permit the recovery of economic loss in service contract negligence cases where such a special relationship exists. ***Pisano v. American Leasing***, 146 Cal.App.3d 194, 194 Cal.Rptr. 77 (1983); ***Huang v. Garner***, 157 Cal.App.3d 404, 203 Cal.Rptr. 800 (1984). (***Alex-Peratis Foods International, Inc. v. American Can Co.***, 164 Cal.App.3d 277, 209 Cal.Rptr. 917 (1985) is totally inapposite since no contract existed between the parties at all in that case and the only possible claim arose in negligence). There are other intermediate appellate cases which continue to follow ***Seely*** in denying such recovery. ***Weber v. Mercedes Benz of North America***, 152 Cal.App.3d 1039, 199 Cal.Rptr. 765 (1984); ***Sacramento Regional Transit Dist. v. Grumman Flexible***, 158 Cal. App.3d 289, 204 Cal.Rptr. 736 (1984). A federal district court in California has noted that "[T]he argument made . . . in support of the continuing vitality of ***Seely*** is entirely acceptable." ***Golden Eagle Distr. Corp. v. Burroughs Corp.***, 103 F.R.D. 124, 129 (N.D. Cal. 1984). ***See also Weber***, 199 Cal.Rptr. at 766. Further in a suit between a utility and WESTINGHOUSE with similar allegations to those in the instant cause, a United States District Court has granted summary judgment to WESTINGHOUSE eliminating economic loss (Footnote continues)

two lines of cases under any circumstances.

This Court's decision in ***First American Title Insurance Co. v. First Title Service,*** 457 So.2d 467 (Fla. 1984) clearly reflects the distinction which exists between product and service cases in Florida. In ***First American,*** the petitioner argued that product liability concepts had been extended to professional service contracts. This Court expressly refused to apply the traditional tort test of foreseeability to professional service liability finding "the attempted analogy to product liability situations unpersuasive." 457 So.2d. at 471.[20] ***First American*** thus makes it clear that Florida courts, unlike a few other courts, do not apply the same rule to professional service contract cases as to products liability cases. The theory represented by ***Monsanto*** coexists in Florida without difficulty with that represented by ***First American.***[21] The pre-

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claims based upon ***Seely. See Southern California Edison Co. v. Westinghouse Electric Corp.,*** Case No. CV-83-1985 CBM (C.D. Cal. 1984).

[20] The court also explained ***Moyer's*** seeming application of product liability principles to service cases as growing from the peculiar relationship between the professionals involved in that case. The contractor was said to possess no ability to protect himself from the consequences of a negligent engineer or architect. FPL, to the contrary, was in a strong bargaining position and thus had the ability to protect itself in the instant contract.

[21] FPL continually refers to the ***First American*** opinion as explaining that the imposition of liability in ***Moyer*** for (Footnote continues)

sent case is clearly a products case of the ***Monsanto*** lineage and, therefore, recovery of economic loss in tort should be precluded.[22/]

Finally, as a matter of public policy, this Court should not permit a party such as FPL to misappropriate theories of negligence in order to evade its contractual bargain. As discussed above, the courts in Florida and

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negligence causing financial loss was derived from the application of products liability tort principles to the negligent provision of professional services. (Brief of Appellant at 26, 27) What FPL relegates to a footnote, however, is that this Court in ***First American*** specifically rejected the plaintiff's effort in that case to have it apply products liability tort principles to the service case before it. (Brief of Appellant at 26 n. 16) In doing so, this Court rejected the very same broad forseeability approach urged by FPL in the present case and, instead, applied principles of third-party beneficiary contracts.

In addition, FPL quotes a passage from the opinion in ***Kovaleski v. Tallahassee Title Co.***, 363 So.2d 1156 (Fla. 1st DCA 1978) **which essentially states the broad forseeability theory adopted in** *Audlane*. **(Brief of Appellant at 23) This Court specifically rejected this theory in** *First American*, **finding this "foreseeability approach . . . inconsistent with our decision here." 457 So.2d at 474. Accordingly, FPL's assertion that** *Kovaleski* **was "modified on other grounds" in** *First American* **(Brief of Appellant at 23) is wrong.**

22/ It is noteworthy that in none of the cases relied upon by FPL, with the possible exception of ***Drexel Properties***, was the economic loss rule raised by the defendants as a defense. Most, in fact, focused solely on the issue of privity. It is quite clear that a defense based on the economic loss rule can be waived if not timely raised by a party. ***See General Dynamics Corp. v. Wright Airlines, Inc.***, 470 So.2d 788 (Fla. 3d DCA 1985). The fact that the issue was never raised explains the (Footnote continues)

elsewhere have repeatedly delineated the limits of a manufacturer's liability under negligence. The duties imposed relate to product safety and not to expectations of product performance. The risk of loss has only been shifted to the manufacturer in cases where the party least able to avoid or accept the consequences of the loss -- the consumer -- has no practical ability to protect himself. The policy of risk allocation is not served when, as here, the risk of loss will fall either on the shoulders of the purchaser or seller, both of whom are sophisticated commercial entities.[23/] There is simply no reason -- public policy or otherwise -- to shift the risk of loss by allowing FPL to pursue damage claims contrary to the terms of the contract. The first certified question should therefore be answered in the negative.

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results in those cases.

23/ Policy choices about the relative roles of contract and tort law as sources of legal obligations were recently analyzed by the New Jersey Supreme Court, which concluded "[a]s among commercial parties in a direct chain of distribution, contract law ... provides the more appropriate system for adjudicating disputes arising from frustrated economic expectations." ***Spring Motors Distributors v. Ford Motor Co.***, 98 N.J. 555, 489 A.2d 660, 673 (N.J. 1985).

II. THE RULE PRECLUDING THE RECOVERY OF ECONOMIC LOSS IN NEGLIGENCE SHOULD BE APPLIED TO THE TRANSACTION BETWEEN FPL AND WESTINGHOUSE.

A. The Retroactivity Issue is not Involved in this Case Because the Economic Loss Rule is not a "New" Principle of Law

The threshold test for determining whether a retroactivity issue is involved in a civil[24/] case (whether or not the decision[25/] should be applied retroactively) is whether the decision is a "clear break" from past principles of law. *See United States v. Johnson*, 457 U.S. 537, 550 n. 12 (1982). Despite FPL's attempt to characterize the economic loss rule as a rule of recent development, the fact is that the rule's underpinnings can be traced back at least to 1842. Accordingly, this court is not confronted with a clear break with past principles of law, and, therefore, the threshold test for nonretroactivity of a decision is not met.

24/ Different tests for determining whether a decision should be applied retroactively are applied in civil and criminal cases. *Compare Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944) (civil) *with Witt v. State*, 387 So.2d 922 (Fla. 1980) (criminal). *See also United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

25/ The retroactivity principle applicable to judicial decisions (generally applied both retrospectively and prospectively) is different from the principle applicable to statutes (generally applied only prospectively). *See Black v. Nesmith*, 475 So.2d 963 (Fla. 1st DCA 1985).

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The history of the economic loss rule can be traced back to the early English case of ***Winterbottom v. Wright***, 152 Eng. Rep. 402 (Ex. 1842) and the enunciation of the privity doctrine. ***See*** Probert, ***Negligence and Economic Damage: The California-Florida Nexus***, 33 U. FLA. L. REV. 485 (Summer 1981). The privity doctrine precluded recovery of economic loss (or damages for personal injury or property damage) outside a contractual setting. Recovery of damages, including economic loss, was controlled by the terms and principles of contracts. Before the formulation of the theory of strict liability in tort, the privity doctrine was eroded and numerous theories were utilized by the courts to compensate consumers for personal injuries or property damage resulting from defective products which were unreasonably dangerous. ***See Royal v. Black & Decker Manufacturing Co.***, 205 So.2d 307 (Fla. 3d DCA 1967) (at one point, twenty-nine theories of recovery were counted; citing Prosser, ***The Assault Upon the Citadel***, 69 YALE L.J. 1099, 1124 (1960)), ***cert. denied***, 211 So.2d 214 (Fla. 1968). ***See also First American*** (discussion of erosion of privity doctrine in tort). At the same time the courts were eroding the privity doctrine to permit recovery for personal injury and property damage, they steadfastly held to the principle that purely economic loss was recoverable only under the

principles of contract law. ***See Seely*** and its progeny. Thus, it is apparent that the economic loss rule, as it is now labeled, is not of recent origin, but rather derives from the age-old privity doctrine and the principle that contract theories are best suited for determining claims for economic loss.

The economic loss rule is grounded in the long standing distinction between torts and contracts. ***See East River Steamship Corp. v. Transamerica Delaval Inc.***, 54 U.S.L.W. 4649, 4653 n.8 (U.S. June 16, 1986) ("the main currents of tort law run in different directions from those of contract and warranty, and the latter [are] far more appropriate for commercial disputes" over economic loss). Standards of safety applied in tort cases involving personal injury or property damage are known to a manufacturer, whereas a particular buyer's economic needs can only be ascertained through some form of bargaining. It has been held that a manufacturer's product should not be held to a level of economic performance unless he covenants that such will be the case and that the terms of the bargain alone should create the manufacturer's required level of performance vis-a-vis the purchaser's economic needs. ***See Seely v. White Motor Co.***, 63 Cal.2d 9, 403 P.2d 145, 151-52 (1965). These well developed principles underlie the court's

observation in ***Spring Motors Distributors, Inc. v. Ford Motor Co.***, 98 N.J. 555, 489 A.2d 660, 672 (1985), that

> tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

See also Moorman Mfg. Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 450 (1982).

The economic loss rule is hardly a "clear break" from past principles of Florida law; rather it is totally consistent with such principles. Accordingly, the economic loss rule should be applied to the transaction between FPL and WESTINGHOUSE, precluding FPL from recovering economic loss in negligence, and leaving FPL to pursue recovery of economic loss through its contractual remedies.

B. Florida Law Supports The Application of the Rule Precluding The Recovery of Economic Loss To The Instant Cause.

Even though unnecessary[26/], an analysis of principles of retroactivity requires the application of the rule confirmed in ***Monsanto, Cedars*** and ***GAF Corp.*** to the instant cause. FPL takes great pains in attempting to apply the

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26/ ***See supra,*** Part II, A.

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criteria of the civil retroactivity rule set forth in ***Chevron Oil Co. v. Huson***, 404 U.S. 97 (1971). ***Chevron***, however, concerned the retroactive application of a federal decision involving federal law. Accordingly, the rule announced there is not controlling in this case which involves a question of purely Florida law. ***See Lamb v. Aktiengesellschaft***, Case No. 82-1692 (CIV) (S.D. Fla. March 25, 1986); ***Eddings v. Volkswagenwerk***, 635 F. Supp. 45 (N.D. Fla. 1986). ***See also International Studio Apartment Association v. Lockwood***, 421 So.2d 1119 (Fla. 4th DCA 1982) (analyzing the case under both the federal and state principles of retroactivity, but clearly recognizing that separate and distinct rules exist) ***cert. denied***, 464 U.S. 895 (1983). Rather, this Court has the sole power to determine whether decisions concerning state law should be prospective or retroactive in application. ***Benyard v. Wainwright***, 322 So.2d 473, 474 (Fla. 1975). Under standards adopted by this Court, the ***Monsanto*** rule precludes FPL from recovering economic loss in this case.

Florida law provides no impediment to a retroactive application of the rule applied in ***Monsanto*** and ***GAF Corp.*** since the preclusion of recovery for economic loss in negligence affects only a remedy. While generally the law in effect at the execution of a contract becomes part of the

contract, a different analysis is required when dealing with remedies. In ***Van Ingen v. Panama City***, 126 Fla. 776, 171 So. 760 (1937), this Court considered the question of whether a statute providing for new remedies in enforcing the payment of delinquent taxes could be applied to bonds issued prior to the passage of the act. In permitting the application of the new statute the Court announced a general rule:

> While it is generally conceded that laws in force affecting its validity at the time the contract is executed enter into its obligation, ***the parties to it have no vested right in the remedies or modes of procedure then existing for its enforcement***, and the legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligations of contracts, provided a substantive or efficacious remedy remains or is provided by which a party can enforce his right under the contract. (Emphasis supplied)

171 So. at 762. Several years later in an ***en banc*** decision this Court carried the analysis further:

> It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations.

Mahood v. Bessemer Properties, Inc., 18 So.2d 775, 779-80 (Fla. 1944). The same approach has continued validity in Florida. ***See Morris v. American Bankers Ins. Co.***, 184 So.2d

906, 907 (Fla. 3d DCA 1966); ***Ruhl v. Perry***, 390 So.2d 353, 355 (Fla. 1980). ***See also El Portal v. City of Miami Shores***, 362 So.2d 275, 278 (Fla. 1978).

The rule adopted in ***Monsanto***, ***GAF Corp.*** and ***Cedars*** merely affects a remedy. These cases hold only that the remedy for the recovery of economic loss must be contractual and not based upon tort. FPL is still entitled to seek the recovery of economic loss on the contract as executed. The district court's decision in this case cannot violate the intentions of FPL, as FPL is presumed to anticipate just the development or change in remedies reflected by ***Monsanto***. ***See Mahood***, 18 So.2d at 779-80. Finally, application of the rule does not affect the balance struck by the contract. In fact, by limiting FPL to contractual remedies for economic loss the lower court fortifies that balance.[27/]

Even if the economic loss rule did not merely affect a remedy, the retroactivity principles applicable to Florida civil cases would still preclude recovery of the economic

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[27/] It is ironic indeed that, even though FPL now inveighs against moving from the contract, the history of its position in this cause reveals a consistent attempt to ignore the contract, ***e.g.***, FPL's attempt to avoid its agreement in the contract to waive implied warranties and consequential damage. ***See supra*** note 8. In one breath, FPL espouses that courts can not vary the terms of the contract, and in the next breath, it attempts to avoid those very same terms.

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loss in the instant case.

> The general rule is that appellate decisions, even those which overrule earlier ones or establish theretofore unrecognized claims for relief, are to be given retrospective as well as prospective effect. [Citations omitted.]

Parkway General Hospital Inc. v. Stern, 400 So.2d 166, 167 (Fla. 3d DCA 1981). This Court, in reiterating a rule of long standing, stated:

> We have held that on appellate review the issues must be resolved in accordance with the case law in effect at the time the appellate decision is rendered. ***Florida East Coast Railway Company v. Rouse*** 194 So.2d 260 (Fla. 1967); ***Clark v. Lowe***, 261 So.2d 567 (Fla. 4th DCA 1972).

Linder v. Combustion Engineering, Inc., 342 So.2d 474, 475-76 (Fla. 1977). Thus, decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since the time of trial. ***Lowe v. Price***, 437 So.2d 142, 144 (Fla. 1983).[28/] In ***Florida Forest & Park Service v. Strickland***, 154 Fla. 472, 18 So.2d 251, 253 (Fla. 1944), this Court set forth the retroactivity principles which are controlling in Florida:

> Ordinarily, a decision of a court of last

28/ This same rule applies where the change in law occurs during the pendency of an action but before final judgment. The appeal of such an action is to be remanded for retrial in accordance with the law as changed. ***See Ingerson v. State Farm Mutual Auto. Ins. Co.*** 272 So.2d 862 (Fla. 3d DCA 1973); ***Ryter v. Brennan***, 291 So.2d 55, 57 (Fla. 1st DCA 1974).

> resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. Generally speaking, therefore, a judicial construction of a statute will ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein. To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. [citations omitted]

In applying these principles over the years, Florida courts have repeatedly given retroactive effect to decisions arguably "adopting" new concepts in tort law. The most pertinent application of retroactivity arises in the cases applying the rule precluding the recovery of economic loss in tort. The contract forming the basis of the litigation in ***Monsanto*** was executed in 1978. The damage occurred during the 1978 growing season and the suit was filed thereafter. The state of the law in Florida regarding the recovery of economic loss at the time of that contract was identical to that at the time of the execution of the contract by FPL and WESTINGHOUSE. In November of 1982, some four years after the contract, the court precluded the recovery by the plaintiff of economic loss.

Likewise in both ***GAF Corp.*** and ***Cedars*** the contracts in dispute were executed prior to the "adoption" of the rule precluding the recovery of economic loss. Nevertheless, the rule was applied to the previously executed contracts. Florida courts have thus applied the rule precluding the recovery of economic loss to contracts executed prior to the "adoption" of the rule.[29/] Furthermore, FPL cites no jurisdiction in the country which has adopted the economic loss rule and not applied it to the case before it (retroactively).

In addition to the principle of law involved in the instant case, Florida courts have applied other newly announced principles retroactively in a variety of circumstances. ***See, e.g., Florida East Coast Ry. Co. v. Rouse,*** 194 So.2d 260 (Fla. 1967) (decision holding railroad comparative negligence statute unconstitutional); ***Clark v. Lowe,*** 261 So.2d 567 (Fla. 4th DCA 1972) (decision determining contributory negligence of minor); ***Hoffman v. Jones,*** 280 So.2d 431 (Fla. 1973) (comparative negligence); ***Ryter v.***

29/ In addition to these cases applying the economic loss rule, this court permitted the recovery of economic loss in a narrowly defined area of professional service contracts in ***First American,*** a case principally relied upon by FPL. In applying "these new principles of Florida law," this Court retroactively applied its decision to permit the action to proceed in that case. 457 So.2d at 473.

Brennan, 291 So.2d 55 (Fla. 1st DCA 1974) (loss of consortium claim by wife); ***Linder v. Combustion Engineering***, 342 So.2d 474 (strict liability); ***Blackburn v. Dorta***, 348 So.2d 287 (Fla. 1977) (elimination of assumption of risk); ***El Portal v. Miami Shores***, 362 So.2d 275 (Fla. 1978) (Uniform Contribution Among Tortfeasors Act); ***Parkway Gen'l. Hosp. Inc. v. Stern***, 400 So.2d 166, (liability of wife for husband's debts); ***Pullum v. Cincinnati, Inc.***, 476 So.2d 657 (Fla. 1985) (finding statute of repose in products liability cases constitutional, overruling previous decision), ***dismissed***, 54 U.S.L.W. 3696 (U.S. April 21, 1986) (lack of substantial federal question).

Under the principles announced in ***Florida Forest***, in order for FPL to avoid application of the economic loss rule in this case, it must demonstrate that such would (1) destroy property or contract rights that (2) it acquired pursuant to previous decisions of this Court which are being overruled in this case. FPL must fail on both counts. First, this Court has never held that a plaintiff can recover purely economic loss in a products case under tort theories. In fact, prior to the execution of the contract in the present case, this Court had not permitted such recovery in any case (product or service). The most FPL can claim is that this Court had not had the opportunity to

consider the issue. Accordingly, there were no decisions of this Court under which FPL could have acquired any type of property or contract rights, or upon which FPL could have relied in negotiating the contract with WESTINGHOUSE.

In addition, FPL has no property or contract rights which will be destroyed by an application of the economic loss rule in this case. The rights referred to in the retroactivity rule must be substantive, vested rights. A substantive, vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment. ***City of Sanford v. McClelland***, 121 Fla. 253, 163 So. 513, 514-15 (1935); ***In re Will of Martell***, 457 So.2d 1064, 1067 (Fla. 2d DCA 1984); ***Division of Workers' Compensation v. Brevda***, 420 So.2d 887, 891 (Fla. 1st DCA 1982). "To be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law," and, certainly, must be more than an expectation based on anticipation of the development of a particular area of law; "it must have become a title, legal or equitable, to the present or future enforcement of a demand." ***Martell***, 457 So.2d at 1067; ***Brevda***, 420 So.2d at 891. "The mere prospect that plaintiff might recover damages from a defendant on a tort theory is clearly not tantamount to a vested right." ***Lamb v. Aktiengesellschaft***, No. 82-1692 (CIV) (S.D. Fla. March

25, 1986). *See Van Ingen,* 171 So. at 762 (parties to a contract have no vested right in the remedies or modes of procedure for enforcement of the contract which may exist at the time the contract is executed). Accordingly, it is clear that FPL has no vested property or contract right that will be destroyed by applying the economic loss rule in this case. In fact, FPL will remain free to pursue its contractual rights.[30] Florida law does not require more.

C. The *Chevron v. Huson* Analysis Relied Upon By FPL Supports The Application of The Rule Precluding The Recovery of Economic Loss To The Instant Case.

In its brief, FPL urges the prospective application of the *Monsanto* rule by relying upon the test enunciated in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).[31] FPL's

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[30] *See supra* notes 8 and 27.

[31] The application of that test to the instant cause is questionable. *Chevron,* as well as virtually all of the cases relied upon in this argument by FPL, deal with rights created by legislative enactments which were subsequently modified. *See, e.g. Lemon v. Kurtzman,* 403 U.S. 602 (1971) (compensation by state of sectarian schools); *International Studio Apartment Ass'n, Inc. v. Lockwood,* 421 So.2d 1119 (Fla. 4th DCA 1982), *cert. den.* 464 U.S. 895 (1983) (payment of rent into court registry); *Safarik v. Udall,* 304 F.2d 944 (D.C. Cir. 1962) (agency ruling regarding land leases); *Parker v. Port Huron Hosp.,* 361 Mich. 1, 105 N.W.2d 1 (1960) (charitable immunity). To the contrary, the instant cause deals with a modification of one of several remedies available to a litigant.

attempt to apply the ***Chevron*** test to this case, however, is unavailing. Despite the fact that ***Chevron*** is not controlling, even under the test espoused therein, the economic loss rule should be applied in this case.

In ***Chevron***, the Court listed three factors to consider in making a determination as to retroactivity: (1) whether the decision established a new principle of law; (2) whether retroactive application would further or retard the operation of the new law; and (3) whether retroactive application would produce substantial inequitable results. 404 U.S. at 106-07. All three prongs must be met before nonretroactive application is mandated. ***International Studio Apartment Association v. Lockwood***, 421 So.2d at 1121. FPL's position must fail, however, because not even one of the prongs is met in the present case.

The first prong of the ***Chevron*** test requires that the case in question establish new law by either overruling past precedent or deciding an issue of first impression, and that the plaintiff demonstrate reliance on the old rule. 404 U.S. at 107-08. FPL argues that it relied upon pre-***Seely*** law that allegedly permitted the recovery of economic loss in negligence. FPL, however, can cite no authority which permitted such recovery in Florida. Further, it is difficult at best to imagine that in the face of the intense

negotiations over two years between FPL and WESTINGHOUSE (as well as three other vendors) FPL purposefully omitted any protection for which it could have bargained. FPL's argument that it "relied" upon tort remedies while negotiating a complex and fully integrated contract therefore lacks merit.

Further, FPL's argument that the preclusion of economic loss in negligence could not have been anticipated in November of 1965 (date of contract) is not an accurate description of the state of the law at that time. Not only had ***Seely*** expressly included negligence claims in its description of the rule, but other courts had adopted a similar rule. ***See, e.g., Amodeo v. Autocraft Hudson, Inc.***, 195 N.Y.S.2d 711 (Misc. 1959), ***aff'd***, 12 A.D.2d 499, 207 N.Y.S.2d 101 (N.Y. App. 1960); ***Karl's Shoe Stores, Ltd. v. United Shoe Mach. Corp.***, 145 F.Supp. 376 (D. Mass. 1956) ("No case has been found in which a manufacturer has been held liable where no personal injury or physical injury to property was involved."); ***Donovan Constr. Co. v General Electric Co.*** 133 F. Supp. 870 (D. Minn. 1955); ***A.J.P. Contracting Corp. v. Brooklyn Builders Supply Co.***, 283 N.Y. 692, 28 N.E.2d 412 (1940); ***Creedon v. Automatic Voting Machine Corp.*** 243 App. A.D. 339, 276 N.Y.S. 609 (1935).

More significantly, the Supreme Court of Ohio had

decided ***Inglis v. American Motors Corp.***, 3 Ohio St.2d 132, 209 N.E.2d 583 (1965), prior to the execution of the instant contract. That court not only clearly adopted the rule of ***Seely*** in a negligence case, it also provided an extensive analysis of the rationale for the rule. Most importantly, it quotes extensively from an article by Dean Prosser which discusses the question of the recovery of economic loss in negligence. In describing what damage is recoverable in negligence, ***Prosser*** wrote:

> The one kind of damage not included is pecuniary loss. In other words, loss of the benefit of the bargain.

Cleveland Bar A.J., Journal, at 174-75 (May 1965).

Thus, for at least thirty years prior to the execution of the contract there was explicit authority precluding the recovery of the damages sought by FPL.[32/] Five months prior to the execution, Prosser referred to that authority as applying the "usual rule." ***Id.*** FPL's suggestion that it had no ability to foresee the advance of the ***Seely*** rule is merely an indictment of its awareness of the state of the law when it negotiated the contract. Clearly any reliance by FPL based upon a perception of the law permitting the recovery of economic loss in negligence was misplaced. The

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32/ ***See also supra*** Part II.A. of this brief.

economic loss rule, as applied by the district court in this case, represents the culmination of more than fifty years of consistent development of the majority rule. It certainly is not a new principle of law as required by the ***Chevron*** test.

The second prong of the ***Chevron*** test requires the court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." 404 U.S. at 106-07. FPL argues that this prong militates in favor of a prospective application because, as FPL claims, in light of the post-***Seely*** California cases, there is no rule regarding economic loss in negligence. (Brief of Appellant at 53) This argument hardly merits comment. Suffice it to say that the economic loss rule has not only been adopted and applied in three Florida intermediate appellant decision, but also represents a remarkably consistent jurisprudence in dozens of state jurisdictions and at least nine federal circuits, and, most recently, has been adopted by a unanimous decision of the United States Supreme Court.[33/]

33/ FPL's accusation that courts adopting the rule precluding the recovery of economic loss in negligence cases have engaged in "the gratuitous, unthinking importation of strict liability concepts into the law of (Footnote continues)

Since FPL misconstrues the purpose of and policy behind the rule, the remainder of its argument emanates from a faulty premise. The economic loss rule represents a policy decision by the courts that recovery of purely economic loss should be controlled by principles of contract, pursuant to which parties can bargain for warranties and expected levels of a product's economic performance vis-a-vis the purchaser's economic needs.[34/] To hold that the rule is applicable only to transactions and contracts entered after a certain date would be nonsensical and would undermine the very policy behind the rule. It would permit parties (such as FPL) who entered contracts before the date certain, whose contracts specifically provided for economic loss liability, to avoid the terms of the contracts by pursuing negligence actions and, thereby, obtain more than they bargained for, while it would limit those who entered identical contracts after said date to the bargain they made. No court in the nation has countenanced such an irrational result which would apply a decidedly bad policy to transactions occurring before its decision and a recognized better policy only to transactions occurring after the decision. Certainly, there

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negligence" (Brief of Appellant at 10) now apparently applies to the United States Supreme Court.

34/ ***See supra*** discussion and cases cited in Part I.A.

is no sound basis for such a result. Accordingly, the second prong of the ***Chevron*** test also militates in favor of retroactive application in the present case.

The third and final prong of the ***Chevron*** test requires a balancing of the equities involved so as to avoid "injustice or hardship." 404 U.S. at 107. Certainly, no injustice or hardship is imposed by requiring a corporate entity such as FPL to comply with and be limited by the terms of the bargain it made. FPL engages in Orwellian "doublespeak" in its persistence that this Court not disrupt its settled transaction or the terms of the contract it negotiated, while at the same time urging that it is not bound by the terms of the very same contract.[35/] FPL and WESTINGHOUSE engaged in extensive negotiations leading to the contract involved in this case. The contract contains specific provisions limiting WESTINGHOUSE's liability for the type of damages FPL now seeks (economic loss). These provisions were obviously a factor in the price FPL was able to obtain from WESTINGHOUSE for the products involved. Certainly, the equities favor holding FPL to the bargain it made and not allowing FPL to avoid the terms of the contract by pursuing a negligence action. By application of the economic loss

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[35/] ***See supra*** notes 8 and 27.

rule to this case, FPL is not precluded from pursuing its just, legal and equitable remedies under the counts based on contract theories which are still pending before the federal district court. The equities, therefore, favor a retroactive application of the economic loss rule in this case.

As previously stated, FPL must prevail on all three prongs of the ***Chevron*** test to avoid retroactive application. ***International Studio.*** As demonstrated, however, all three prongs favor retroactive application of the economic loss rule in this case. Accordingly, even under the ***Chevron*** test, FPL is precluded from recovering economic loss in negligence. Accordingly, the second certified question should be answered in the affirmative.

CONCLUSION

Based on the foregoing, WESTINGHOUSE respectfully requests that this Court answer the first certified question in the negative and the second certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT/APPELLEE, WESTINGHOUSE ELECTRIC CORPORATION, has been furnished by hand delivery this 4th day of August, 1986, to ALVIN DAVIS, ESQUIRE, Steel, Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131-2398.

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