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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,~~382~~ 282

CV REIT, INC., a Delaware corporation f/k/a CENVILL INVESTORS, INC.; and H. IRWIN LEVY,

Petitioners,

vs.

TGI DEVELOPMENT, INC.,

Respondent.

ON CERTIFIED CONFLICT FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY, P.A.
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-and-
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I.
STATEMENT OF THE CASE AND FACTS

We are unable to accept the petitioners' statement of the case and facts, for the following reasons: it contains a great deal of material which is extraneous to the narrow issue before the Court; it omits much that is relevant to the issue; some of it is simply inaccurate; and because it is designed to support an argument (the petitioners' "intertwined and inextricable facts" argument) which has no support whatsoever in the decisional law, it is lacking in clarity. In an effort to refocus the Court on the narrow issue before it, we must restate the case and facts in full, as they were stated for the district court.

By way of an introductory nutshell (without record references, which will follow when the details of the introduction are supplied), the respondent, TGI Development, Inc., was the plaintiff below in an action against the petitioners, defendants below, CV Reit, Inc. and H. Irwin Levy. The plaintiff alleged that Mr. Levy (during the course and scope of his employment with CV Reit) made fraudulent misrepresentations to it which induced it to do two separate things: (1) to exercise an option to purchase real estate contained in a contract between it and a third party, for the indirect but ultimate benefit of CV Reit; and (2) to borrow money from CV Reit to construct improvements on the purchased property, and to mortgage the property to secure the debt. The plaintiff also alleged that the defendants' fraud ultimately caused it considerable economic damage.

Notwithstanding that the alleged fraudulent misrepresentations occurred *before* any contractual relationship was ever established with CV Reit, that they were designed in part to induce the plaintiff to enter into a contractual relationship with CV Reit, that they were no part of the promises to perform made by CV Reit in the loan contract, and that they were therefore entirely separate and independent of any later act which might have amounted to a breach by CV Reit of the loan contract -- and notwithstanding that the

plaintiff had no contract at all with Mr. Levy -- the trial court ruled that Florida's so-called "economic loss rule" completely barred the plaintiff's fraud action, and it entered a summary final judgment in favor of both defendants. The plaintiff appealed this ruling to the District Court of Appeal, Fourth District, contending that it was legally erroneous. The single issue on appeal presented to the district court arose from the following procedural and factual background.

The plaintiff's second amended complaint (R. 256-303) named three defendants: Cenvill Investors, Inc.; H. Irwin Levy; and Boca Grove, Ltd., through its general partner, La Bonte Diversified Development, Inc. The single count in the complaint directed at Boca Grove was voluntarily dismissed during the course of the litigation, however, so the Court need not concern itself with that aspect of the complaint (R. 796). In addition, Cenvill changed its name during the course of the litigation to CV Reit, Inc., so the Court may consider that all references to Cenvill in the complaint are references to the petitioner here, CV Reit, Inc.[1/] And with those brief housekeeping details behind us, we set out verbatim the factual allegations of the second amended complaint:[2/]

ALLEGATIONS COMMON TO ALL COUNTS

> 1. TGI, formerly known as Tridel Development, Inc., is a Florida corporation with its principal place of business in Palm Beach County, Florida.

[1/] The "Notice of Name Change" which Cenvill filed in the action on August 1, 1990, was apparently omitted by the Clerk from the record on appeal, since it does not appear in the index. The defendants conceded the name change, however, and because all subsequent documents filed by the parties reflected the name change in any event, there was no need to supplement the record below with this document.

[2/] The defendants have set out these factual allegations verbatim in their initial brief, so the quotation which follows is duplicative. Nevertheless, because we intend to refer to some of these allegations by paragraph number as we proceed, we have duplicated the allegations for ease of internal reference by the Court.

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2. CENVILL is a foreign corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of Florida with its principal place of business in Palm Beach County, Florida.

3. LEVY is an individual residing in Palm Beach County, Florida, who at all times material hereto was and is an officer and director of CENVILL.

4. All acts and omissions of LEVY complained of herein were within the course and scope of his agency relationship with CENVILL, were carried out by LEVY with the intent of furthering the interests of CENVILL, were either authorized in advance or subsequently ratified by CENVILL and were otherwise conducted under such circumstances as to render CENVILL either directly or vicariously liable for the acts and omissions of LEVY.

5. BOCA GROVE, LTD. (hereinafter BOCA GROVE) is a Florida limited partnership of which LaBonte Diversified Development, Inc. (hereinafter LDD) is the sole general partner. BOCA GROVE was the developer of a project known as Boca Grove Plantation.

6. Boca Grove Plantation (hereinafter Plantation) is a real estate development project conceived as an exclusive, luxury residential golf and country club community including both single family and multi-family residential units.

7. Beginning in approximately 1982, CENVILL acquired a substantial financial interest in Plantation in the amount of approximately $7,000,000.00, as a joint venture investor in Plantation with BOCA GROVE, LTD. and/or as mortgage creditor of BOCA GROVE secured by an interest in Plantation. The joint venture between CENVILL and BOCA GROVE arose out of an oral agreement between them to engage in the development of Boca Grove Plantation as an exclusive luxury residential golf and country club community. Both joint venturers contributed financing, management direction, property, labor, experience, skill, time, or a combination thereof with the objective of generating a profit to be shared between them without any actual partnership or corporate designation.

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8. As an inducement to BOCA GROVE to establish the aforedescribed business relationship with CENVILL, LEVY represented that CENVILL, as a knowledgeable and sophisticated developer, would take such action as necessary in the interests of BOCA GROVE to assure the financial success of Plantation.

9. Shortly after the initiation of the relationship between CENVILL and BOCA GROVE, BOCA GROVE recognized that market conditions were such that the cash flow demands of the transaction between CENVILL and BOCA GROVE as structured in the written agreements between them would ensure the failure of Plantation. Those facts were communicated to LEVY and CENVILL by BOCA GROVE on various occasions and in various forms from time to time beginning during 1983.

10. During 1983 and on numerous occasions thereafter, LEVY and CENVILL continued to promise BOCA GROVE that CENVILL would fulfill its earlier promises to assure the financial success of Plantation.

11. Contrary to the express representations of LEVY and CENVILL, CENVILL (acting through LEVY and others) had formulated a scheme to acquire complete control of Plantation at minimal cost to CENVILL and at the expense of BOCA GROVE and other Plantation investors.

12. In furtherance of this scheme, CENVILL acquired the first mortgage on Plantation in October, 1983, thereby increasing its investment from 7 to 22 million dollars.

13. Responding to the continuing and increasingly serious financial problems of Plantation and in furtherance of the ultimate objectives of its scheme, CENVILL modified its written agreements with BOCA GROVE in 1985 and again in 1986. The modification expanded CENVILL's control over Plantation and perpetuated Plantation's financial distress.

14. Prior to 1987, CENVILL acquired the right to approve each and every one of BOCA GROVE's expenditures and thereafter managed BOCA GROVE's cash receipts and disbursements, payroll, operations and personnel including the

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hiring and firing of senior management. CENVILL thereby had direct control over all marketing and development efforts relating to Plantation and first-hand knowledge of the financial condition of the project.

15. During approximately June, 1985, Plaintiff, TGI, became interested in a real estate purchase within Plantation. While contemplating the purchase, TGI was contacted by LEVY who communicated to TGI that he, LEVY, was the operating principal of CENVILL, which in turn was a major investor in Plantation. LEVY further communicated to TGI through words and actions that he, on behalf of CENVILL, controlled the marketing and development decisions of BOCA GROVE as they related to Plantation.

16. In reliance upon CENVILL and LEVY's commitment to and involvement in Plantation, TGI entered into a Purchase and Sale Agreement with BOCA GROVE on February 28, 1986, which contract included an option granted to TGI for additional real estate purchases. Said agreement is attached as Exhibit A.

17. The transaction between TGI and BOCA GROVE required TGI to enter into an Exclusive Agency Brokerage and Marketing Program Agreement (attached as Exhibit B). Said Agreement was subsequently amended on August 7, 1987 (Exhibit C) and January 18, 1988 (Exhibit D).

18. Prior to March, 1987, BOCA GROVE approached TGI with a request that TGI accelerate the purchase of the optioned Plantation property.

19. The health of the project generally and the economic well-being of BOCA GROVE were considered by TGI to be essential to the success of any development plans of TGI within Plantation and were, therefore, primary considerations in TGI's decision as to whether to exercise its option to purchase.

20. Accordingly, TGI met with IRWIN LEVY on several occasions during the period from March through July, 1987, for the express purpose of investigating the financial health of Plantation and BOCA GROVE.

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21. LEVY unequivocally stated to TGI that CENVILL had a major investment in Plantation and a strong personal commitment to the principals in BOCA GROVE such that CENVILL would never foreclose its mortgage interest in the project, but would instead utilize its own assets to assure the continued viability of BOCA GROVE.

22. LEVY further stated that a substantial portion of the proceeds of the sale from BOCA GROVE to TGI would be set aside to assure continuation of a quality marketing program for Plantation.

23. LEVY further stated that the financial obligations between BOCA GROVE and CENVILL had been met in a timely fashion and were in good standing to date.

24. The aforedescribed statements were made by LEVY for the purpose of inducing TGI's reliance and with knowledge that TGI would and did, in fact, rely upon the statements in deciding to purchase the additional optioned Plantation land.

25. The statements when made were false and were known by LEVY to be false in the following material respects:

a. At the same time LEVY was assuring TGI that CENVILL would never foreclose on BOCA GROVE, LEVY knew that CENVILL was contemplating foreclosure proceedings.

b. CENVILL had no intent to protect the viability of BOCA GROVE, but intended instead to take over Plantation from BOCA GROVE at the cheapest possible price and without regard to the impact of such takeover of BOCA GROVE on any other developer involved in Plantation.

c. CENVILL never had an intent to set aside any proceeds of the sale from BOCA GROVE to TGI for marketing and, in fact, never did make any effort to have any funds set aside. Instead, said funds were intended to be used and were used to reduce BOCA GROVE's indebtedness to CENVILL.

d. BOCA GROVE was repeatedly delinquent in

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meeting its financial obligations to CENVILL and was subject to foreclosure at the very time that CENVILL was assuring TGI of BOCA GROVE's good standing.

26. The false and fraudulent statements of LEVY were made with the malicious intent to deceive TGI and they did, in fact, deceive TGI.

27. As a further inducement for TGI to enter into a purchase of additional Plantation land, CENVILL volunteered to loan $800,000.00 to TGI to finance the construction of improvements to the land, requiring TGI to secure repayment of the loan with a mortgage on the land from TGI to CENVILL.

28. In reliance upon the false and fraudulent statements of CENVILL acting through LEVY, TGI entered into a Purchase and Sale Agreement with BOCA GROVE on July 31, 1987 (Exhibit E) and borrowed $800,000.00 from CENVILL. But for the false and fraudulent statements, TGI would not have engaged in either transaction.

29. The purchase was closed on August 7, 1987, with TGI paying $4,000,000.00 to BOCA GROVE which in turn transferred all or substantially all of said funds to the use or benefit of CENVILL. No money was set aside for marketing.

30. By February, 1988, in accordance with the CENVILL scheme to take control of Plantation, all marketing efforts with respect to the project ceased.

31. Subsequently, CENVILL discontinued its financial support of Plantation causing the clubhouse facility to be closed to members and further causing a discontinuance of golf course maintenance and services. Eventually, the project was placed under the control of a receiver.

32. As a direct and proximate consequence of the aforedescribed acts and omissions of LEVY and CENVILL, TGI lost the value of its investment in Plantation, the sums spent in the development of its Plantation holdings, and all profits which would otherwise have been derived from the development of its Plantation holdings, which sums are in an amount substantially in excess of Five Million Dollars.

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Following these allegations, five causes of action were alleged against the defendants in separate counts. However, Counts II, IV, and V were later voluntarily dismissed (R. 384, 796), leaving only the following two counts extant:

COUNT I -- COMMON LAW FRAUD

> The Allegations Common To All Counts are incorporated as if each were fully set out herein and Plaintiff further alleges:
>
> 33. The aforedescribed actions of the Defendants constitute the commission of a fraud upon the Plaintiff which fraud proximately caused injury to the Plaintiff.
>
> WHEREFORE, Plaintiff demands judgment against the Defendants, CENVILL and LEVY, for compensatory damages in an amount in excess of Five Million Dollars ($5,000,000.00) plus interest, punitive damages, costs and such further relief as this Court deems just and proper. Plaintiff further demands trial by jury.
>
> . . . .

COUNT III -- BREACH OF CONTRACT

> The Allegations Common To All Counts are incorporated as if each were fully set out herein and Plaintiff further alleges:
>
> 46. This is an action for damages in excess of Five Thousand ($5,000.00) Dollars.
>
> 47. The loan agreement between Plaintiff and Cenvill referenced in Paragraph 27 and 28, by implied covenant, requires the exercise of good faith and fair dealing on the part of all parties concerned. Plaintiff is not currently in possession of a copy of the agreement but believes the Defendant, Cenvill, to have it.
>
> 48. The duty of good faith and fair dealing requires that such party cooperate in such a manner so as not to prevent the other party from enjoying the benefit of their bargain and further requires that one party not preclude or interfere with

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performance by the other.

> 49. Defendant, CENVILL, has breached the implied covenants of good faith and fair dealing by engaging in the fraudulent and unreasonable activities more particularly alleged throughout this Complaint including particularly those activities described in Paragraphs 29, 30 and 31; that is, failing to set aside money for marketing; terminating all marketing efforts; terminating financial support of Plantation; causing or permitting the clubhouse facility to be closed to members; discontinuing golf course maintenance and services; and causing or permitting the project to be placed in the hands of a receiver.
>
> 50. As a direct and proximate result of CENVILL'S breach, Plaintiff has been damaged.
>
> WHEREFORE, Plaintiff demands judgment against Defendant, CENVILL, for damages in excess of Five Thousand ($5,000.00) Dollars, plus interest, costs and such further relief as this Court deems just and proper. Plaintiff further demands trial by jury.

The defendants answered, generally denying liability (R. 328-37, 920-21). CV Reit also counterclaimed on the $800,000.00 promissory note, seeking a money judgment against TGI for its failure to pay the note when due (R. 338-39, 344-47, 915-19). The plaintiff answered the counterclaim, generally denying liability, and incorporating the factual allegations of its second amended complaint as affirmative defenses to enforcement of the note (R. 350-51, 926-27). Following extensive discovery and some procedural skirmishing not pertinent here, the defendants moved for summary judgment on the fraud count, specifying the following ground (among others) for the motion:

> 1. Partial summary judgment should be entered in favor of Defendants against Plaintiff on their fraud count because, as testified by Frank Zappala during his deposition, the facts which give rise to the breach of contract also form the basis for the fraud count. The fraud count was therefore an impermissible attempt to convert a breach of contract into a

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> tort and cannot stand. Furthermore, Frank Zappala testified that the damages were the same for both causes [of] action, again negating the ability to bring a cause of action in tort. The economic loss rule therefore precludes recovery based upon a tort.

(R. 1144-45).

A lengthy hearing was conducted on this motion in January, 1994, before the Honorable Ronald V. Alvarez (SR. T2:1-67).[3/] At the commencement of the hearing, defendants' counsel withdrew all grounds in the motion for summary judgment save the single ground quoted above (*id.* 4-9). He also specified that the "facts" upon which he intended to rely were limited to three sources: (1) the factual allegations of the plaintiff's second amended complaint, which the defendants would accept as true for purposes of the motion; (2) a single sentence in the deposition of the plaintiff's principal, Frank Zappala, in which he said, "Truthfully, same set of facts, both counts are based -- I'm not a lawyer, I don't understand these things, but try as I might, I've got to admit that they are all based on the same set of facts"; and (3) several answers to interrogatories, in which the plaintiff had stated that, with some exceptions, the damages sought under both the fraud count and the breach of contract count were essentially the same (*id.* 11-20, 62).[4/] Defendants' counsel then conceded that Florida's so-called "economic loss rule" did not bar claims for fraud in the inducement, but he argued that the plaintiff had

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[3/] A similar motion had been filed, heard, and denied in November, 1992, by the Honorable Edward Rodgers. Transcripts of both hearings were filed with the district court as attachments to an "Agreed Motion to Supplement Record on Appeal." References to the transcript of the November, 1992, hearing will be identified by the symbol "SR. T1:(page no.)"; references to the transcript of the January, 1994, hearing will be identified by the symbol "SR. T2:(page no.)."

[4/] It would appear from the index to the record on appeal that these answers to interrogatories were never filed below. There is no need for supplementation of the record, however, because we concede the accuracy of counsel's representation.

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alleged only fraud, rather than fraud in the inducement, and that the "rule" therefore barred the action (*id.* 20-25).[5/]

In response, plaintiff's counsel argued (in essence) (1) that Mr. Levy's misrepresentations were made *before* any contract was entered into with CV Reit; (2) that the misrepresentations were made for the purpose of *inducing* the plaintiff (a) to exercise a contractual option contained in a contract with a third party, for the defendants' indirect but ultimate benefit, and (b) to enter into a contract with CV Reit to borrow money from it; (3) that the fraud count, considered in light of the facts alleged, was therefore a count for fraudulent inducement; (4) that the pre-contractual misrepresentations were separate and independent of the *different* acts of CV Reit which had been alleged as subsequent breaches of the loan agreement; (5) that, in any event, the breach of contract count actually amounted to little more than an anticipatory defense to the counterclaim on the promissory note which the defendants ultimately filed; (6) that the plaintiff might actually be unable to recover the damages caused by the pre-contractual misrepresentations under its breach of contract count, notwithstanding that it was claiming essentially the same damages under both counts; (7) that both counts could be maintained in any event provided simply that there was no double recovery of any element of damage claimed

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[5/] Frankly, we do not understand this argument at all. Certainly the general includes its specifics. Moreover, substance controls over form where the administration of justice is concerned, and where the facts incorporated by reference into Count I demonstrated a fraud in the inducement, merely labelling the count as a count for "Common Law Fraud" could not even be challenged as misleading. Moreover still, the facts alleged in the plaintiff's complaint prove both a fraud and a fraud in the inducement -- a fraud to the extent that the plaintiff was induced to exercise its option with a third party (which may or may not amount to a classic "fraud in the inducement," a semantic point which we deem unnecessary to resolve because it is substantively unimportant), and fraud in the inducement of the plaintiff's contract with CV Reit. In any event, counsel's argument was so obviously semantic that we will address it only in this footnote, and ignore it in the substantive argument which follows.

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under the two counts; and (8) that the fact "that this may not be the best pled case in the world" was certainly no reason to enter judgment in the defendants' favor on the fraud count as a matter of law (SR. T2:25-50).

In reply, defendants' counsel conceded once again that claims for fraudulent inducement were not barred by the "economic loss rule," but he argued that the rule applied as a bar whenever "the facts of the purported, whether you want to call it fraud or fraud in the inducement, are interwoven in the contractual situation" -- and he insisted that, because the plaintiff had chosen to base both counts on the "same set of facts" in its second amended complaint, the plaintiff was stuck with the bar of the "economic loss rule" (SR. T2:56-62). In a rather telling admission, defendants' counsel then conceded, in effect, that the defendants were not entitled to a summary judgment because the law required it, but simply because the plaintiff had pled its breach of contract action poorly:

> Now I will be the first to admit that if I were the plaintiff and I could do this all over again, maybe I'd just carve out this loan transaction and put it in back of the complaint and talk about the $800,000 and that would be the end, and [I] wouldn't be there [here?] then. But that's not what they have done.

(*Id.* 62).

After the hearing, the trial court entered an order granting the defendants' motion, ruling that the fraud count was barred by the "economic loss rule" (R. 3872-73). The defendants then moved for the entry of a final judgment on Count I of the second amended complaint (R. 3877-78). The trial court obliged by entering a so-called "Final Judgment as to Count I" (R. 3894-95). Because Count III and the counterclaim remained pending, this interlocutory order was not immediately appealable (or, if appealable, its appeal could be delayed until disposition of the remaining claims, pursuant to Rule 9.110(k), Fla. R. App. P.), so the plaintiff entered into a stipulation with the defendants

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disposing of the remaining claims (R. 3900-03).

In that stipulation, the plaintiff agreed to dismiss Count III (the breach of contract action) voluntarily, with prejudice, and it agreed to the entry of a judgment in CV Reit's favor on its counterclaim, in the amount of $1,149,500.54. (The parties also stipulated to several additional matters concerning the consequences of the agreement -- matters which are not really pertinent here.)[6/] Based upon this stipulation, the defendants moved for the entry of a judgment on CV Reit's counterclaim, and for the dismissal with prejudice of Count III of the second amended complaint (R. 3897-3909). The trial court obliged by entering the requested orders (R. 3910-11, 3912-13), and a timely appeal of the two orders followed (R. 3914-20).

The district court reversed the judgment on the fraud claim, holding that "[f]raud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule." *TGI Development, Inc. v. CV Reit, Inc.*, 665 So.2d 366, 366 (Fla. 4th DCA 1996). On that point, a conflict with *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (en banc), was certified. And, although the district court held that the plaintiff's claim for fraud in the inducement was sufficiently pled, it authorized the plaintiff to clarify its allegations on remand if it wished. The defendants thereafter invoked this Court's discretionary review jurisdiction.

[6/] Although the stipulation has no real pertinence to the issues presented for review, the defendants have quoted a sentence from it in their statement of the case and facts, to support an assertion that "the absence of a contract remedy is not to be considered in any way" here (petitioners' brief, p. 18). Frankly, we do not understand the purpose of the assertion (and it is not developed in the petitioners' argument in any meaningful way), but we do know that petitioners' counsel relied on this sentence below to accuse us of an impropriety; and because it is possible that the sentence will be utilized to support a similar charge in the petitioners' reply brief, we feel we must clarify the point briefly to protect against that eventuality. To digress here for that purpose would be both confusing and distracting, however, so we will reserve our clarification of the point to the end of our argument on the merits of the principal issue.

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II.
ISSUES PRESENTED FOR REVIEW

The defendants have presented two issues for review. They are constructed upon false predicates and stated in highly argumentative fashion, however, so they are unacceptable to us. We will therefore restate the issues neutrally.

The principal issue before the Court, which arises from the certified conflict by which the Court acquired jurisdiction, is this:

> A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT "FRAUD IN THE INDUCEMENT, EVEN WHEN ONLY ECONOMIC LOSSES ARE SOUGHT TO BE RECOVERED, IS THE KIND OF INDEPENDENT TORT THAT IS NOT BARRED BY THE ECONOMIC LOSS RULE."

The defendants have presented a second issue which has nothing to do with the certified conflict, and the consideration of which is therefore a matter of grace:

> B. WHETHER THE DISTRICT COURT ERRED IN "ALLOW[ING] TGI, IF IT BE SO ADVISED, TO RE-PLEAD ITS FRAUDULENT INDUCEMENT CLAIM IN AN AMENDED PLEADING" AFTER REMAND.

III.
SUMMARY OF THE ARGUMENT

A. For their first issue, the defendants contend that the district court erred in holding that fraud in the inducement is an independent tort not barred by the "economic loss rule." We will disagree. Initially, we will present an updated version of the straightforward arguments which we initially presented in the district court. There will be four of them. First, we will distinguish between cases in which the act alleged to be fraudulent is an act which also constitutes a breach of the contract, and cases where the act alleged to be fraudulent *precedes* formation of the contract and is designed to induce formation of the contract. We will demonstrate that the "economic loss rule" is

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applicable only in the first type of cases -- that, in the latter type of cases, the law is thoroughly settled that fraud in the inducement of a contract is an independent tort which is plainly *not* barred by the "economic loss rule." Second, we will demonstrate that the fact that an initial fraud committed in the inducement of a contract and a subsequent breach of that contract may give rise to two claims for essentially the same set of damages does not require imposition of the "economic loss rule" as a bar to the fraud action; instead, both actions can be pursued simultaneously, and the defendant is protected from a "double recovery" by the settled rule that, where two causes of action for the same set of damages can be maintained, the damages can be recovered only once.

Third, we will argue that even if the "economic loss rule" were somehow implicated by the fact that the plaintiff was asserting a mere *claim* for the same damages in both counts, the summary final judgment was nevertheless premature because it might ultimately be concluded in the litigation that the plaintiff had no claim at all for damages in its breach of contract action -- that is, we will argue that summary judgment could not properly be bottomed upon mere inartful pleading alone. Finally, we will demonstrate that, because Mr. Levy was not a party to any contract with the plaintiff, the "economic loss rule" was plainly no bar to the plaintiff's fraud action against him.

Following these arguments, we will address the defendants' principal contention -- that a variant of the "economic loss rule" exists where the facts of the fraud claim and breach of contract claim are "interwoven," "intertwined," and "inextricable." First, we will demonstrate that the facts of the two claims alleged by the plaintiff are temporally independent, and therefore not "interwoven" in any relevant way. Next, we will demonstrate that, even if the facts underlying the two claims were the same, that would not automatically implicate the "economic loss rule" -- that the variant of the "rule" which the defendants are attempting to sell here simply does not exist. Instead, the three words

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which the defendants have extracted from some of the early decisional law on the subject, read in context, are simply another way of saying what we have maintained all along -- that, where the act alleged to be fraudulent is an act which also constitutes a breach of the contract (and the facts, according to the infelicitous words upon which the defendants have seized, are therefore "interwoven" etc.), the "economic loss rule" remits the plaintiff to a breach of contract action and bars the fraud action. However, nothing in that rule "bars even fraudulent inducement claims," as the defendants contend -- and the decisional law relied upon by the defendants says exactly that.

Next, we will address the Second District's recent 8 to 6 decision in *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (en banc) -- a decision which is a lonely wave in a sea of contrary authority (some of it from the Second District itself). We will demonstrate that the majority's conclusion that fraud in the inducement claims are barred by the "economic loss rule" was not compelled by any decision of this Court; that the conclusion was inconsistent with a number of decisions of this Court holding that, where tortious conduct is distinguishable from or independent of conduct constituting a breach of contract, the damaged party has a tort remedy to recover its damages; and that *Woodson* was wrongly decided, just as the district court concluded below. Finally, we will address the defendants' four miscellaneous arguments, none of which are significant enough that our responses need to be summarized here.

B. For their second issue, the defendants contend that the district court erred in granting the plaintiff leave to clarify its complaint on remand -- that the footnote in which this leave was extended was prohibited by this Court's decision in *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981). We will disagree. First, we will demonstrate that the predicate upon which this issue is constructed is simply false. We did not change our horses on appeal and take a position not urged in the trial court. It was the defendants who

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bottomed their motion for summary judgment exclusively on what they perceived to be inartful pleading; the summary judgment they obtained was granted on that ground; and that was therefore *the* issue on appeal. It was therefore perfectly appropriate for us to argue on appeal that the plaintiff's complaint was not inartfully drafted, and alternatively, that even if the complaint was inartfully drafted, that was no reason for ordering the entry of a final judgment in the defendants' favor.

We will also demonstrate that *Dober* is plainly inapposite to the footnote of which the defendants complain. In *Dober*, the district court *affirmed* a summary final judgment which had properly been entered against the plaintiff, and then remanded the case with leave to plead an affirmative defense which the plaintiff had *not* previously pled -- a practice of which this Court disapproved. In the instant case, the district court *reversed* the summary final judgment which had been entered against the plaintiff, declared the plaintiff's claim sufficiently pled, and then remanded with leave to clarify the claim which had been previously pled so that the defendants would no longer be confused about the nature of the claim. The two circumstances are entirely different. And because Rule 1.190, Fla. R. Civ. P., would have authorized the amendment after remand whether the district court had authorized it or not, it is simply impossible that the district court committed *reversible error* in merely allowing the plaintiff, at its option, to clarify its claim for the defendants' benefit once the cause recurred in the trial court.

IV.
ARGUMENT

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT "FRAUD IN THE INDUCEMENT, EVEN WHEN ONLY ECONOMIC LOSSES ARE SOUGHT TO BE RECOVERED, IS THE KIND OF INDEPENDENT TORT THAT IS NOT BARRED BY THE ECONOMIC LOSS RULE."

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Because the defendants' argument misreads both the plaintiff's complaint and the decisional law, and invents a new variant of the "economic loss rule" which has no support whatsoever in either logic or the law, we cannot respond to it on its own terms without confusing the issue beyond any hope of a reasoned resolution. In the interest of clarity, we propose instead to present our argument in two parts. First, we will present an updated version of the straightforward position which we initially presented below, and which the district court ultimately endorsed. Then we will respond to the several arguments which the defendants have mustered here in their effort to persuade the Court that their non-existent variant of the "economic loss rule" required a different result.

1. The straightforward position we presented in the district court.

Although the factual allegations of the plaintiff's second amended complaint (which the defendants accepted as true for purposes of their motion) speak very well for themselves, it is worth emphasizing some of them briefly here to set the stage for what follows. The fraudulent misrepresentations alleged in paragraphs 21-23 of the complaint were made by Mr. Levy between March and July, 1987 -- *before* the plaintiff entered into the loan agreement with CV Reit, and *before* the plaintiff exercised the option to purchase contained in its contract with Boca Grove. The misrepresentations were designed to induce the plaintiff to do both things -- and they were effective in inducing the desired response, to the considerable loss of the plaintiff. The misrepresentations were also simply that; they were not promises to perform contained in any contract with CV Reit -- since the contract between the plaintiff and CV Reit was a simple promise by CV Reit to loan $800,000.00 to the plaintiff (which was performed), and a reciprocal promise by the plaintiff (secured by a mortgage) to repay that loan. Neither could the misrepresentations have amounted to a breach of the contract between the plaintiff and CV Reit,

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because that contract was not even in existence when the misrepresentations were made. And, of course, the plaintiff had no contract at all with Mr. Levy.

Most respectfully, on those facts, the mere existence of the loan agreement between the plaintiff and CV Reit simply does not bar the plaintiff's action to recover the damages caused by the pre-contractual fraud which induced formation of that subsequent contract -- and Florida's so-called "economic loss rule" does not even arguably require a contrary conclusion. Although we make no claim that this "rule" is simple of application in every circumstance (especially since a somewhat expanded variant of it exists in the context of the sale of products and services), we do insist that its inapplicability to the type of circumstance at issue here is thoroughly settled.

To begin with, the principal "rule" itself is simply this: where an act constituting a breach of contract is also a tortious act, absent personal injury or property damage, the damaged party is limited to its contractual remedies and has no tort remedy for purely economic losses; however, where the tortious conduct is distinguishable from or independent of the conduct constituting the breach of contract, the damaged party has a tort remedy to recover its damages. *See AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla. 1987); *Southern Bell Telephone & Telegraph Co. v. Hanft*, 436 So.2d 40 (Fla. 1983); *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982); *Schimmel v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 464 So.2d 602 (Fla. 3d DCA 1985). *See also Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *Casa Clara Condominum Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993).

Because this is the "rule," tort claims and breach of contract claims cannot be simultaneously pursued where the act alleged to be tortious is an act which also constitutes a breach of the contract: "We conclude that without some conduct resulting

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in personal injury or property damage, there can be no independent tort *flowing from a contractual breach* which would justify a tort claim solely for economic losses." *AFM Corp., supra* at 181-82 (emphasis supplied). *Accord McDonough Equipment Corp. v. Sunset Amoco West, Inc.*, 669 So.2d 300 (Fla. 3d DCA 1996); *Richard Swaebe, Inc. v. Sears World Trade, Inc.*, 639 So.2d 1120 (Fla. 3d DCA 1994); *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So.2d 565 (Fla. 2d DCA 1990); *J. Batten Corp. v. Oakridge Investments 85, Ltd.*, 546 So.2d 68 (Fla. 5th DCA 1989); *John Brown Automation, Inc. v. Nobles*, 537 So.2d 614 (Fla. 2d DCA 1988), *review denied*, 547 So.2d 1210 (Fla. 1989); *Standard Fish Co., Ltd. v. 7337 Douglas Enterprises, Inc.*, 21 Fla. L. Weekly D909 (Fla. 3d DCA Apr. 17, 1996); *Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 40 F.3d 1198 (11th Cir. 1994) (Florida law). *Cf. Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991) (Florida law).

There is a relatively simple reason for drawing this distinction between a tortious act which constitutes a breach of contract, and a tortious act which is separate and independent of any act constituting a breach of contract:

> The "efficient breach" doctrine is the economic rationale for denying punitive damages in breach of contract cases. It holds that a party should be allowed to breach an existing contract, and pay the expectancy damages rather than to be forced by the threat of punitive damages to perform under an unprofitable agreement. This concept advances efficient and profitable commercial transactions. As long as both parties act in good faith at the outset, then the efficient breach rationale protects the nonbreaching party's interest and encourages productive enterprise.

Theresa Montalbano Bennett, "Lies and Broken Promises: Fraud and the Economic Loss Rule After *Woodson v. Martin*," *The Florida Bar Journal*, May 1996, at 46, 47.

A good discussion of this point can be found in *John Brown Automation, Inc. v. Nobles*, 537 So.2d 614 (Fla. 2d DCA 1988), *review denied*, 547 So.2d 1210 (Fla. 1989),

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where the court explains that the "economic loss rule" prevents recovery of punitive damages for fraud committed in the *performance* of a contract, because such conduct amounts to a *breach of contract* which will not support an award of punitive damages -- and that an action for fraud in the inducement of a contract *will* lie because such conduct precedes formation of the contract and does *not* amount to a breach of contract. In short, where an act constituting a breach of contract is also a tortious act, good reason exists for limiting the damaged party to its contractual remedies and preventing it from pursuing possible tort remedies which might support an award of punitive damages. Where a tort has been committed which is separate and independent of any breach of contract, however, the reason supporting the "economic loss rule" simply does not exist, so the "rule" is not applied.

To be more specific with respect to the particular issue presented here, where the act alleged to be fraudulent *precedes* formation of the contract, and is designed to induce formation of the contract (and other action as well, as in this case), it is impossible that the act can also constitute a breach of the subsequently-formed contract; instead, it is plainly an act distinguishable from and independent of any later act which might amount to a breach of the subsequently-formed contract -- and the so-called "economic loss rule" therefore does not bar the defrauded party from pursuing a conventional tort remedy to recover the damages caused by the fraud, including punitive damages to deter a repeat of the fraudulent conduct in the future. That point, we believe, is thoroughly settled by a long line of authority which squarely holds that "fraud in the inducement" of a contract is an "independent tort" *not* barred by the "economic loss rule."[7/]

[7/] There is a single, anomalous decision to the contrary -- the recent 8 to 6 decision of the en banc Second District in *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (en banc), with which conflict was certified in the instant case (and which, incidentally, is in square conflict with the Second District's prior decision in *John Brown Automation*,

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The following decisions (excluding the decision under review) are representative: *Monco Enterprises, Inc. v. Ziebart Corp.*, 21 Fla. L. Weekly D755 (Fla. 1st DCA Mar. 25, 1996); *Jarmco, Inc. v. Polygard, Inc.*, 663 So.2d 300 (Fla. 4th DCA 1996); *H.T.P., Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So.2d 1221 (Fla. 3d DCA 1995); *Adee Resort Corp. v. Brewer & Co., Inc.*, 653 So.2d 1052 (Fla. 4th DCA), *review denied*, 662 So.2d 931 (Fla. 1995); *Burton v. Linotype Co.*, 556 So.2d 1126 (Fla. 3d DCA 1989), *review denied*, 564 So.2d 1086 (Fla. 1990); *Gold v. Wolkowitz*, 430 So.2d 556 (Fla. 3d DCA), *review denied*, 437 So.2d 677 (Fla. 1983); *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995); *Leisure Founders, Inc. v. CUC International, Inc.*, 833 F. Supp. 1562 (S.D. Fla. 1993); *Brass v. NCR Corp.*, 826 F.Supp. 1427 (S.D. Fla. 1993); *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566 (S.D. Fla. 1992); *Williams Electric Co., Inc. v. Honeywell, Inc.*, 772 F. Supp. 1225 (N.D. Fla. 1991); *Moro-Romero v. Prudential-Bache Securities, Inc.*, 5 Fla. L. Weekly D520, 1991 WL 494175 (S.D. Fla. 1991).

There are numerous additional decisions holding frauds in the inducement to be actionable notwithstanding the existence of the fraudulently-induced contract, decisions in which the so-called "economic loss rule" is not even mentioned: *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985); *Acadia Partners, L.P. v. Tompkins*, 21 Fla. L. Weekly D795 (Fla. 5th DCA Mar. 22, 1996); *Cummings v. Warren Hendry Motors, Inc.*, 649 So.2d 1230 (Fla. 4th DCA 1995); *Ray v. Elks Lodge #1870 of Stuart*, 649 So.2d 292 (Fla. 4th DCA 1995); *Schmidt v. Firriolo*, 634 So.2d 283 (Fla. 4th DCA 1994); *Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So.2d 168 (Fla. 4th DCA 1994); *Mettler, Inc. v.*

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which was not even mentioned in *Woodson*). We will address this decision (and its progeny from the Second District) in the second part of our argument, where we respond to the defendants' arguments.

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Tracy, 648 So.2d 253 (Fla. 2d DCA 1994); *Johnson v. Bokor*, 548 So.2d 1185 (Fla. 2d DCA 1989); *Capital Bank v. M. V. B., Inc.*, 644 So.2d 515 (Fla. 3d DCA 1994), *review denied*, 654 So.2d 918, 659 So.2d 1086 (Fla. 1995); *Ashland Oil, Inc. v. Pickard*, 269 So.2d 714 (Fla. 3d DCA 1972), *cert. denied*, 285 So.2d 18 (Fla. 1973). *See also Gordon v. Omni Equities, Inc.*, 605 So.2d 538 (Fla. 1st DCA 1992) (civil theft based upon fraud in the inducement was actionable notwithstanding the existence of the fraudulently-induced contract); *Burke v. Napieracz*, 21 Fla. L. Weekly D754 (Fla. 1st DCA Mar. 25, 1996) (civil theft and conversion are actionable notwithstanding the existence of a contractual relationship creating the opportunity for commission of the torts); *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So.2d 521 (Fla. 4th DCA 1984) (fraud in the inducement was actionable notwithstanding exculpatory provision in contract). In fact, the point is so obvious that Judge Griffin was recently compelled to proclaim that "[a]ppellees' argument that the economic loss rule bars the fraudulent inducement claim is specious . . . ." *Lee v. Paxson*, 641 So.2d 145, 145 (Fla. 5th DCA 1994) (J. Griffin, concurring in part, dissenting in part).

The point is also so obvious that the defendants actually *conceded* it in the trial court (which is why we have only string-cited the authority supporting it, rather than elaborating upon the reasoning and explanations contained in the decisions). The defendants contended below that the "rule" nevertheless applied to bar the plaintiff's fraud action simply because the plaintiff was claiming essentially the same set of damages in its separate counts for fraud and breach of contract against CV Reit. This contention derives, we believe, from some rather loose language in some of the cases in which the "rule" is paraphrased (in an overly-abbreviated, shorthand form which unfairly obscures its qualifications and limitations) to be that tort remedies are barred "[w]here damages sought in tort are the same as those for breach of contract." *Ginsberg v. Lennar Florida*

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Holdings, Inc., 645 So.2d 490, 494 (Fla. 3d DCA 1994), *review denied*, 659 So.2d 272 (Fla. 1995). *See Rosen v. Marlin*, 486 So.2d 623 (Fla. 3d DCA), *review denied*, 494 So.2d 1151 (Fla. 1986); *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229 (Fla. 3d DCA 1981), *review dismissed*, 415 So.2d 1359 (Fla. 1982).

Despite the oversimplification, there is nothing wrong with abbreviating the "rule" in this fashion, provided that the single set of damages is caused by a single act constituting both a tort and a breach of contract, as in the cases where the paraphrase appears. However, the paraphrase loses its accuracy where two separate acts causing a single set of damages are concerned, where one act is tortious and independent of the second act constituting the breach of contract. The paraphrase simply has to be inaccurate in that context, since that qualification of the "rule" plainly appears in this Court's decisions on the subject, and in the numerous decisions cited above which declare fraud in the inducement to be an actionable independent tort, notwithstanding that a breach of contract action is pursued simultaneously for essentially the same set of damages.

As a result, and as the Court might expect, there are several decisions rejecting the paraphrase as inapposite to cases (like the instant case) in which the tortious act is independent of the incidental contractual relationship between the parties. *See, e. g., Gordon v. Omni Equities, Inc.*, 605 So.2d 538 (Fla. 1st DCA 1992); *Aspen Investments Corp. v. Holzworth*, 587 So.2d 1374 (Fla. 4th DCA 1991); *O'Donnell v. Arcoiries, Inc.*, 561 So.2d 344 (Fla. 4th DCA 1990); *Nova Flight Center, Inc. v. Viega*, 554 So.2d 626 (Fla. 5th DCA 1989). In addition, of course, the paraphrase plainly has no application in an action against the person fraudulently inducing the contract, where that person (like Mr. Levy in the instant case) was not subsequently made a party to the fraudulently-induced contract. *See Roth v. Nautical Engineering Corp.*, 654 So.2d 978 (Fla. 4th DCA

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1995); *Zinn v. Zinn*, 549 So.2d 1141 (Fla. 3d DCA 1989).

Most respectfully, the fact that an initial fraud committed in the inducement of a contract and a subsequent breach of that contract may give rise to two claims for essentially the same set of damages simply does not require imposition of the "economic loss rule" as a bar to the fraud action. Instead, both actions can be pursued simultaneously, and the defendant is protected from a "double recovery" by the equally settled rule that, where two causes of action for the same set of damages can be maintained, the damages can be recovered only once. *See Besett v. Basnett*, 437 So.2d 172 (Fla. 2d DCA 1983); *Raben Builders, Inc. v. First American Bank & Trust Co.*, 561 So.2d 1229 (Fla. 4th DCA), *review denied*, 576 So.2d 290 (Fla. 1990); *Kingswharf, Ltd. v. Kranz*, 545 So.2d 276 (Fla. 3d DCA), *review denied*, 553 So.2d 1165 (Fla. 1989); *Phillips v. Ostrer*, 481 So.2d 1241 (Fla. 3d DCA 1985), *review denied*, 492 So.2d 1334 (Fla. 1986).

That general rule, we might add, is clearly applicable to the two independent causes of action in issue here -- fraud in the inducement and breach of contract. *See Florida Temps, Inc. v. Shannon Properties, Inc.*, 645 So.2d 102 (Fla. 2d DCA 1994) (plaintiff could maintain both fraudulent inducement and breach of contract claims simultaneously, but could recover the damages recoverable on the two claims only once); *Burton v. Linotype Co.*, 556 So.2d 1126 (Fla. 3d DCA 1989) (same), *review denied*, 564 So.2d 1086 (Fla. 1990). *Cf. C & J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290 (Fla. 2d DCA 1991) (following *Burton*; the fact that the plaintiff pled the same damages under its separate counts for fraudulent inducement and breach of contract did not support a summary judgment on the fraud count). And, of course, because the plaintiff has no action for breach of contract against Mr. Levy, there is no threat that he will be subjected to a "double recovery" at all. Most respectfully, the fact that the plaintiff was claiming essentially the same damages under both counts against CV Reit provides no legal

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justification whatsoever for declaring the plaintiff's fraud claim barred by the "economic loss rule."

It is also worth noting that, even if the "economic loss rule" were somehow implicated by the fact that the plaintiff had pleaded and was asserting a mere *claim* for the same damages in both counts, the fact remains that it might ultimately be concluded in the litigation that the plaintiff had no claim at all for damages in its breach of contract action. After all, that is precisely what the defendants argued below at the 1992 hearing held on their first motion for summary judgment, in which they sought summary judgment on both the fraud and breach of contract counts. They insisted there that the contract between the plaintiff and CV Reit was a simple loan agreement, which CV Reit had fully performed by funding the loan -- and that, because the written agreement between the parties contained none of the promises which the plaintiff claimed had been breached (under an implied condition to exercise good faith), there was simply no actionable breach of contract to support the plaintiff's claim for damages under Count III (SR. T1:37-49).

The defendants may well have been correct on that point (although we do not concede it), but the Court need not resolve it here. We mention it simply to make the point that summary judgment on the fraud count was inappropriate, even if pleading and claiming the same damages in the two counts somehow implicated the "economic loss rule," because it might ultimately be concluded that the breach of contract action was not viable at all -- and the fraud count would then become a perfectly legitimate vehicle for recovery of the damages claimed in both counts. In a circumstance like that, summary judgment on the fraud count is simply premature, and resolution of the fraud count must await the litigation of both counts to conclusion:

> Linotype anticipates that MLG and Burton will be unable to prove fraud damages distinct from contract damages because

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> the relief segments of the complaint are identical. Linotype presumes too much: Burton and MLG seek general relief and not specific dollar amounts. At trial, Burton and MLG may be able to establish, for example, that the loss of business suffered as a result of the alleged fraud is different from the loss of business occasioned by the failure of the machinery to work properly. Under the facts of this case, it would be premature to foreclose proof of differentiated damages.[2]
>
> ---
>
> 2. Of course, a double recovery may not be derived from one element of damages . . . .

Burton v. Linotype Co., 556 So.2d 1126, 1128 (Fla. 3d DCA 1989), *review denied*, 564 So.2d 1086 (Fla. 1990). *Accord C & J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290 (Fla. 2d DCA 1991).

In other words, the fact that a plaintiff's pleadings may be wrong on one count is simply no justification for entering judgment against it on the merits of a perfectly legitimate, well-pled count. Or, as plaintiff's counsel correctly put the point below, the fact "that this may not be the best pled case in the world" was certainly no reason to enter judgment in the defendants' favor on the fraud count as a matter of law. Defendants' counsel also recognized as much, when he informed the trial court that if *he* had been drafting the pleadings in the case, he would have carved out the loan transaction and put it in the back of the complaint without a prayer for duplicate damages, and then there would have been no basis for a summary judgment.

Most respectfully, summary final judgments cannot be based on mere inartful pleading. The burden is considerably heavier than that. At minimum, even if pleading and claiming the same damages in the two counts somehow implicated the "economic loss rule," the defendants had the burden on their motion to demonstrate, and to demonstrate *conclusively*, that the plaintiff could and *would* recover all the damages claimed in the fraud count in its breach of contract action. And because no such demonstration was

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even attempted, the summary final judgment entered on the fraud count was -- under the very best version of the law which the defendants might hope to establish in their favor here (which is not the law, as we have demonstrated) -- simply premature, and therefore still erroneous.

A final observation is in order concerning Mr. Zappala's deposition statement that, in his mind at least and although he did not claim to understand these things, both the fraud count and the breach of contract count were based on the same set of facts. Most respectfully, this statement plainly provides no support for the summary final judgment in issue here. The two counts *are* based on the same *set* of facts, because the *set* of facts in issue here proves an ongoing scheme to defraud the plaintiff of substantial sums of money over a lengthy period of time: first by making several fraudulent misrepresentations of fact designed to induce the plaintiff to exercise an option in a contract with a third party, and to induce the plaintiff to enter into a contract with CV Reit; and then by taking subsequent actions totally inconsistent with the facts as initially represented, actions which amounted to a breach of the implied condition of good faith contained in the fraudulently-induced contract. To Mr. Zappala, that *set* of facts may very well appear to underlie both counts of the complaint. In the eyes of the law, however, that *set* of facts gives rise to two separate and independent causes of action.

In essence, Mr. Zapalla's lay perception notwithstanding, the law divides this single *set* of facts into two separate *subsets* of facts -- the pre-contractual fraud and the post-contractual breach of contract. The initial misrepresentations give rise to an action for fraud in the inducement; they cannot give rise to an action for breach of contract because they *preceded* formation of the contract. The subsequent actions, which were inconsistent with the facts as represented to induce formation of the contract, give rise to an action for breach of contract; they cannot give rise to an action for fraud in the

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inducement, because they were committed *after* formation of the contract.[8/]

And, as we have demonstrated, because the two causes of action are separate and independent, both can be maintained, provided simply that there is no double recovery of the damages caused by the *set* of facts of which Mr. Zappala fairly feels aggrieved. In addition, of course, because the plaintiff and Mr. Levy had no contract at all, the fact that the fraud count against him arises out of a *set* of facts supporting two independent causes of action against CV Reit is simply beside any arguable point which the defendants might muster here in support of the erroneous summary final judgment which both of them received. Most respectfully, the summary final judgment in issue here was plainly erroneous, and the district court did not err in saying so.

2. Our response to the defendants' arguments.

a. The defendants' principal position is without merit.

The defendants' principal position here is that the "economic loss rule" bars the plaintiff's action for fraud in the inducement because the facts of the fraud claim and the breach of contract claim are "closely interwoven" and "intertwined and inextricable" -- and because an 8 to 6 majority of the Second District recently said so in *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (en banc). We disagree, as did the district court below.

[8/] To the extent that paragraph 49 of the second amended complaint briefly asserts that the plaintiff's contract with CV Reit was breached by "the fraudulent and unreasonable activities more particularly alleged throughout this Complaint" before specifying the particular post-contractual acts upon which Count III is based, that allegation simply must be disregarded as inartfully-pleaded surplusage here. It must be disregarded for that reason because it is factually impossible that the pre-contractual misrepresentations could have amounted to a post-contractual breach of contract. In addition, whether disregarded or not, that simple slip of the pen is clearly too slender a reed upon which to bottom a summary judgment on the merits of the plaintiff's otherwise artfully-pleaded fraud count.

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To begin with, the facts of the fraud claim and the breach of contract claim are simply not "interwoven," "intertwined," or "inextricable." As we have just taken some pains to make clear, the separate claims for fraud and breach of contract are certainly based on the same overall *set* of facts, because the *set* of facts alleged in the "Allegations Common to All Counts" proves an ongoing scheme to defraud the plaintiff of substantial sums of money over a lengthy period of time. However, this *set* of facts plainly gives rise to two separate and independent causes of action. The initial misrepresentations give rise to an action for fraud in the inducement; they cannot give rise to an action for breach of contract because they *preceded* formation of the contract. The subsequent actions, which were inconsistent with the facts as represented, give rise to an action for breach of contract; they cannot give rise to an action for fraud in the inducement, because they were committed *after* formation of the contract. And because the two causes of action arising out of this *set* of facts are separate and independent, both can be maintained exactly as pleaded, provided simply that there is no double recovery of the damages caused by the *set* of facts out of which the separate causes of action arise.

Moreover, even if the facts *were* "interwoven," "intertwined," and "inextricable," as the defendants contend, that would not automatically implicate the "economic loss rule," because the rule simply does not turn upon such nebulous semantic concepts. And for the defendants to argue that "[t]he Economic Loss Rule bars even fraudulent inducement claims when the facts constituting the breach of contract are closely interwoven with those constituting the alleged fraud" (petitioners' brief, p. 30) is to invent a variant of the "economic loss rule" which simply does not exist. While the three words upon which the defendants rely do appear in some of the early decisional law on the question, the ambiguity inherent in their imprecision is easily resolved by a simple examination of the context in which they are used. They are simply another way of

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saying what we have maintained all along here, with considerably more precision -- that, where the act alleged to be fraudulent is an act which also constitutes a breach of the contract (and the facts, according to the infelicitous words upon which the defendants have seized, are therefore "interwoven" etc.), the "economic loss rule" remits the plaintiff to a breach of contract action and bars the fraud action. However, nothing in that rule "bars even fraudulent inducement claims," as the defendants contend.

That, incidentally, ought to have been clear to the defendants from the very decision which they have held up to this Court as direct support for their invented variant of the "rule":

> It is clear that Florida law bars all claims for fraud where the plaintiff has a remedy in contract for the breach. *See Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769, 776-777 (11th Cir. 1991). Where a contract exists, and the plaintiff asserts a claim for fraud in the breach, this is essentially the equivalent of a claim that the breach was willful. A claim for willful breach of contract is still a claim for breach of contract, and does not give rise to tort remedies, e. g., punitive damages, no matter how oppressive the breach. *See Waltman v. Prime Motor Inns, Inc.*, 446 So.2d 185 (Fla. 3d DCA 1984), *approved in part, quashed in part on other grounds by Prime Motor Inns, Inc. v. Waltman*, 480 So.2d 88 (Fla. 1985). Ultimate proof of a claim for fraudulent inducement to contract, however, involves elements entirely distinct from a showing that the Defendants willfully breached an agreement; at trial, Plaintiffs must demonstrate that Defendants convinced them to enter into the agreement by means of deceitful representations and that all along the contract was a ruse the obligations of which Defendants never intended to perform.
>
> True fraudulent inducement attends conduct prior to striking the express or implied contract and alleges that one party tricked the other into contracting. *See Williams Electric Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1238 (N.D. Fla. 1991). "It is based on pre-contractual conduct which is, under the law, a recognized tort." *Id.* Where the complaint

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alleges fraudulent inducement, but the facts comprising the fraudulent inducement claim are closely interwoven with the [sic] those constituting the breach of contract, the economic loss rule bars the pleading of a separate tort claim. *See Serina v. Albertson's Inc.*, 744 F. Supp. 1113, 1118 (M.D. Fla. 1990); *John Brown Automation, Inc. v. Nobles*, 537 So.2d 614, 617-618 (Fla. 2d DCA 1988) (striking punitive damages for fraud where the misrepresentation was "inextricable from the events constituting a breach of contract"); *J. Batten Corp. v. Oakridge Investments 85 Ltd.*, 546 So.2d 68, 69 (Fla. 5th DCA 1989) (dismissing fraud claim in breach of contract case). No Florida case that we can find has expressly held that true fraudulent inducement does not come within the ambit of the economic loss rule. One Florida appellate court, however, deciding under the economic loss rule that a showing of fraud at a trial of a breach of contract case could not support an award of punitive damages, noted the "constant untangled thread running though [sic] all the cases" indicating that a fraud claim is precluded where it is "associated with the *performance* of a contract" and that the economic loss rule would not bar a fraud claim if the pleadings alleged "an intent on the part of [the defendants] not to fulfill the contract when it was formed." *John Brown*, 537 So.2d at 617-618. Here, Plaintiff's fraud claim alleges, in essence, that Defendants knew all along that they were not going to provide certain elements of the compensation package to Knight, and thus fraudulently induced Leisure to perform certain acts and Knight to sell his shares.

The analysis presents a question of timing: does this tort claim that Defendants fraudulently induced Plaintiffs to contract for the sale of the Leaguestar shares, arise from conduct prior to, and distinct from, the alleged willful breach of that contract? We find that Count V, for what is best described as fraudulent inducement, does arguably assail conduct prior to any alleged agreement between the parties. As such, it is distinct from the conduct constituting the breach, and does not fall within the scope of the economic loss rule. *Accord Kingston Square Tenants v. Tuskegee Gardens*, 792 F. Supp. 1566, 1576 (S.D. Fla. 1992); *Williams Electric Co.*, 772 F. Supp. at 1238. Accordingly, the motion to dismiss Count V must be DENIED.

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Leisure Founders, Inc. v. CUC International, Inc., 833 F. Supp. 1562, 1572-73 (S.D. Fla. 1993). Most respectfully, the defendants' assertion that this decision supports its invented variant of the "economic loss rule" is dead wrong; the decision draws precisely the distinctions which we have drawn here between fraud in the performance of a contract and fraud in the inducement of a contract, and it fully supports our position here in every respect.[9/]

The remaining decisions upon which the defendants rely for their invented variant of the "rule" fall into the category of willful acts which constitute a breach of the contract between the parties. In *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113, 1117-18 (N.D. Fla. 1990), for example, the court followed a New Jersey decision which "drew a distinction between fraud extraneous to the contract and fraud interwoven with the breach of contract"; which noted that the alleged "fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings"; and which applied the "economic loss rule" to bar an action alleging fraudulent acts committed in the performance of the contract, and which therefore constituted mere willful breach of the contract. The other decisions relied upon by the defendants are collected at page 20 of our brief, as exemplars of this settled rule that a willful breach of contract cannot support a tort claim, so there is no need for us to parse them at the Court's expense here.

Most respectfully, the variant of the "economic loss rule" upon which the defendants rely simply does not exist. A willful, even fraudulent, breach of contract will not support a tort action because of the "economic loss rule"; however, fraudulent conduct which precedes the formation of a contract and which does not constitute a

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[9/] So, incidentally, does *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (1995), upon which the defendants also inappropriately rely.

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breach of the subsequently-formed contract is plainly actionable in tort -- and with the single exception to be discussed in a moment, nothing in this state's jurisprudence misapplies the "economic loss rule" to bar a common law claim for fraud in the inducement, as the defendants would have this Court do in the instant case.

The single exception is the Second District's recent 8 to 6 decision in *Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (en banc), and its recent progeny (which we will not separately discuss) -- a decision which is a lonely wave in a sea of contrary authority (some of it from the Second District itself, as revealed by our previous citations to various decisions of that Court). In that case, over two vigorous dissenting opinions joined by six judges, a bare majority of the court held that a home buyer, who had been fraudulently induced by the intentional misrepresentations of a real estate agent to enter into a contract with a seller for the purchase of a home, had no tort remedy against the agent for either compensatory or punitive damages (notwithstanding that no contractual relationship existed between them), and that the buyer's sole remedy was for breach of contract against the seller.

In effect, the decision abolishes a tort which has been actionable in the common law for nearly a millennium -- and by rendering fraud in the inducement immune from suit, it effectively *encourages* the intentional lie which the law has long attempted to prevent. The majority purported to find support for this peculiar conclusion in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993), and *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995). Not a single one of the Second District's prior decisions to the contrary was even mentioned. Most respectfully, neither *Casa Clara* nor *Airport Rent-A-Car* required this anomalous result.

Casa Clara and *Airport Rent-A-Car* involved a discrete problem embraced by the

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general "economic loss rule" -- and the "rule" is defined narrowly in its discrete context as "prohibit[ing] tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself. *E. g. East River Steamship Corp. v. Transamerica Delaval, Inc.*[,] 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed.2d 865 (1986) . . ." *Casa Clara*, 620 So.2d at 1246. In that context, the general rule with which we began our argument is plainly implicated. When a contractual sale has occurred and the product does not perform properly and damages only itself, the purchaser has lost the benefit of his contractual bargain -- i. e., the seller has breached the contract. The purchaser's remedy for purely economic losses is therefore limited to an action for breach of contract (in which punitive damages are not recoverable), just as the general rule requires.[10/]

There is nothing in *Casa Clara* or *Airport Rent-A-Car*, however, which purports to extend the "economic loss rule" to abolish actions for tortious conduct distinguishable from or independent of conduct constituting a breach of contract, like intentional fraud in the inducement of a contract. In fact, we think the Court made this fairly clear in *Casa Clara* itself by explicitly noting that its decision in *Johnson v. Davis*, 480 So.2d 625

[10/] To this extent, the rule announced in *Casa Clara* is not particularly controversial. The controversial aspect of the decision is its extension of the "economic loss rule" to bar tort claims by and against persons and entities not parties to the purchase and sale contract. Because of the discrete context to which *Casa Clara* is directed, that aspect of the decision is not implicated in the instant case, so we will spare the Court a reargument on the wisdom of that aspect of the decision. For what it may be worth, however, we would observe that a great deal of unnecessary mischief would have been prevented if the Court had limited application of the "economic loss rule" to parties to the contract, and analyzed the additional actions by and against non-parties to the contract in terms of the "duty" analysis ordinarily applied to tort actions, as Justice Shaw's dissent appears to propose. Perhaps it is not too late to put the "economic loss rule" back upon its jurisprudential tracks in that manner, as Paul J. Schwiep has cogently proposed in "The Economic Loss Rule Outbreak: *The Monster That Ate Commercial Torts," The Florida Bar Journal*, Nov. 1995, at 34.

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(Fla. 1985) -- which recognizes an action against a seller for fraud in the inducement of a contract to purchase a home -- remains viable. 620 So.2d at 1247. This conclusion is also fairly inferable from the fact that neither *Casa Clara* nor *Airport Rent-A-Car* purports to overrule any of this Court's prior decisions (cited at page 19, *supra*) holding that the "economic loss rule" does not bar actions for tortious conduct distinguishable from or independent of conduct constituting a breach of contract.

Notwithstanding these clear signposts, the *Woodson* majority concluded that application of the "economic loss rule" turned on "the nature of the damages suffered," and that, where the damages caused by the tort and the breach of contract were essentially the same, the tort action was barred. 663 So.2d at 1329. As we have previously explained (at pages 23-25, *supra*), however, this conceptualization of the "rule" is accurate only where the single set of damages is caused by a single act constituting both a tort and a breach of contract. It is not accurate where two separate acts causing a single set of damages are concerned, where one act is tortious and independent of the second act constituting the breach of contract. The *Woodson* court's conceptualization simply has to be inaccurate in that context, since that qualification of the "rule" plainly appears in several of this Court's decisions on the subject. Most respectfully, the fact that an initial fraud committed in the inducement of a contract and a subsequent breach of that contract may give rise to two distinguishable, independent claims for essentially the same set of damages simply does not require imposition of the "economic loss rule" as a bar to the fraud action. Instead, both actions can be pursued simultaneously, and the defendant is protected from a "double recovery' by the settled rule that, where two causes of action for the same set of damages can be maintained, the damages can be recovered only once.

In any event, the question is presently pending in this Court in several cases

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(including *Woodson*), and will no doubt receive extensive briefing as a result, so we will not belabor the point. Instead, we have included in our appendix a thoughtful, perceptive, thoroughly researched, and cogently argued article which recently appeared in *The Florida Bar Journal*, which makes the case against *Woodson* as well as we could have hoped -- and we commend a reading of that article to the Court in lieu of further responsive argument by us. Theresa Montalbano Bennett, "Lies and Broken Promises: Fraud and the Economic Loss Rule after *Woodson v. Martin*," *The Florida Bar Journal*, May 1996, at 46. We have also included in our appendix another recent article which directs some eminently fair criticism at *Casa Clara* itself, and which presciently cautions against precisely the type of unjustified extension of the "economic loss rule" in which the majority engaged in *Woodson*. Paul J. Schwiep, "The Economic Loss Rule Outbreak: *The Monster That Ate Commercial Torts*," *The Florida Bar Journal*, Nov. 1995, at 34. We commend a careful reading of that article to the Court as well.

Most respectfully, *Woodson* was wrongly decided. Every other court which has considered the question (including the Second District itself, in all of its prior decisions on the subject) has ruled to the contrary -- holding, as the district court did in the instant case that, "[f]raud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule." *TGI Development, Inc. v. CV Reit, Inc.*, 665 So.2d 366, 366 (Fla. 4th DCA 1996). And unless this Court intends to immunize from redress (and thereby encourage) damaging intentional lies by abolishing the tort of fraud (and numerous other long-recognized torts which cause only economic losses) altogether, the district court's decision should be approved.

b. The defendants' miscellaneous positions are also without merit.

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The defendants have also advanced four miscellaneous arguments which deserve brief responses. First, they complain that the record does not disclose, and that we have declined to reveal on appeal, precisely what damages we are claiming under the fraud count. There is a good reason for this. We remind the Court that the *only* ground which was asserted for summary judgment in the trial court was that, based on the allegations of the plaintiff's second amended complaint, the "economic loss rule" barred the fraud claim. By prior agreement and at the hearing held on the motion for summary judgment, defendants' counsel expressly withdrew any claim of entitlement to summary judgment relating to the damage issues (SR. T2: 4-9). As a result, because of the "specificity" requirement of Rule 1.510, Fla. R. Civ. P., the only ground to which we were required to respond was the defendants' "economic loss rule" argument; there was no need whatsoever for us to prove up our damages in order to defeat the motion for summary judgment. And because the defendants' motion for summary judgment did not trigger the need for responsive proof of the plaintiff's damages, this previously unasserted argument is simply not available to the defendants during appellate review of the single-ground summary final judgment which they obtained. *See, e. g., Epperson v. Dixie Insurance Co.*, 461 So.2d 172 (Fla. 1st DCA 1984), *review denied*, 471 So.2d 43 (Fla. 1985); *Gisela Investments, N.V. v. Liberty Mutual Insurance Co.*, 452 So.2d 1056 (Fla. 3d DCA 1984); *Loranger v. State, Department of Transportation*, 448 So.2d 1036 (Fla. 4th DCA 1983).

Next, the defendants assert (although they do not really argue the point) that the plaintiff's complaint did not contain an allegation that Mr. Levy personally profited from any of his allegedly fraudulent misrepresentations. To the extent that this assertion might be taken as a contention that the plaintiff's complaint stated no cause of action against Mr. Levy personally, there are two things wrong with it. First, like the previous

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miscellaneous argument, this position was not asserted in the defendants' motion for summary judgment, so it is not properly raised here. Second, even if the position had been asserted in the motion for summary judgment, it would have been erroneous. Financial benefit to the defendant is not an element of an action for fraud in the inducement, and never has been; detriment to the plaintiff is quite enough:

> In order to establish fraud in the inducement, the plaintiff must prove . . . .
>
> > (1) A misrepresentation of a material fact;
> >
> > (2) The representor of the misrepresentation, knew or should have known of the statement's falsity;
> >
> > (3) Intent by the representor that the representation will induce another to rely and act on it; and
> >
> > (4) Resulting injury to the party acting in justifiable reliance on the representation.

Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So.2d 306, 308 (Fla. 4th DCA 1990), *review denied*, 581 So.2d 165 (Fla. 1991). *Accord Johnson v. Davis*, 480 So.2d 625 (Fla. 1985); *Lance v. Wade*, 457 So.2d 1008 (Fla. 1984).

As a result, Mr. Levy plainly cannot avoid liability for his own fraudulent misrepresentations simply by hiding behind the skirts of his corporation:

> . . . Plaintiff alleges that based on Schoell's fraudulent representations he was induced to enter into a contract to pay for the construction of the racing boat.
>
> We reject Schoell's argument that he is shielded from individual liability because he acted as an agent and corporate representative of defendant corporations. A corporate officer may be individually liable for torts committed even while acting as the representative of the corporate entity. *See A-1 Racing Specialties, Inc. v. K & S Imports of Broward County,*

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> *Inc.*, 576 So.2d 421, 422 (Fla. 4th DCA 1991); *P. V. Constr. Corp. v. Kovner*, 538 So.2d 502, 504 (Fla. 4th DCA 1989); *Orlovsky v. Solid Surf, Inc.*, 405 So.2d 1363, 1364 (Fla. 4th DCA 1981). Therefore, the trial court improperly granted summary judgment on this basis.

Roth v. Nautical Engineering Corp., 654 So.2d 978, 979-80 (Fla. 4th DCA 1995). *See also Jones v. Childers*, 18 F.3d 899 (11th Cir. 1994) (construing Florida law; "economic loss rule" does not bar fraud action against president of corporation, where plaintiff's only contractual relationship was with the corporation). Most respectfully, whatever the merits of CV Reit's position concerning application of the "economic loss rule" to the plaintiff's claim for fraud in the inducement, Mr. Levy clearly has no leg to stand upon here.

Next, the defendants argue that Mr. Levy's alleged misrepresentations amounted to no more than mere "puffing," and that they therefore cannot support an action for fraud. There are two things wrong with this argument as well. Once again, like the previous miscellaneous arguments, this position was not advanced in the trial court as a ground for summary judgment, so it is not properly raised here. Second, even if the position had been asserted in the motion for summary judgment, it would have been erroneous. The misrepresentations attributed to Mr. Levy were not mere exaggerated opinions, or "puffing"; they were the following:

> 21. LEVY unequivocally stated to TGI that CENVILL had a major investment in Plantation and a strong personal commitment to the principals in BOCA GROVE such that CENVILL would never foreclose its mortgage interest in the project, but would instead utilize its own assets to assure the continued viability of BOCA GROVE.
>
> 22. LEVY further stated that a substantial portion of the proceeds of the sale from BOCA GROVE to TGI would be set aside to assure continuation of a quality marketing program for Plantation.

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23. LEVY further stated that the financial obligations between BOCA GROVE and CENVILL had been met in a timely fashion and were in good standing to date.

24. The aforedescribed statements were made by LEVY for the purpose of inducing TGI's reliance and with knowledge that TGI would and did, in fact, rely upon the statements in deciding to purchase the additional optioned Plantation land.

25. The statements when made were false and were known by LEVY to be false in the following material respects:

a. At the same time LEVY was assuring TGI that CENVILL would never foreclose on BOCA GROVE, LEVY knew that CENVILL was contemplating foreclosure proceedings.

b. CENVILL had no intent to protect the viability of BOCA GROVE, but intended instead to take over Plantation from BOCA GROVE at the cheapest possible price and without regard to the impact of such takeover of BOCA GROVE on any other developer involved in Plantation.

c. CENVILL never had an intent to set aside any proceeds of the sale from BOCA GROVE to TGI for marketing and, in fact, never did make any effort to have any funds set aside. Instead, said funds were intended to be used and were used to reduce BOCA GROVE's indebtedness to CENVILL.

d. BOCA GROVE was repeatedly delinquent in meeting its financial obligations to CENVILL and was subject to foreclosure at the very time that CENVILL was assuring TGI of BOCA GROVE's good standing.

The representations alleged in paragraph 23 were statements of past and existing fact -- and if they were false at the time they were made, as alleged in paragraph 25d, they will plainly support an action for fraudulent misrepresentation. *See* 27 Fla. Jur.2d, *Fraud & Deceit*, §19 (and numerous decisions cited therein). The representations alleged in paragraphs 21 and 22 were statements of present intent to act in a certain way in the

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future -- and if Mr. Levy had no intention of conducting himself in that manner at the time he represented otherwise, as alleged in paragraphs 25a, 25b, and 25c, they will plainly support an action for fraudulent misrepresentation. *See, e. g., Home Seeker's Realty Co. v. Menear*, 102 Fla. 7, 135 So. 402 (1931); *Stow v. National Merchandise Co., Inc.*, 610 So.2d 1378 (Fla. 1st DCA 1992); *Palmer v. Santa Fe Healthcare Systems, Inc.*, 582 So.2d 1234 (Fla. 1st DCA), *review denied*, 593 So.2d 1052 (Fla. 1991); *Bongard v. Winter*, 516 So.2d 27 (Fla. 3d DCA 1987), *cause dismissed*, 520 So.2d 584, *review denied*, 525 So.2d 881 (Fla. 1988); *Perry v. Cosgrove*, 464 So.2d 664 (Fla. 2d DCA 1985).

Next, and finally, the defendants resort to the stipulation by which the breach of contract claim and counterclaim were ultimately resolved, and assert that the plaintiff's present absence of a contract remedy cannot be asserted to bolster its position here. Although we do not understand the purpose of the assertion (and it is not developed in the argument in any meaningful way), we do know that petitioners' counsel relied on the stipulation below to accuse us of an impropriety; and because it is possible that the stipulation will be utilized to support a similar charge in the petitioners' reply brief, we feel we must clarify the point briefly to protect against that eventuality. We will clarify it by quoting the defense to the charge which we included in our reply brief in the district court:

> According to the defendants, it was "improper" for us to raise this argument [that even if the "economic loss rule" were somehow implicated by the fact that the plaintiff was asserting a mere *claim* for essentially the same damages in both counts, the summary final judgment was nevertheless premature because it might ultimately be concluded in the litigation that the plaintiff had no claim at all for damages in its breach of contract action] because we stipulated below that we would not. We plead not guilty to this indecorous charge. As we explained to the Court in our initial brief, the order in issue

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here, the "Final Judgment as to Count I," was not immediately appealable because both Count III and the counterclaim remained pending. In order to render the order appealable, the plaintiff stipulated to a dismissal of Count III and the entry of a judgment on the counterclaim (R. 3900-03). Because the defendants were apparently concerned that the dismissal of Count III might provide us with an argument on appeal which we did not have at the time that the motion for summary judgment directed to Count I was argued, the following paragraph was inserted into the stipulation:

> 4. Plaintiff agrees that it will not seek to bolster its appeal or seek reversal of the Final Judgment as to Count I based on its voluntary dismissal of the Breach of Contract action pursuant to this Agreement. Plaintiffs [sic] agree that in no way will they argue in the appeal that the fact that they have no available remedy for breach of contract makes their fraud claim viable. Plaintiffs [sic] also agree that Defendants will not be in anyway [sic] prejudiced in the appeal by agreeing to enter into this agreement in order to accommodate Plaintiffs' [sic] desire to appeal at this time, and that the agreement will not be construed by the parties, and should not be construed by the Court, in any fashion to prejudice the Defendants. Defendants agree that Plaintiff's dismissal of their [sic] breach of contract count and entry of judgment on Defendant's [sic] Counterclaim will in no way prejudice [P]laintiff in their [sic] appeal of the final judgment entered in Defendant's [sic] favor on the fraud count.

(R. 3902-03).

With all due respect to opposing counsel, the only reasonable construction of this perfectly sensible paragraph is that we would not argue on appeal that the post-summary judgment *dismissal* of Count III somehow revived Count I of the complaint, and that our arguments on appeal would be based on the record that existed at the time of the summary judgment hearing, when both Counts I and III were pending. In

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> hindsight, the stipulation would possibly have been clearer if the second sentence had included one additional word: "Plaintiffs [sic] agree that in no way will they argue in the appeal that the fact that they [now] have no available remedy for breach of contract makes their fraud claim viable." The word "now" is fairly implied by the context of the entire paragraph, however; and its necessary implication is underscored by the final sentence of the paragraph, in which the defendants agreed that the dismissal of Count III would not prejudice the plaintiff in challenging the dismissal of Count I in this appeal. Fairly read, the stipulation was that we would limit our arguments here to the arguments made at the summary judgment hearing, when both Count I and Count III were pending, and that we would not assert the subsequent dismissal of Count III as a ground for reversal here -- and we were very careful to do *exactly* that.
>
> Most respectfully, nothing in the stipulation purports to deprive us of any arguments which were available to us on the record as it existed at the time of the summary judgment hearing; those arguments are the only arguments which we made; we based no argument at all on the subsequent dismissal of Count III; and we are frankly annoyed at counsel's charge that we deliberately violated the stipulation in order to gain an undue advantage here. If anything, it is counsel for the defendants who has violated the stipulation by repeatedly referencing the dismissal of Count III in his argument for affirmance of the dismissal of Count I. No useful purpose would be served by pursuing this counter-charge, however, so we will leave it alone. . . .

(Appellant's reply brief, pp. 9-11).[11/] Most respectfully, neither the defendants' principal argument nor their several miscellaneous arguments have any merit, and the district court's decision should be approved.

B. THE DISTRICT COURT DID NOT ERR IN "ALLOW[ING] TGI, IF IT BE SO ADVISED, TO REPLEAD

[11/] In this connection, we should note that we have carefully toed the line in this Court as well, and have limited our arguments to those available to us on the record as it existed at the time of the hearing on the defendants' motion for summary judgment.

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ITS FRAUDULENT INDUCEMENT CLAIM IN AN AMENDED PLEADING" AFTER REMAND.

In their second issue, the defendants do not complain of the district court's conclusion that the plaintiff's complaint sufficiently alleged a claim for common law fraud in the inducement; however, they do contend that the district court committed reversible error in inserting the following footnote in its opinion: "Even though we find the claim sufficiently pleaded, on remand we direct the trial court to allow TGI, if it be so advised, to replead its fraudulent inducement claim in an amended pleading." *TGI Development, Inc. v. CV Reit, Inc.*, 665 So.2d 366, 366 n. 2 (Fla. 4th DCA 1996). According to the defendants, this grant of leave to amend was prohibited by this Court's decision in *Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981). We disagree. *Dober* is entirely inapposite to the footnote of which the defendants complain.

Before we demonstrate the inapplicability of *Dober*, however, we must take issue with the following assertion in the defendants' brief: "Then, for the first time on appeal, appellate counsel changed horses and began arguing that the complaint was poorly worded, inartfully drawn and this was the reason the summary judgment was granted" (petitioners' brief, p. 44). This assertion is simply false. As should be clear from our restatement of the case and facts, it was the *defendants* who insisted in the trial court that the plaintiff's second amended complaint was inartfully drafted. In fact, the defendants conceded in the trial court that the "economic loss rule" did *not* bar claims for fraud in the inducement, but argued that they were entitled to summary judgment nevertheless for the sole reason that the plaintiff had chosen to base both the fraud count and the breach of contract count on the "same set of facts."

In a rather telling admission, defendants' counsel even conceded, in effect, that the defendants were not entitled to a summary judgment because the law required it, but

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simply because the plaintiff had pled its breach of contract action poorly:

> Now I will be the first to admit that if I were the plaintiff and I could do this all over again, maybe I'd just carve out this loan transaction and put it in back of the complaint and talk about the $800,000 and that would be the end, and [I] wouldn't be there [here?] then. But that's not what they have done.

(SR. T2: 62).

Most respectfully, it was the *defendants* who contended that the complaint was inartfully drafted, and that they were entitled to win for that reason alone -- and because that is the *only* thing they argued to the trial court, that simply had to be the reason why the trial court granted their motion. As a result, we can hardly be faulted for arguing on appeal, just as plaintiff's counsel had argued to the trial court, that the complaint sufficiently alleged a claim for fraudulent inducement distinguishable from and independent of the claim for breach of contract -- and alternatively, that even if the pleading was inartfully drafted in that respect, that was no reason for ordering the entry of a final judgment in the defendants' favor. In fact, given the defendants' position in the trial court, that was *the* issue on appeal. It was therefore not even arguably a "change of horses" argued for the first time on appeal, as defendants' counsel now claims -- and frankly, we think the Court has been disserved by counsel's undeniably false claim to the contrary.

In any event, *Dober* is simply beside the point here. In that case, the plaintiffs brought a medical malpractice action against several physicians. In their answer, the physicians alleged as an affirmative defense that the statute of limitations barred the plaintiffs' claim. The plaintiffs did not file any further pleading. The physicians then moved for summary judgment on their statute of limitations defense; they proved their defense conclusively; and the motion was therefore granted. On appeal, the plaintiffs

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argued -- for the first time in the case, and notwithstanding that they had failed to allege the affirmative defense of fraudulent concealment in a reply to the defendants' statute of limitations defense -- that the summary judgment was erroneous because a fact question was presented on the statute of limitations defense by the defendants' fraudulent concealment of the claim.

Because the fraudulent concealment defense had not been pled or raised in any other manner in the trial court, the district court *affirmed* the defendants' summary final judgment, but remanded the case to allow the plaintiffs to amend their pleadings to assert the affirmative defense of fraudulent concealment. This Court disapproved of the remand, with the following observation:

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment *and then permits the losing party to amend his initial pleadings to assert matters not previously raised* renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.

401 So.2d at 1324 (emphasis supplied).

Nothing of the sort happened in the instant case. To begin with, as we explained above, the issue of the inartfulness of the allegations of the plaintiff's second amended complaint was not raised for the first time on appeal; instead, it was the very ground upon which the defendants moved for summary judgment in the trial court, the very position upon which the summary judgment was bottomed, and the very thing which was challenged on appeal. Neither did the district court *affirm* the defendants' summary final judgment and then remand to allow the plaintiff to amend its pleadings; instead, the district court *reversed* the summary final judgment, and remanded the case for further proceedings. At that point, of course, the case became subject to the Rules of Civil

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Procedure once again -- including Rule 1.190, which allows the amendment of pleadings upon request -- so an amendment would have been available to the plaintiff upon request even if the district court had not granted the plaintiff leave to amend. And, of course, the district court did not remand with leave to amend to add a new cause of action not previously pled; it explicitly found that, "[h]owever inartfully pleaded, . . . TGI's complaint sufficiently alleged a claim for common law fraud in the inducement," and it then simply authorized the plaintiff to *clarify* its pleadings "if it be so advised" so that the defendants would no longer be confused about the nature of the plaintiff's previously-pled fraud action. 665 So.2d at 366.

This, we submit, was perfectly consistent with the liberal policy of Florida's rules of practice and procedure:

> At any time in furtherance of justice, upon such terms as may be just, the court may permit any process, proceeding, pleading, or record to be amended or material supplemental matter to be set forth in an amended or supplemental pleading. At every stage of the action, the court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Rule 1.190(e), Fla. R. Civ. P. Most respectfully, because the district court *reversed* the defendants' summary final judgment, remanded for further proceedings, and allowed only a simple, optional clarification of a previously-pled claim, *Dober* plainly has no application whatsoever to the footnote of which the defendants complain.

We are also constrained to suggest that this issue is much ado about nothing of any real significance, and that the Court should exercise its discretion to ignore it. Because the district court squarely held that the complaint sufficiently alleged a claim for common law fraud in the inducement, there is really no need for the plaintiff to amend its pleadings at this point at all. As far as we can tell, the footnote was added only to allow the plaintiff to clarify its allegations for the defendants' benefit, so that they would no

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longer be confused about the relationship between the fraud claim and the breach of contract claim. Surely, to allow the mere clarification of a previously-pled claim in order to obviate some apparent confusion as the case proceeds cannot rise to the level of *reversible error*; according to Rule 1.190(e), that is precisely what courts are supposed to do "in furtherance of justice." Neither, of course, will quashing the grant of leave to amend (as the defendants request) have any practical effect on the future course of the litigation, since the plaintiff's complaint has been declared sufficient *without* the optional, clarifying amendment allowed by the footnote. In short, the issue is simply not worthy of consideration by this Court, which has far more important things to do with its limited time and resources. Most respectfully, this second issue should not be entertained; if entertained, it should be declared meritless.

V.
CONCLUSION

For all of the foregoing reasons, the district court's decision should be approved, or review should simply be denied.

Respectfully submitted,

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TGI DEVELOPMENT, INC., Appellant,

v.

CV REIT, INC., a Delaware Corporation f/k/a Cenvill Investors, Inc., H. Irwin Levy; and Boca Grove, Ltd., through its General Partner, La Bonte Diversified Development, Inc., Appellees.

No. 94–2749.

District Court of Appeal of Florida, Fourth District.

Jan. 3, 1996.

Developer brought action against investment corporation and partnership for fraudulent inducement. The Circuit Court, Palm Beach County, Ronald Alvarez, J., granted summary judgment in favor of defendants. Developer appealed. The District Court of Appeal, Farmer, J., held that economic loss rule did not bar recovery.

Reversed and remanded; conflict certified.

Fraud ⇐25

Fraud in inducement, even when only economic losses are sought to be recovered, is kind of independent tort that is not barred by economic loss rule.

Joel D. Eaton of Podhurst, Orseck Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, and Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for appellant.

John Beranek of Macfarlane, Ausley, Ferguson & McMullen, Tallahassee, and J. Michael Burman of Burman & Critton, North Palm Beach, for appellees.

FARMER, Judge.

TGI Development, Inc., appeals from a final summary judgment in which the trial court found that its common law fraud claim was barred by the economic loss rule. We reverse.

Fraud in the inducement, even when only economic losses are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So.2d 1221 (Fla. 3d DCA Sept. 22, 1995); *but see Woodson v. Martin*, 663 So.2d 1327 (Fla. 2d DCA 1995) (common law fraud in the inducement claim seeking only economic losses is barred by economic loss rule.)[1] However inartfully pleaded, we find that TGI's complaint sufficiently alleged a claim for common law fraud in the inducement.[2]

1. We agree with the dissenting opinions of Judges Altenbernd and Lazzara in *Woodson*, and thus certify conflict with the majority's decision in that case.

2. Even though we find the claim sufficiently pleaded, on remand we direct the trial court to allow TGI, if it be so advised, to replead its fraudulent inducement claim in an amended pleading.

Therefore, it was error to grant summary judgment in favor of the appellees.

REVERSED and REMANDED.

STONE, J., and STREITFELD, JEFFREY E., Associate Judge, concur.

Lies and Broken Promises: Fraud and the Economic Loss Rule after *Woodson v. Martin*

by Theresa Montalbano Bennett

Florida's economic loss rule continues to devour commercial torts.[1] In three recent cases, beginning with *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d DCA 1995), the Second District Court of Appeal held that the economic loss rule bars fraud in the inducement claims in contracts for the sale of residential and commercial real estate.[2] The court of appeal certified the following questions to the Florida Supreme Court:

Is a buyer of residential property prevented by the "economic loss rule" from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers?[3] and,

Is a buyer of commercial property prevented by the "economic loss rule" from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers?[4]

Shortly after the *Woodson* trilogy, in *TGI Development, Inc. v. CV Reit, Inc.*, 665 So. 2d 366 (Fla. 4th DCA 1996), the Fourth District Court of Appeal held that fraud in the inducement is not barred by the rule even though only economic damages are sought, and certified its conflict with the Second District Court of Appeal.[5]

In *Woodson*, the court affirmed the dismissal of a fraud in the inducement claim associated with the purchase of residential property. The court reasoned that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories. If the damages sought are economic losses only, the party seeking recovery for those damages must proceed on contract theories of liability.[6]

In reaching this conclusion, the court relied on *Casa Clara Condo. Ass'n v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628 (Fla. 1995); *Hoseline, Inc. v. U.S.A. Diversified Products, Inc.*, 40 F.3d 1198 (11th Cir. 1994); and *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995).

> *In* Woodson, *the court reasoned that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories"*

The superficial analysis of the above cases led to a poor decision and overbroad certified questions. If the Florida Supreme Court answers affirmatively, fraud in the inducement will be abolished as a cause of action in Florida. Significantly, only one of the latter cases actually involved a claim for "fraud in the inducement."

In *Pulte*, the 11th Circuit acknowledged that the rule does not bar fraud in the inducement claims; the plaintiffs simply failed to prove their claim. *Hoseline* involved fraud in the *performance* (not inducement) of a supplies contract. *Casa Clara* and *Airport Rent-A-Car* applied the rule only to negligence claims.

In *Hoseline*, the plaintiff claimed that the manufacturer/defendant had short-shipped certain hosing by 45 to 50 percent. The claim included counts for civil theft and fraud arising from the undershipment. In dismissing the civil theft claim, the 11th Circuit correctly relied on *Rosen v. Martin*, 486 So. 2d 623 (Fla. 3d DCA 1986), which held that breach of contract claims do not generally give rise to civil theft claims, unless the object of the "theft" is a specific fund capable of specific identification. In dismissing the "fraudulent breach" theory, the court relied, in part, on *Serina v. Albertson's*, 744 F. Supp. 1113 (M.D. Fla. 1990), which held that the rule bars intentional tort claims that are "intertwined" with a breach of contract claim, (commonly discussed as the "independent tort" requirement of the rule). Deceit, by definition, is an "independent tort."[7]

Casa Clara did not address fraud claims at all. Nonetheless, it fueled the *Woodson* court's troubling examination of the rule in the context of damages resulting from fraud. If the damages resulting from fraudulent inducement are economic losses only (no personal injury or damage to other property), then the rule bars the claim, said the Second District Court of Appeal. However, the *only* damages resulting from fraudulent inducement are economic.[8] Perhaps one could fraudulently induce another to shoot himself in the foot, causing personal injury, but the comparative fault in such a case would surely offset the compensatory damages, and leave nothing on which to stack the punitives.

(3)

And after all, punitive damages are the reason for fraud claims associated with breaches of contract. The rationale for denying punitive damages in breaches of contract and yet awarding them for fraud demonstrates that the punitive damages bar in contracts was never meant to encourage deceit.

This article tracks the historical prohibition of punitive damages for breach of contract; highlights the risks of adopting the *Woodson* bar to concurrent fraud and breach of contract claims; and summarizes the decisions of other jurisdictions as they relate to concurrent breach and punitive damages claims.

In the beginning, there was sanctity of promise in contracts.[9] For breaking a promise, the breaching party must pay compensatory damages. Punitive damages are not awardable for breaking promises because the law encourages the "social gain of efficient breaches."[10] This philosophy is implicitly observed in Florida.[11] Mere broken promises yield only compensatory damages.

Conversely, common law fraud has traditionally supported exemplary damages.[12] As dissenting Judge Altenbernd recognized in *Woodson*, "the interest protected by fraud is society's need for true factual statements in . . . commercial or business relationships."[13] Society protects this interest by more than compensatory damages. Fraud warrants punitive damages.

Even failure to disclose known defects in the sale of residential real estate ("sins of omission" as they were called in catechism), now creates fraud liability. For home sales, *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), elevated commercial dealing standards from caveat emptor.[14]

Commercial Autonomy and Efficient Breaches

Many reasons have been advanced for the prohibition of punitive damages in breach of contract claims. They are based generally on theories of either commercial autonomy or efficient breach.

If a contract is "simply a set of promises to either perform or pay damages for nonperformance,"[15] then there should be no commercial expectation of exemplary damages between the parties. Scholars have also reasoned that contracts govern commercial relationships in which compensatory losses are easily established, unlike torts, in which compensatory damages are more difficult to value.[16] Some have argued that contractual breaches do not generate the same level of resentment as do intentional torts, and thus retribution in the form of punitive damages is not necessary.[17] Still others have explained that since breach of contract instills liability without fault (strict liability), punitive damages would serve no deterrent purpose.[18]

The "efficient breach" doctrine is the economic rationale for denying punitive damages in breach of contract cases. It holds that a party should be allowed to breach an existing contract, and pay the expectancy damages rather than to be forced by the threat of punitive damages to perform under an unprofitable agreement.[19] This concept advances efficient and profitable commercial transactions. As long as both parties act in good faith at the outset, then the efficient breach rationale protects the nonbreaching party's interest and encourages productive enterprise.

The *Woodson* Threat

When parties do not act in good faith in the formation of an agreement, however, the efficient breach theory protects wrongdoers by limiting their exposure to expectancy damages. An economic loss rule that bars fraud in the inducement claims would similarly limit damages.

The absence of a punitive damages remedy would reward deceit and punish the nonbreaching party in several ways. First, the defrauding party's liability would be limited to contract damages. These damages are inherently less than actual losses, since many litigation costs and business expenses related to litigation are not recoverable.

Worse yet, the defrauded party may find his or her expectancy damages are too speculative[20] and thus the remedy may be reduced to reliance damages or rescission.[21]

The nonbreaching party would be further burdened with the duty to mitigate in the face of a fraudulently induced transaction, since the surviving claim is not fraud, but rather, breach of contract.[22] Moreover, if the fraudulent representation is found to be a partial breach, the defrauded party would be entitled to damages, but would be bound to continue his or her own performance in good faith.[23]

An economic loss rule bar to a fraudulent inducement claim would unfairly burden the nonbreaching party, because the surviving contract claim requires the defrauded party to continue to act in good faith by either mitigating the defrauded party's losses or continuing to perform for fear that the fraud may be ruled a partial breach. In addition, the defrauding party would not only be protected from punitive damages, but also from even expectancy damages in many cases.

Due Diligence and Bargaining

The rationale that sophisticated, contracting parties can and should protect themselves is likewise flawed where fraud in the inducement exists. Due diligence cannot ensure against fraud, and contracting parties are prohibited from bargaining against fraud between or among themselves because they cannot fashion their own deterrents within agreed or liquidated damages.[24]

If fraudulent inducement claims were no longer available in breach of contract claims, parties would be foreclosed from protecting themselves from fraud. It is against public policy to agree to punitive damages and, therefore, parties could not include fraud deterrents within their contracts. In addition, under both the UCC and at common law, liquidated damages are measured against actual damages and the actual damages comparison presents proof of problems similar to those previously mentioned, especially when speculative ventures are involved.

Commercial autonomy and efficient breach theories fail unless parties tell the truth during contract negotiations. The duty to provide true factual statements is given teeth by punitive damages exposure for fraud.

If actual fraud and the legal fraud authorized by *Johnson v. Davis* warrant punitive damages, then why do courts routinely dismiss fraud claims when they are associated with breaches of contract? It seems that courts simply have difficulty distinguishing between a broken promise and a lie.

If actual fraud and the legal fraud authorized by Johnson v. Davis *warrant punitive damages, then why do courts routinely dismiss fraud claims associated with breaches of contract?*

Rulings in Other Jurisdictions

Nearly all other jurisdictions currently permit punitive damages for intentional torts associated with breach of contract claims.[25] The most liberal jurisdictions simply require the breach to be willful, or oppressive. The majority of jurisdictions require that the breach be accompanied by independent, intentional torts, such as fraud. Independent torts are loosely defined among the jurisdictions. Factors used for the determination are either the nature of the duty breached,[26] the substance of the breach, and the tort,[27] or the claimed damages.[28] Only two jurisdictions other than Florida in *Woodson* have used damages to define whether an independent tort exists.[29]

Texas requires separate and distinct damages for fraud and other independent torts associated with a breach of contract. Punitive damages cannot be awarded without discrete damages arising from the tort. In *Grace Petroleum Corp. v. Williamson*, 906 S.W. 2d 66 (Tex.App. 1995), the 12th District Court of Appeal reversed an exemplary damages award founded on concurrent claims for fraudulent misrepresentation and breach of contract. In reversing the punitive damages award, the court explained, "[W]e are directed to examine the nature of the plaintiff's loss, because the nature of the injury most often determines which duty[30] has been breached." *Id.* at 68.

The fraudulent misrepresentations complained of in *Grace* were given to induce the plaintiffs (Williamson) to extend an existing lease. This differs from *Woodson* since the *Woodson* fraud was the inducement to the original purchase contract. In other words, the fraud in *Grace* occurred in connection with a modification, rather than formation of the contract. Even the *Grace* court did not look prior to formation of the initial contract to bar a fraud claim.

Conclusion

Until *Woodson*, Florida courts allowed fraudulent inducement claims to coexist with breach of contract claims, safe from the economic loss rule. *Woodson* advanced no convincing rationale for extending the rule to foreclose fraud claims. Moreover, if fraud in the inducement were eliminated as a cause of action in Florida, then defrauded parties would be unfairly burdened under classic contract tenets. ❑

[1] Paul J. Schwiep has aptly described the economic loss rule as "The Monster That Ate Commercial Torts." *See* Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34 (Nov. 1995).

[2] *Linn-Well Development Corp. v. Preston & Farley, Inc.*, ___ So. 2d ___, 21 Fla. L. Weekly D63 (Fla. 2d D.C.A. 1995); *Raymond James & Assoc., Inc. v. P.K. Ventures, Inc.*, ___ So. 2d ___, 20 Fla. L. Weekly D2699 (Fla. 2d D.C.A. 1995).

[3] *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d D.C.A. 1995).

[4] *Linn-Well*, 21 Fla. L. Weekly at D63.

[5] *See also Jarmco, Inc. v. Polygard, Inc.*, 1996 WL 71251 (Fla. 4th D.C.A., Feb. 21, 1996).

[6] *Woodson*, 663 So. 2d at 1327.

[7] *See Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 720-721 (Fla. 3d D.C.A. 1972).

[8] It is difficult to imagine noneconomic fraud damages, though there are some Florida cases that support mental anguish as a personal injury resulting from fraud. The cases are few, however, and the fraudulent conduct must be particularly malicious to authorize the award of punitive damages. *See Food Fair, Inc. v. Anderson*, 382 So. 2d 150 (Fla. 5th D.C.A. 1980).

[9] JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS §1-4 (3d ed. 1987).

[10] *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1984 (7th Cir. 1985).

[11] *See Ashland Oil, Inc.*, 269 So. 2d at 720-21; *see also Sleight v. Sun and Surf Realty, Inc.*, 410 So. 2d 998 (Fla. 3d D.C.A. 1982).

[12] *American International Land Corp. v. Hanna*, 323 So. 2d 567 (Fla. 1975).

[13] *Woodson*, 663 So. 2d at 1329.

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[14] *See Lingsch v. Savage*, 213 Cal. App. 2d 729.

[15] HOLMES, THE COMMON LAW 235-36 (M. Howe ed. 1963).

[16] Sullivan, *Punitive Damages in the Law of Contract*, 61 MINN. L. REV. 207 (1977).

[17] 5 CORBIN ON CONTRACTS §1077, at 438.

[18] *See Patton v. Mid Continent Systems, Inc.*, 841 F.2d 742, 750 (7th Cir. 1988).

[19] FARNSWORTH, CONTRACTS §12.8 at 843.

[20] Speculative damages are more likely where fraud has induced a contract for new or unproven products or services.

[21] RESTATEMENT (SECOND) OF CONTRACTS, §§345, 349; *see also Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

[22] RESTATEMENT (SECOND) OF CONTRACTS §350; *see also Hilsenroth v. Kessler*, 446 So. 2d 147 (Fla. 3d D.C.A. 1983).

[23] RESTATEMENT (SECOND) OF CONTRACTS §§237, 241, 242.

[24] The use of liquidated damages clauses to compel compliance with contract terms has long been rejected as against public policy. *Humana Medical Plan, Inc. v. Jacobson*, 614 So. 2d 520, 522 (Fla. 3d D.C.A. 1992) (citing to *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954)).

[25] *Gamma-10 Plastics v. American Pres. Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994) (admiralty); *John Deere Industrial Equip. Co. v. Keller*, 431 So. 2d 1157 (Ala. 1983); *Great Western Savings Bank v. George W. Easley Co., J.V.*, 778 P.2d 569 (Alaska 1989); *Rhue v. Dawson*, 841 P.2d 215 (Ariz. App. 1992); *Thomas Auto Co., Inc. v. Craft*, 763 S.W. 2d 651 (Ark. 1989); *Ott v. Alfa Laval Agri*, 31 C.A. 4th 1439 (Cal. App. 1995); *Interstate Gas Co., Inc. v. Chemico*, 833 P.2d 786 (Col. App. 1991); *Hudson River Cruises v. Bridgeport Dry Dock Corp.*, 892 F. Supp. 380 (D. Conn. 1994); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987); *Washington v. Gov't Emp. Ins. Co.*, 769 F. Supp. 383 (D.D.C. 1991); *Williamson v. Palmer*, 404 S.E. 2d 131 (Ga. App. 1991); *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037 (Haw. 1994); *Cuddy Mountain Concrete, Inc. v. Citadel Const. Ins.*, 824 P.2d 151 (Idaho App. 1992); *Donald v. Liberty Mut. Ins. Co.*, 18 F.3d 474 (7th Cir. 1994) (Ill.); *Wauchop v. Dominos Pizza, Inc.*, 832 F. Supp. 1577 (N.D. Ind. 1993); *White v. Northwestern Bell Tel. Co.*, 514 N.W. 2d 70 (Iowa 1994); *Woodmont Corp. v. Rockwood Center Partnership*, 858 F. Supp. 158 (D. Kan. 1994); *Reid v. Key Bank of Southern Maine*, 821 F.2d 9 (1st Cir. 1987) (Me.); *Monday v. Waste Mgmt. of N.A.*, 858 F. Supp. 1364 (D. Md. 1995); *Sullivan Industries v. Double Seal Glass Co., Inc.*, 480 N.W. 2d 623 (Mich. App. 1991); 865 F. Supp. 574 (D. Minn. 1994); *Sessoms v. Allstate Ins. Co.*, 634 So. 2d 516 (Miss. 1993); *Phillips v. Bradshaw*, 859 S.W. 2d 232 (S.D. Mo. 1993); *Daniels v. Dean*, 833 P.2d 1078 (Mont. 1992); *Sprouse v. Wentz*, 78 P.2d 1136 (Nev. 1991); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (N.J.); *Paiz v. State Farm Fire & Casualty Co.*, 880 P.2d 880 (N.M. 1994); *Rocanova v. Equitable Life Assurance*, 634 N.E. 2d 940 (N.Y. 1994); *City of Amsterdam v. Goldreyer, Ltd.*, 882 F. Supp. 1273 (E.D. N.Y. 1995); *Nationwide Mutual Ins. Co.*, 435 S.E. 2d 537 (N.C. App. 1993); *Delzer v. United Bank of Bismark*, 527 N.W. 2d 650 (N.D. 1995); *Goldfarb v. Robb Report, Inc.*, 655 N.E. 2d 211 (Ohio Ct. App. 1995); *Buzzard v. Farmer's Ins. Co.*, 824 P.2d 1105 (Okla. 1991); *Western Essex Corp. v. Casco, Inc.*, 674 F. Supp. 8 (W.D. Pa. 1987); *O'Coin v. Woon Socket Inst. Trust Co.*, 535 A.2d 1263 (R.I. 1988); *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198 (4th Cir. 1988) (S.C.); *Centrol, Inc. v. Morrow*, 489 N.W.2d 890 (S.D. 1992); *Seaton v. Lawson Chevrolet Mazda*, 821 S.W. 2d 137 (Tenn. 1991); *Grace Petroleum Corp. v. Williamson*, 906 S.W. 2d 66 (Tex. App. 1995); *Twin City Fire Ins. Co. v. Davis*, 904 S.W. 2d 663 (Tex. 1995); *ADAPT v. Skywest Airlines*, 762 F. Supp. 320 (D. Utah 1991); *Ainsworth v. Franklin City Chev. Corp.*, 592 A.2d 871 (1991) (Vt.); *Tobin v. Ravenswood Aluminum Corp.*, 838 F. Supp. 262 (S.D. W. Va. 1993); *State Farm Mut. Auto Ins. v. Shrader*, 882 P.2d 813 (Wyo. 1994).

[26] *Ott*, 31 C.A. 4th at 1449.

[27] *Edens*, 858 So. 2d at 198.

[28] *See Grace Petroleum Corp. v. Williamson*, 906 S.W. 2d 66 (Tex. App. 1995); *see also Ross v. Stoeffer*, 879 P.2d 1037 (Haw. 1994).

[29] *Grace*, 906 S.W. 2d at 68 (citing to *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W. 2d 493, 494-495 (Tex. 1991), and *Jim Walters Homes, Inc. v. Reed*, 711 S.W. 2d 617, 618 (Tex. 1986)).

[30] (Either contract or tort).

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This column is submitted on behalf of the General Practice Section, Carla S. Matthews, chair, and David A. Donet, editor.

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The Economic Loss Rule Outbreak:
The Monster That Ate Commercial Torts

by Paul J. Schwiep

Ask virtually any commercial litigator what the most quickly and confoundingly expanding legal doctrine is, and you are likely to receive the same answer: the economic loss rule. This relatively recent development in Florida law is at the same time both ever-present and ever-misunderstood. Indeed, while the papers were recently filled with anxious reports about an unknown virus that rapidly devours the human flesh, commercial litigators, particularly plaintiffs' commercial tort practitioners, are equally concerned about the economic loss rule, which is just as rapidly consuming commercial tort claims of virtually every variety. Two preliminary observations:

First, it is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine. Recently, this author attended a conference on damages in commercial litigation at which no less than four eminently well-qualified speakers discussed the dramatic spread of the economic loss rule. The panelists admonished the attending practitioners to familiarize themselves with the cases. Unfortunately, however, none of the panelists (Did I mention that they were all excellent lawyers?) agreed on what the doctrine meant, how it applied, or where it was headed. This was discouraging to the rest of us who hoped our well-informed speakers would lay the beast bare for us. One speaker said the doctrine bars recovery of economic losses in tort without accompanying personal injury or property damage, without regard to contract.[1] Another explained that the doctrine prohibits recovery in tort of economic losses that are also compensable via a breach of contract claim.[2] Yet another said that the doctrine works to prohibit plaintiffs from going forward with both contract and tort claims for economic losses only, unless the tort is "separate and independent" from the contract.[3] All cited cases that can be fairly read as supporting each proposition.

As for the bench (at least at a circuit and district court level), judges are also grappling with the rule's proper application. This author recently attended a circuit court argument at which plaintiff's counsel defended her complaint's count II for fraud, notwithstanding that her count I was for breach of contract, and yet both sought recovery for economic losses only. She explained that one "clear point" in the economic loss analysis is that a separate and independent tort survives the doctrine regardless of contract. At that point, the judge—a very well-regarded jurist in South Florida—stopped counsel and said, "There isn't a damn thing about the economic loss rule that's clear to me." The sentiment was echoed by Judge Altenbernd of the Second District Court of Appeal, who lamented that "the economic loss rule is stated with ease but applied with great difficulty."[4]

Further, the bar and bench's efforts at understanding the economic loss doctrine have, sadly, not been much assisted

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by the Florida Supreme Court's pronouncements. The three leading cases[5] (they are not quite a "trilogy" because that implies they build on one another) do not provide adequate guidance. Worse, and because of this, the U.S. Court of Appeals for the 11th Circuit's well-meaning attempts to define the doctrine have quite probably done more harm than good (and caught the attention of at least one law review writer).[6] Perhaps the federal appellate court would do well to return to the point that got us here in the first place: Certifying economic loss rule questions to the Florida Supreme Court.[7] Don't you wish you could do the same?

Second, the economic loss doctrine, at least in certain of its iterations, is illogical and ill-founded. For example, it has seemingly always been the law in Florida that one who violates the common law duty to avoid fraud by intentionally deceiving another with the intent and effect of inducing reliance to the other's detriment, will be liable in tort—period, end of story, and no need to start talking about contract. Yet the economic loss doctrine, in its more aggressive tort-devouring strains, has been held to trump this fundamental common law precept.[8] Insatiable, the doctrine has claimed as its victims actions for negligence, fraud, and demands for punitive damages.[9] And beyond these familiar casualties in the doctrine's war on commercial torts, cases have held that claims for conversion, civil theft, Florida RICO, intentional interference with contract, and (for heaven's sake) breach of fiduciary duty are prohibited by the rule.[10] Think about it: Your client who suffered only pecuniary losses due to the fiduciaries' breach of trust has no tort claim for breach of fiduciary duty. Can this be the law?

More troubling, in the wake of the Florida Supreme Court's decision in *Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), the doctrine has been aggressively applied even where there is no contractual relationship between the parties. Recently, the Third District Court of Appeal, en banc, relied on the doctrine in holding that a certified airplane mechanic who prepares a plane for federal certification under contract with the plane's seller does "not owe the buyer of [the] airplane with whom it had no privity of contract a duty of care." *Id.* The court found that the buyer had no theory of recovery against the mechanic, notwithstanding (or in spite of) the absence of a contractual relationship.

In sum, the trend seems clear—courts are invoking the economic loss doctrine as a formulaic judicial talisman to ward off tort claims of nearly every variety if plaintiffs claim no personal injury or property damage. The point of this article is fourfold: 1) to address four recent cases; 2) to engender debate about the doctrine's proper place in Florida jurisprudence; 3) to attempt to re-tie the economic loss rule to its historical tethers from which it has seemingly broken free; and 4) to urge courts to tame the doctrine and restrict it to its original, well-founded role.

Where Did This Monster Come From?

Not Runnymede. Yet in the Florida Supreme Court's first real foray into the economic loss doctrine (*Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987)), the court attempted to pin the doctrine far back into Florida jurisprudence, stating that "the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting."[11] Based on the court's somewhat surprising view that the doctrine had been the law in Florida forever, the court applied it retroactively.

In fact, and with the benefit of hindsight, *Florida Power & Light* marked a dramatic turn in the economic loss rule's development in Florida, taking the doctrine down a slippery slope on which it continues to slide. *Florida Power & Light* was premised on two cases, one from California and one from the U.S. Supreme Court. Both were product liability cases. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the Supreme Court, in an admiralty action, was confronted with the issue "whether [a] cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss."[12] The Supreme Court began its analysis by explaining that product liability law had expanded to impose strict liability on manufacturers because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[13] The Court continued, finding that when a defective product causes purely monetary harm, "the reasons for imposing a tort duty are weak, and those for leaving the party to its contractual remedies are strong."[14] This is because "[t]he tort concern with safety is reduced when an injury is only to the product itself."[15] Because a manufacturer's tort-based duty to avoid manufacturing a defective product that harms life or property (other than the product itself) is a safety-driven concern, that duty does not arise where a defective product causes only monetary harm. In that instance, the economic harm caused by a defective product "is most naturally understood as a warranty claim."[16] The Court further justified its conclusion by noting that "[c]ontract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements."[17]

The other case underpinning *Florida Power & Light* is *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), perhaps the most articulate explanation of the rationale upon which the economic loss doctrine is bottomed. There plaintiff's defectively manufactured pickup truck "galloped," bounced, and finally overturned. Thankfully from Mr. Seely's perspective, but to the everlasting torment of tort law students, Mr. Seely walked away from the accident unscathed. The case ultimately landed on Justice Traynor's desk who dispatched plaintiff's product liability claim. Justice Traynor limited the plaintiff to contract finding that the basis for the distinction lies "in the nature of the responsibility a manufacturer must undertake in distributing his products."[18] He wrote that under tort law, a manufacturer who produces a product that is defective because it "creates unreasonable risks of harm" should be held "liable for physical injuries caused by [the] defects."[19] If, however, the product does not cause physical injuries (or injuries to other property), the manufacturer should not "be held liable to the level of performance of his products in the consumer's business

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unless he agrees that the product was designed to meet the consumer's demand."[20]

From the consumer's perspective, Justice Traynor commented that, "[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."[21]

The doctrine announced in *Seely* and in *East River* was properly invoked by the Florida Supreme Court in *Florida Power & Light* so as to bar Florida Power & Light's negligence claim. There, Florida Power & Light contracted for Westinghouse to build a steam supply system. Westinghouse naturally would expect that it was duty bound to construct for Florida Power & Light a steam supply system that would not be unreasonably dangerous, so as to result in physical injury or damage to other Florida Power & Light property. A violation of this duty would subject Westinghouse to tort liability. Westinghouse would also expect that it was duty bound to build for Florida Power & Light a system that complied with Westinghouse's contractual obligations, including any warranties. A violation of these contractual responsibilities would subject Westinghouse to contract liability. But as the U.S. Supreme Court stated in *East River*, beyond these tort and contract duties, Westinghouse should have "no duty under either a negligence or strict products-liability theory to prevent a product from [causing economic loss only]."[22] As the Florida court explained, if Florida Power & Light wanted more protection than provided by either tort law (including Restatement (Second) of Torts §402A) and its contract, it should have negotiated such.

The 11th Circuit again resorted to the punt in *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). There, AFM Corp. contracted with Southern Bell for Yellow Pages advertising. The advertisement was printed incorrectly and, after other snafus, AFM sued for breach of contract and negligence. The 11th Circuit did not view the case as an economic loss case, and asked the Florida Supreme Court to decide whether a plaintiff suing exclusively in tort could recover lost profits. The Florida court, however, decided to restate the issue as whether Florida law allows "a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage."[23] Relying on *Florida Power & Light*, the court answered the question in the negative, finding that "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses."[24]

The final of the Florida Supreme Court's "big three" economic loss rule cases is *Casa Clara*.[25] There the court put its foot forcefully down on the rule's accelerator pedal, ensuring its speedy romp through commercial torts. *Casa Clara's* facts are straightforward. As Justice Barkett noted in her partial dissent, the plaintiffs alleged that "their homes [were] literally crumbling around them because the concrete supplied by [the Defendant] was negligently manufactured."[26] The plaintiffs, homeowners in Monroe County, had no contract with the defendant concrete supplier—they bought their homes under contract with various developers. They sued the concrete supplier for, among other things, breach of an implied warranty, negligence, products liability, and building code violations.[27] Given the lack of contractual privity between the plaintiff homeowners and the concrete supplier, the plaintiffs must naturally have felt secure that the economic loss rule could not bar their claims. For as the Florida Supreme Court explained in *Florida Power & Light*, the rule's raison d'etre is to "encourag[e] parties to negotiate economic risks through warranty provisions and price."[28] As the homeowners never had opportunity to negotiate a contractual allocation of risks and remedies with the supplier, the rule could not, they argued, logically be applied to them.

The Florida Supreme Court (by a four to three vote) disagreed. The majority found that the economic loss rule barred plaintiffs' claims in their entirety. The majority glossed over the lack of privity problem, mechanistically chanting that the rule bars a claim in tort "for purely economic losses."[29] The court parroted the "negotiated rights and remedies" rationale—cold comfort to the homeowners, who never met the supplier at a bargaining table. Worse, the court invoked the well-worn rebuff to plaintiff lawyers about slippery slopes and floodgates, saying that to hold otherwise would cause contract law "to drown in a sea of tort."[30] In dissent, Justice Shaw complained that, "[w]hile . . . parties who have freely bargained and entered a contract relative to a particular subject matter should be bound by the terms of that contract including the distribution of loss, . . . the theory is stretched when it is used to deny a cause of action to an innocent third party who the defendant . . . should have known would be injured by the tortious conduct."[31] Justice Barkett's dissent similarly noted: "A key premise underlying the economic loss rule is that parties in a business context have the ability to allocate economic risks [through] negotiations. That premise does not exist here."[32]

Four Recent Decisions

Four recent decisions, one from the Florida Supreme Court, one from the 11th Circuit, and two from Florida's Third District Court of Appeal, further illustrate the economic loss doctrine's expansiveness. First, on June 15, 1995, the Florida Supreme Court decided *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 20 Fla. L. Weekly S276 (Fla. June 15, 1995). There, plaintiff operated several buses manufactured by defendant. Two of the buses caught fire, one while transporting children. No one was injured. Plaintiff purchased the buses from a third party, and thus had no contractual relationship with the manufacturer. Plaintiff initiated tort claims against the manufacturer for strict liability and negligence. The Supreme Court affirmed the dismissal of the claims based on the economic loss rule. The court rejected plaintiff's arguments that the rule is inapplicable when no alternative theory of recovery exists or when the loss is caused by a sudden calamitous event.[33] Further (and more troubling), the court found of no moment plaintiff's contention that the defendant manufacturer knew or should have know, after manufacture, that the buses were dangerous and so should have warned plaintiff of the danger.[34] On this point, Justice Wells dissented, explaining, "[o]ur policy should be that a manufacturer does have a duty to warn of a defect known

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to it to exist in the product when the defect's existence becomes apparent to the manufacturer."[35] Justice Wells also sounded a broader condemnation, stating, "[o]ur commitment to the economic loss rule should not be so total that we permit a manufacturer to proceed 'ostrich like.' "[36]

Second, in October 1994 the Third District issued its opinion in *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994). There, two limited partnerships which owned apartment complexes entered into loan agreements with the plaintiff's predecessor in interest. The loan documents included mortgages, promissory notes, and a collateral assignment of rent in favor of the lender. The complaint was brought against two defendants, the limited partnerships' general partner and their property management firm. The general partner also controlled the property management firm. The complaint alleged that after notice of default, the defendants diverted rents to the general partner's personal use. Claims were raised against both defendants for conversion, civil theft, Florida RICO, and conspiracy to violate RICO.[37]

Citing the economic loss rule, the court blocked all of plaintiff's claims. As to the general partner, the court examined the loan documents, dutifully reciting the number of paragraphs and subparagraphs in each, and surmised that "[t]he . . . documents expressly deal with the issues involved in the instant action and they clearly demonstrate that the parties intended their contract to cover all eventualities."[38] Can that be so? Do lenders, in executing commercial loans, typically negotiate remedies in the event that the borrower decides to engage in a pattern of criminal activity separately actionable under a Florida statute? Can the common law economic loss rule trump a legislatively created remedial scheme designed to extend a remedy to those harmed by a pattern of criminal activities?[39]

As to the defendant property management firm, the court again turned down the plaintiff's tort claims, finding that a contractual relationship existed between the firm and the two limited partnership apartment complex owners.[40] The court held that plaintiff "has not alleged a breach of duty separate and apart from the contractual duties which bound [the property management firm] and the partnerships, thus [the firm] can only be held liable to those with whom it has contracted."[41] The court reasoned that since plaintiff's tort claims alleged in essence only that the property management firm violated its contractual duties to the partnerships, there could be no separate tort claims.

But this rationale cannot survive scrutiny. The plaintiff *had* alleged violations of duties beyond the contractual. For example, plaintiff alleged defendants violated the legislatively imposed duty to avoid civil theft. And how about the duty (also legislatively enacted) not to conspire to engage in a pattern of criminal activity? Or the duty not to convert the plaintiff's assigned rents? Moreover, because the property management firm was owned and operated

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by the borrowers' general partner, it would be highly unlikely that the borrower partnerships would bring an action in contract against the firm owned by their general partner. How would you like to have to explain that holding to your lender client who has had its assigned rents stolen by its borrowers' general partner?

Third, in December 1994, the U.S. Court of Appeals for the 11th Circuit decided *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir. 1995). In *Hoseline*, plaintiff and defendant USA Diversified entered into a contract whereby plaintiff bought wire harnesses from USA that USA then shipped direct to plaintiff's customers. On a tip, plaintiff's president inspected some boxes of wire harnesses and found that USA had undershipped the product. Plaintiff sued USA for breach of contract, and USA's president (Davis) for fraud and civil theft.[42] The court found that "the economic loss doctrine bars tort recovery for contract claims which involve no injury to person or property."[43] The court struck down the fraud and civil theft claims.

Finally, on March 15, 1995, the Third District Court of Appeal issued its en banc decision in *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412 (Fla. 3d DCA 1995) (en banc), a well-written opinion that goes far to illustrating the development of the economic loss rule. There, the plaintiff contracted to buy an airplane. As required by the contract, the seller entered into an agreement with a certified airplane mechanic who was to inspect the plane and prepare it for registration in the United States. The mechanic knew of the pending sale. In fact, in preparing the necessary registration application, the buyer was listed as the plane's owner—two days before the sale was consummated. After the sale, the buyer discovered problems with the plane that the buyer maintained the mechanic negligently overlooked. Claims were brought against the seller for breach, and against the mechanic for negligently performing the inspection, negligently misrepresenting the condition of the aircraft, and for negligently performing repairs.

In affirming a summary judgment in the mechanic's favor, the Third District read *Casa Clara* as wholesale "bar[ring] tort recovery when a product damages itself and causes economic loss, without personal injury or property damage."[44] Quoting from *Casa Clara*, the court explained that "economic losses are disappointed economic expectations that are protected by contract law, rather than tort law."[45] That the buyer and the mechanic lacked privity was of no moment—the court found *Casa Clara* "fatal" to the buyer's position. The court reasoned that the plaintiff buyer, like the plaintiff home buyers in *Casa Clara*, could have contractually protected itself by hiring its own mechanic, purchasing insurance, or negotiating a fuller warranty from the seller.

Interestingly, the *Palau* court was faced, in reaching its defense judgment, with the not insubstantial problem that the case seemed, at first blush, controlled by *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973).[46] There, the Florida Supreme Court had held a contractor has a negligence tort claim against a supervising architect, notwithstanding the absence of privity, and notwithstanding only economic losses are suffered.[47] In *Casa Clara*, the court, in a footnote, limited *A.R. Moyer* "strictly to its facts."[48] *Palau* took the footnote to heart, and jettisoned the airplane buyer's reliance on the decision.

What Is the Economic Loss Rule?

If nothing else, the above case review should excuse lawyers' (including this one's) frustration in attempting to get one's arms around the economic loss rule. To be sure, the Florida Supreme Court has, as Justice Wells stated in dissent in *Airport Rent-A-Car*, committed itself to the doctrine. But just what is this hopelessly amorphous principle that has effected a court-compelled disarmament of commercial plaintiffs lawyers' traditional arsenal—even of legislatively granted weapons like Florida RICO and civil theft?

Certainly, the economic loss rule cannot be as much as the Florida Supreme Court implied in *Casa Clara*, or as the 11th Circuit held in *Hoseline*. For if the doctrine were genuinely applied to bar "all tort claims for economic losses without accompanying personal injury or property damage," the rule would wreak havoc on the common law of torts. For example, and even though recently challenged under the rule,[49] an attorney who commits malpractice is liable in tort regardless of a contractual relationship, and even though, only economic losses (one would hope) are suffered. Indeed, an attorney who negligently drafts a will may be liable to intended beneficiaries notwithstanding the lack of privity.[50] Is this at odds with *Casa Clara*?

Likewise, a residential home seller who fails to disclose a known material defect, or one who fraudulently misrepresents a material fact, is liable in tort to the buyer, notwithstanding the damage is economic and the parties have a contractual relationship.[51] The language of *Casa Clara* would halt these claims.

Other examples abound. Malpractice claims against accountants and architects are unquestioningly permitted, although they would be barred by the theory of the doctrine if applied as in cases such as *Palau*. And what of bad faith claims against an insurer? If an insured sues the insurer for breach of contract and for bad faith, and both claims seek economic losses, the bad faith claim can naturally be thought barred by the rationale of *Florida Power & Light*.

What Should the Economic Loss Rule Be?

Whatever the economic loss rule is, it should certainly not be the analysis-lacking short cut to eliminating plaintiff's tort claims that it is becoming. Clearly, the rule has a well-deserved and substantial place in Florida jurisprudence, for example, in barring tort claims that are mere subterfuge for skirting the plaintiff's failure to negotiate adequate contract rights—FP&L's problem in its case. Likewise, the rule can and should logically be employed to avoid turning an intentional breach of contract into a tort. But beyond this economic loss rule heartland, what is needed is critical analysis of the rule's place and application, rather than the trivial invocation of the rule to stem the tide of commercial tort litigation, in an apparent attempt at judicial tort reform.

First, Florida courts should make clear that intentional tort claims for economic losses only, even between parties in privity, will generally survive the economic loss rule. Fraud, conversion, intentional interference, civil theft, abuse of process, and other torts requiring proof of intent should

generally be deemed outside the rule's reach. To hearken back to *East River* and *Seely*, defendants generally can foresee that they will be liable, for example, for intentionally misrepresenting material facts so as to, and with the effect of, inducing detrimental reliance. In the "duty" analysis on which *East River* and *Seely* are anchored, defendants are duty bound to avoid intentionally causing the harms protected by the above tort claims precisely because they can foresee their liability for doing so. The rule is not an escape hatch from intentional commercial torts.

One caveat: Intentional tort claims that allege no more than a breach of contractual obligations should be barred by the doctrine. This is because plaintiffs pressing such claims are protected (or not, depending on the plaintiff's negotiation prowess) by the contract. Thus in *Hoseline*, the defendant's contractual obligation was to ship stated quantities of goods and plaintiff's obligation was to pay therefor. When defendant undershipped, yet kept plaintiff's money, plaintiff's remedy was properly limited to those available under the contract. Defendant did no more than breach its contract, albeit intentionally, and so it is to that contract that plaintiff must turn for its remedies. Incidentally, this is already the law of Florida (and most jurisdictions).[52]

Second, as to parties that lack contractual privity, the economic loss rule is simply inapplicable. As Justice Shaw noted (unfortunately in dissent), the doctrine cannot be "stretched" that far.[53] Accordingly, in this author's view, the doctrine was wrongly invoked in *Casa Clara* and *Palau* to defeat those plaintiffs' claims. Rather, as the Florida Supreme Court found in *Florida Power & Light*, the doctrine ought to be invoked only as against those with an opportunity (in fact, or in the case of many adhesion contracts, in theory) to negotiate rights and remedies, for this is the premise from which the doctrine sprang.

That is not to say, however, that either *Casa Clara* or *Palau* was wrongly decided, only that they were decided on the wrong ground. Those cases should have been considered, as was *A.R. Moyer* and earlier decisions, on a "duty" analysis, namely: Did the defendant owe the plaintiff a duty to avoid the type of harm alleged?[54] Two oft-cited cases from other jurisdictions are useful guideposts. First, in *Glanzer v. Chopart*, 135 N.E. 275 (N.Y. 1922), (which is in most law school torts books, and which is remarkably similar to *Palau*), plaintiff contracted with a seller to buy 905 bags of beans. Seller then contracted with defendant, a public weigher, to weigh the bags and issue certificates of weight that would then govern plaintiff's payment to the seller. The weight was substantially off.

That is not to say, however, that either Casa Clara *or* Palau *was wrongly decided, only that they were decided on the wrong ground*

Under *Palau* and *Casa Clara*, plaintiff bean buyer probably would have no claim against the public weigher because purely economic losses were suffered. Justice (then-Judge) Cardozo, however, found the claim viable. He wrote: "The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made . . . . In such circumstances, assumption of the task of weighing was the assumption of a duty of weighing carefully for the benefit of all whose conduct was to be governed." Judge Cardozo found that defendant's obligations should be stated "in terms not of contract merely, but of duty." He explained: "Diligence was owing, not only to him who ordered, but to him who also relied."

The reasoning in *Glanzer* is unquestionably sound. Yet the economic loss rule, rotely applied, has come full circle to defeat what has been the common law for decades. Certainly, under *Glanzer's* analysis, the mechanic in *Palau*, well aware of its tasks and the reasons therefor, owed a duty to the identified buyer to discharge its tasks with appropriate diligence.

How should courts determine when a duty should be found where only economic losses are involved? Other courts, and specifically *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979),[55] have found any number of factors are appropriate, including "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to defendant's conduct, and (6) the policy of preventing future harm."[56] These are all well-worn questions courts traditionally ask in ascertaining whether defendant owes plaintiff a duty of care. The economic loss rule, however, has become an overused mantra that has overrun the traditional duty analysis. Clearly, under the above approach, a fiduciary owes duties, imposed by law, of loyalty and care to its charge. The economic loss rule cannot be properly drawn to slay these duties. And this is true regardless of a contract.

Airport Rent-A-Car is but another example. There, the facts pleaded in plaintiff's complaint raised the possibility that the defendant, after manufacturing the dangerous buses, learned of the dangerous condition, giving rise to a duty to advise of the danger. Thrown into the rubric of a duty analysis, and with appropriate factual development, the court might ultimately have concluded no duty existed. But the trivial invocation of the economic loss rule bars the plaintiff from establishing a record pointing toward the existence of common law duties. Justice Wells rightly dissented that "so total" a commitment to the rule is unwarranted.

The duty-analysis, had it been employed in the above cases, may very well have led to the same final outcome—the facts aren't clear. The point of this article is not to criticize the result, but to urge rigor in the analysis. ❐

[1] For this proposition, *see Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993). *Casa Clara* was fully analyzed by Lynn Wagner & Richard Solomon, *Finally a Concrete Decision: The Supreme Court of*

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Florida Ends the Confusion Surrounding the Economic Loss Doctrine, 68 FLA. B.J. at 46 (May 1994). The long-term impact of the decision was more recently discussed by Robert Alfert, Jr., *Architect's Relief Act of 1993: The Legacy of* Casa Clara v. Charley Toppino & Sons, 69 FLA. B.J. at 36 (May 1995).

[2] For this articulation of the rule, *see Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987); *see also* Robert H. Boesing & John E. Johnson, *The Economic Loss Rule: A Trial Lawyer's Guide to Protecting Contract Rights*, 66 FLA. B.J. 38 (April 1992).

[3] For this proposition, *see AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla. 1987).

[4] *Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352 (Fla. 2d D.C.A. 1992).

[5] In order of appearance: 1) *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987); 2) *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987); 3) *Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

[6] In *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991), the 11th Circuit held that the economic loss rule barred a breach of fiduciary duty claim by the customer of a securities brokerage firm against his securities broker. The case has been kindly described as "wrongly decided." James G. Dodrill II, *Interstate Securities Corp. v. Hayes Corp.: Should the Economic Loss Doctrine Apply to Actions Against Fiduciaries?*, 47 U. MIAMI L. REV. 1193, 1220 (1991). The case was also sharply criticized by Michael A. Hanzman, Interstate Securities Corp. v. Hayes Corp.: *An Unprecedented and Improper Expansion of Florida's "Economic Loss" and "Independent Tort" Rules*, 66 FLA. B.J. 42 (Apr. 1992).

[7] Both *AFM Corp.* and *Florida Power & Light* came to the Florida Supreme Court via the certification procedure.

[8] In *Hoseline, Inc. v. USA Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir. 1994), the 11th Circuit found the rule prohibited claims for civil theft and common law fraud.

[9] *See Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3d D.C.A. 1993) (negligence); *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198 (11th Cir. 1994) (barred fraud); *J. Batten Corp. v. Oakridge Investments 85, Ltd.*, 546 So. 2d 68 (Fla. 5th D.C.A. 1989) (punitive).

[10] *See Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d D.C.A. 1994) (striking claims for conversion, civil theft, and Florida RICO); *Rosa v. Florida Coast Bank*, 484 So. 2d 57, 58 (Fla. 4th D.C.A. 1986) (intentional interference); *Interstate Securities*, 920 F.2d 769 (11th Cir. 1991) (breach of fiduciary duty).

[11] *Florida Power & Light*, 510 So. 2d at 902. The court cited in support *GAF Corp. v. Zack*, 445 So. 2d 350 (Fla. 3d D.C.A.), *cert. denied*, 453 So. 2d 45 (Fla. 1984), and *Cedars of Lebanon Hosp. v. European X-Ray Distribs.*, 444 So. 2d 1068 (Fla. 3d D.C.A. 1984).

[12] *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, at 859 (1986).

[13] *Id.* at 866 (quoting *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (1944) (concurrence)).

[14] *Id.* at 871.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 872-73 (footnote omitted).

[18] *Seely v. White Motor Co.*, 403 P.2d 145, at 151 (Cal. 1965).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *East River*, 476 U.S. at 871.

[23] *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987).

[24] *Id.* at 181-82.

[25] *Casa Clara*, 620 So. 2d 1244 (Fla. 1993); *see also supra* note 1.

[26] *Id.* at 1248. Apparently, the salt content in the concrete was too high, causing the reinforcing steel to rust and crumble the concrete. *Id.*

[27] *Id.* at 1245.

[28] *Florida Power & Light*, 510 So. 2d at 901.

[29] *Casa Clara*, 620 So. 2d at 1247.

[30] *Id.* at 1247 (quoting *East River*, 476 U.S. at 866).

[31] *Id.* at 1249.

[32] *Id.* at 1248.

[33] *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 20 Fla. L. Weekly S276, at S277 (Fla. June 15, 1995).

[34] *Id.*

[35] *Id.* at S278.

[36] *Id.*

[37] *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, at 492-93 (Fla. 3d D.C.A. 1994).

[38] *Id.* at 494.

[39] Indeed, a separation of powers argument cannot be far behind: *viz*, whether the judicial doctrine can, consistent with separation of powers principles, be employed to block a statutory cause of action.

[40] *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d at 495.

[41] *Id.*

[42] *Hoseline*, 40 F.3d 1198, at 1199 (11th Cir. 1995).

[43] *Id.* at 1200.

[44] *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412, at 414 (Fla. 3d D.C.A. 1995) (en banc).

[45] *Id.* at 415.

[46] *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973). In Matthew S. Stelley, *Florida's Economic Loss Rule: A Critical Look at the Cases*, 64 FLA. B.J. at 19 (May 1990), it was urged that *A.R. Moyer* be reconsidered. It now has been in *Casa Clara*.

[47] *A.R. Moyer, Inc. v. Graham*, 285 So. 2d at 402.

[48] *Casa Clara*, 620 So. 2d at 1248.

[49] *See RTC v. Holland & Knight*, 822 F. Supp. 1528 (S.D. Fla. 1993).

[50] *See McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th D.C.A. 1976).

[51] *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

[52] *See Weimer v. Yacht Club Point Estates, Inc.*, 223 So. 2d 100, 103 (Fla. 4th D.C.A. 1969) ("While it has been frequently declared to be a rule that no cause of action in tort can arise from a breach of duty existing by virtue of a contract, on the other hand a contractual relation between the parties is not necessary to the existence of a duty the violation of which may constitute [a claim]"), *quoted in Ginsberg*, 645 So. 2d at 495; *see also Serina v. Albertson's, Inc.*, 744 F. Supp. 1113, 1116-18 (M.D. Fla. 1990) (holding that a fraud claim that is "interlaced" with contract is barred).

[53] *Casa Clara*, 620 So. 2d at 1249.

[54] This is essentially the thought process *Casa Clara* envisioned in explaining that "tort law . . . is determined by the duty owed to an injured party." *Casa Clara*, 620 So. 2d at 1246.

[55] *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979); *see also* Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37 (1986), *cited in* Steffey, *Florida's Economic Loss Rule*, 64 FLA. B.J. at n.56 (May 1990).

[56] *J'Aire Corp. v. Gregory*, 598 P.2d at 63.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 10th day of May, 1996, to: John Beranek, Esq., Macfarlane Ausley Ferguson & McMullen, Post Office Box 391, 227 S. Calhoun Street, Tallahassee, Fla. 32302; J. Michael Burman, Esq., Burman & Critton, 712 U.S. Highway One, Suite 300, North Palm Beach, Fla. 33408; and to John Gundlach, Esq., Fleming, Hale, Shaw & Gundlach, 11760 U.S. Highway One, Suite 300, Golden Bear Plaza, North Palm Beach Fla. 33408.

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