IN THE SUPREME COURT OF FLORIDA

SC10-1022

TIARA CONDOMINIUM ASSOCIATION, INC.,

Movant/Appellant,

v.

MARSH & McLENNAN COS., INC., MARSH INC., MARSH USA INC.,

Respondents/Appellees.

On Certification From The United States Court of Appeals
For The Eleventh Circuit (Case No. 09-11718-GG)

ANSWER BRIEF OF RESPONDENTS/APPELLEES

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INTRODUCTION

Respondent/Appellee Marsh USA Inc. ("Marsh") files this Answer Brief in reply to the Initial Brief filed by Movant/Appellant Tiara Condominium Association, Inc. ("Tiara"). All references to the Record on Appeal are in the same format as used before the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CERTIFIED QUESTION

The Eleventh Circuit certified a single question of Florida law to this Court:

> Does an insurance broker provide a "professional service" such that an insurance broker is unable to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?

(*Tiara Condo. Ass'n v. Marsh & McLennan Cos., Inc.*, No. 09-11718 (11th Cir. May 27, 2010) ("Order") at 13.)

As discussed below, Tiara has sought to "rephrase" the certified question, and has elected not to address the actual certified question until page 46 of its 50-page brief ("Tiara Br.").

STATEMENT OF THE CASE

This case involves claims brought by Tiara, a condominium association that administers an ocean-front luxury high-rise condominium in Florida, against Marsh, its insurance broker, relating to a wind damage insurance policy (the "Policy") issued to Tiara by Citizens Property Insurance Corporation ("Citizens").

The Policy covered the period June 1, 2004 through June 1, 2005. In September 2004, Hurricane Frances and Hurricane Jeanne damaged Tiara's condominium building. Tiara sought and received almost $89 million of insurance coverage under the Policy for the losses it suffered as a result of the hurricanes.

Because Tiara was unable to fully fund the reconstruction of the condominium building it had valued at $49 million prior to the hurricanes with the $89 million of insurance proceeds it received after the hurricanes, on October 19, 2007, Tiara brought this action against Marsh in the United States District Court for the Southern District of New York, alleging that Marsh had breached certain duties in brokering the Policy, principally by allegedly failing to procure a policy with a per-occurrence rather than aggregate limit. (D35 at 11.) [1] Over Tiara's initial opposition, the case was transferred to the Southern District of Florida. (D35, D37-3; D37-5.)

On June 24, 2008, Tiara filed its Second Amended Complaint, and on November 17, 2008, Tiara filed its Third Amended Complaint. (D57; D146.) On

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[1] Citations in the form "D__" are to document numbers assigned in the PACER docket sheet of the district court, *Tiara Condo. Ass'n v. Marsh & McLennan Cos., Inc.*, No. 08-80254-CIV-HURLEY/HOPKINS (S.D. Fla.). This brief will make specific reference to the paragraphs of documents with numbered paragraphs in the form "¶ __." References in the form "at __" are to page numbers.

December 10, 2008, Marsh filed its answer and affirmative defenses to the Third Amended Complaint. (D166.)

On March 3, 2009, the district court granted Marsh's motion for summary judgment, finding, *inter alia*, that "Marsh did in fact obtain a policy for Tiara that met Tiara's specifications," and that the policy did, in fact, contain a per-occurrence limit. (D179 at 7, 11, 15.) The district court entered final judgment in favor of Marsh dismissing all counts. (D178; D179.) Tiara filed a motion for reconsideration, which the district court denied. (D180; D187.)

Tiara appealed to the United States Court of Appeals for the Eleventh Circuit. (D189.) On May 27, 2010, the Eleventh Circuit issued its decision affirming the summary judgment order in part and certifying the single question of Florida law, noted above, to this Court.

STATEMENT OF FACTS

A. Tiara's Retention Of Marsh

In 2002, Tiara hired Marsh to serve as its insurance broker and place various lines of coverage, including coverage for wind damage. (D94 ¶ 2.) As Tiara explained in its Third Amended Complaint, it "orally informed MARSH of its retention, and through proposed engagement letters MARSH repeatedly documented the duties it understood and agreed to accept." (D146 ¶ 29.)

For example, with respect to the year during which Marsh brokered the Policy, Marsh sent Tiara a letter, entitled "Engagement of Services," setting forth in detail and enumerating the services Tiara had retained Marsh to perform as Tiara's "insurance broker" and "advisor." (D104-10.) As Tiara explained, the letter "memorialized Marsh's commitment to do the following in exchange for Tiara's commitment to purchase its insurance exclusively through Marsh:

- Work with Tiara to assess Tiara's risks
- Work with Tiara to design and develop Tiara's insurance program
- Provide coverage summaries for all new coverages and updates on changes to existing coverages
- Consult with Tiara regarding specific claims
- Follow up with insurers with respect to timely collection of claims
- Act as liaison between Tiara and insurers
- Assist Tiara in connection with issues relating to interpretation of insurance policies Marsh placed
- Meet regularly with Tiara key people designated by its Risk Manager to discuss strategy and open items."

(D103 at 11; *see also* D146 ¶¶ 29-30; D104 ¶ 2; D104-10.)

B. The Citizens 2004-2005 Wind Damage Policy

In April 2004, Marsh presented an insurance proposal to Tiara that included, among other things, a quote from Citizens for wind damage coverage. (D94 ¶ 8.) As the proposal made clear, Citizens was the *only* insurance company willing to offer windstorm coverage to Tiara, a forty-two story condominium tower located directly on the ocean. The Board accepted the Citizens quote and the Policy was bound effective June 1, 2004. (*Id.* ¶¶ 8-9.) The Policy's limit of liability of $49,970,530 was based on the insurable value provided by Tiara to Marsh, calculated from an old appraisal that Tiara chose to use to obtain a reduced premium.[2] (*Id.* ¶¶ 6, 9.)

C. Tiara's Actions After The Hurricanes

Tiara sustained damages from Hurricane Frances on September 4, 2004, and Hurricane Jeanne on September 26, 2004. (D94 ¶ 12.) After the hurricanes, Tiara

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[2] Prior to Marsh's engagement, Tiara retained a licensed appraisal firm, Allied Appraisal Services, Inc. ("Allied"), to appraise and determine the replacement value of the condominium building for insurance purposes. (D94 ¶ 3.) At the time of the 2004-2005 policy renewal, Allied's most recent appraisal had been conducted in March 2002. (*Id.*) Nevertheless, in 2004, Tiara chose not to engage Allied to conduct an updated appraisal. *(Id.* ¶ 4.) Instead, John Quinlan, chairman of Tiara's insurance committee, in consultation with Allied, calculated the 2004-05 insurable value by making certain downward adjustments to the value reflected in Allied's 2002 appraisal report, which resulted in a net reduction of the appraised replacement value by approximately $7.5 million. (*Id.* ¶ 5.) The resulting reduced insurable value of $49,970,530 was provided by Quinlan to Marsh for the purpose of procuring the Policy, and resulted in a significant premium savings to Tiara. (*Id.* ¶¶ 5-6, 9.)

hired an outside insurance adjuster to deal directly with Citizens and a general contractor to perform reconstruction work. (*Id.* ¶¶ 13-17.) Marsh was not involved in the adjusting of Tiara's claims or managing the day-to-day reconstruction work. (*Id.* ¶ 16.)

Tiara also engaged a contractor to commence "drying out" the interior of the building. (*Id.* ¶ 17.) The drying out process was undertaken at the instruction of Citizens and on the advice of Tiara's attorney. (*Id.*) In October 2004, Tiara's insurance adjuster and general contractor advised it to cease the drying out efforts because they were ineffective and told Tiara to instead remove the damaged drywall and gut the building. (*Id.* ¶ 18.) Citizens, however, insisted that the drying out process continue and Tiara followed that instruction, continuing the drying out process for another nine months. (*Id.* ¶ 19.) The drying out process, which cost over $30 million, proved to be a failure, as Tiara still had to gut the interior of the building. (D121 at 5; D146 ¶ 26.)

D. Tiara's Litigation Against Citizens

Faced with a claim by Tiara in excess of $100 million, as well as numerous other hurricane-related claims, Citizens unsurprisingly tried to limit its exposure. On July 28, 2005, Citizens notified Tiara of its position that two separate policy limits — one for each hurricane — were not available to Tiara under the Policy, and tendered a "final payment" to Tiara, representing the difference between the

amount paid by Citizens to date and a single limit of $49,970,530. (D94 ¶ 23.) Tiara declined to accept this "final payment" and instead sued Citizens for failure to provide "per occurrence" coverage for the two hurricanes. (*Id.* ¶ 24.)

Throughout the Citizens litigation, Tiara repeatedly argued that the Policy offered per occurrence coverage. (*Id.*) In fact, Tiara moved for summary judgment on that very issue, contending it was entitled to judgment as a matter of law because "the Policy required Citizens to make available an amount up to $49,970,530.00 to indemnify Tiara for *each of the two storms* at issue in this litigation." (D113-5 ¶19 (emphasis added).) To support this position, Tiara relied on opinions from five different insurance experts, all of whom concluded that the Policy provided coverage on a per occurrence basis. (D94 ¶ 25; D95-3 at 13-65.)

In March 2006, Tiara settled its lawsuit against Citizens. (D94 ¶ 28.) Under the terms of the settlement, Citizens paid Tiara approximately $48 million in additional funds (beyond the amount previously tendered) to settle claims for losses from the hurricanes. (*Id.* ¶ 29.) Including amounts previously paid by Citizens, Tiara recovered almost $89 million from Citizens under the Policy. (*Id.*)

E. Tiara's Related Litigation

As a result of the mismanagement and wasteful reconstruction efforts Tiara undertook, Tiara claimed that the $89 million it received from the Citizens Policy was insufficient to complete the reconstruction of a building that Tiara itself had

valued at $49,970,530 prior to the hurricanes. (D94 ¶ 5; D121 at 9.) In litigation that ensued as a result of the mismanaged repair efforts, Tiara sought to lay blame on numerous other parties, including its insurance adjuster, its general contractor, and various sub-contractors; moreover, Tiara's residents sued the condominium Board itself.[3] (D144 at 1-2.) In all of these cases, these other parties were alleged to be responsible for the mismanagement, waste, and resulting additional expenses (over and above the $89 million received from Citizens) that became necessary to complete the repair work. (*Id*.)

F. Tiara's Suit Against Marsh

Tiara next set its sights on Marsh, suing it for breach of an oral contract, negligent misrepresentation, negligence, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing in connection with the placement of the Policy. (D57 ¶¶ 32-89.) Although purportedly pleaded "in the alternative," all of Tiara's claims against Marsh — both contract and tort — were premised on exactly the same allegation: that Marsh failed to procure a per occurrence policy without an annual aggregate limit, and that it failed to obtain an

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[3] *See, e.g., Goodman-Gable-Gould, Inc. v. Tiara Condo. Ass'n, Inc.* (S.D. Fla. 2006) (Hurley, J.); *Southern Constr. Servs., Inc. v. Tiara Condo. Ass'n, Inc.* (Fla. Palm Beach County 2006); *Kas v. Tiara Condo. Ass'n, Inc.* (Fla. Palm Beach County 2006).

adequate amount of insurance under the Policy (the "Underinsurance Claims").[4] (*Compare id.* ¶¶ 32-40 (breach of contract claim) *with id.* ¶¶ 61-72, 79-89 (negligence and fiduciary duty claims).) Tiara filed a Third Amended Complaint, at the district court's direction, to clarify the Underinsurance Claims, but added no new causes of action. (*See* D195 at 13:15-14:1; D146.)

G. The District Court's Summary Judgment Ruling

On March 3, 2009, the district court granted summary judgment dismissing all counts asserted by Tiara. (D178; D179.) The district court held "there is no evidence" that Marsh breached its oral contract because "the policy in fact contains a per-occurrence limit, just as Tiara directed." (D179 at 5, 15.) With respect to the Underinsurance Claims, the district court concluded that Tiara "ha[d] not presented any evidence that Marsh undertook a contractual obligation to perform any of the [other] specific tasks recited" in its complaint, and thus dismissed these "various collateral failures" alleged by Tiara. (*Id.* at 8.)

Tiara's remaining tort claims, which are identical — often verbatim — to Tiara's claims for breach of contract, were dismissed because they too were premised on Tiara's unfounded allegation that the Policy did not provide "per

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[4] Tiara's Underinsurance Claims relate specifically to the assertion that Marsh purportedly failed to (i) tell Tiara to obtain an updated appraisal, (ii) obtain coverage for certain "soft costs", and (iii) obtain "law and ordinance coverage". (*See* D146 ¶¶ 38, 67; Tiara Br. at 8-10.)

occurrence" coverage. (*Id.* at 10-11, 13-16.) And, while the district court "decline[d] to reach the question[]" in light of the other bases for the dismissal of the tort claims, it did state that the economic loss rule also barred Tiara's negligence and breach of fiduciary duty claims. (*Id.* at 15-16.)

H. The Eleventh Circuit Ruling

The Eleventh Circuit affirmed the dismissal of Tiara's claims for breach of contract, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing, finding that the Policy provided "per occurrence" coverage. (Order at 7, 9.) The Eleventh Circuit also affirmed dismissal of Tiara's breach of contract claim relating to the Underinsurance Claims based on a lack of evidence that Marsh undertook to perform any of the specific tasks alleged in the complaint. (*See id.* at 8.)

The Eleventh Circuit further affirmed the dismissal of Tiara's negligence and breach of fiduciary duty claims to the extent those claims were predicated, as they largely were, on Marsh's alleged failure to procure a policy providing per-occurrence coverage. (*Id.* at 10.) The Eleventh Circuit noted, however, that to the extent Tiara's claims for negligence and breach of fiduciary duty related to the Underinsurance Claims — which the court referred to as "collateral failures" — "Florida law is not sufficiently clear on whether such claims are barred as extra-contractual under the economic loss rule." (*Id.*)

Relying on this Court's decision in *Indemnity Insurance Company of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), the Eleventh Circuit pointed out that "Florida . . . recognizes the economic loss rule as a bar to recovery in tort for economic damages that arise in contract [and that the] rule is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." (Order at 11 (citations omitted).) The court acknowledged, however, that "[a]n exception to the economic loss rule applies where the contract at issue relates to the provision of professional services . . . ." (*Id.*) The Eleventh Circuit then set forth the precise issue that led it to certify a question to this Court: "*It is . . . not clear whether an insurance broker provides professional services under Florida law.*" (*Id.* (emphasis added).)

SUMMARY OF ARGUMENT

Tiara virtually ignores the question certified by the Eleventh Circuit, devoting only the final four pages of its 50-page brief to the question of whether insurance brokers provide "professional services" for purposes of the economic loss rule. Tiara's reluctance to engage the certified question is understandable, for Florida law holds that insurance brokers are not "professionals" because they do not require a four-year degree to practice their vocation nor do they possess any of

the other normal indicia of professional status, such as a code of ethics subjecting them to disciplinary violations.

Marsh's status as a non-professional resolves the only remaining issue on appeal. There is no dispute here that the parties were in contractual privity. And when parties are in privity, the Florida economic loss rule bars tort claims, like Tiara's, that seek solely economic damages.

Florida's economic loss rule is premised on the public policy that parties in contractual privity should establish their obligations and allocate their risks by the contract; those allocations are not subject to expansion or revision by resort to tort remedies. Here, the parties' contract spelled out numerous specific duties and allocated various risks. Tiara's suit seeks to impose additional duties that, while not specifically included in the contract (and hence not giving rise to a breach of contract claim), are nonetheless within the subject matter as to which the parties were contracting (provision of insurance brokering services and advice), and thus could and should have been included if they were to support a remedy for breach.

Tiara, in fact, alleges that violations of these supposed duties constituted breaches of contract. And the district court found (in a holding undisturbed on appeal) that the very same conduct alleged to constitute negligence and breach of fiduciary duty was also alleged as a breach of contract. In other words, Tiara's allegations of breach of contract were inextricably intertwined with its tort claims.

Tiara's tort claims attempt to abrogate the bargained-for agreement; in essence, Tiara, through tort, seeks a better bargain than it originally made. The economic loss rule bars such an effort, unless one of the limited, recognized exceptions — of which the "professional services" exception is the only one relevant to this case — applies. Because the district court did not address whether the "professional services" exception applies, the Eleventh Circuit properly certified that question — the only remaining relevant question in the case — to this Court.

In seeking to rephrase the certified question, Tiara ignores settled Florida law and misreads the district court and circuit court decisions. Tiara seeks to cast doubt on the applicability of the economic loss rule to contracts for services, a rule that was first enunciated in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*.[5] Tiara wrongly suggests that the *AFM* holding has since been discredited; in fact, since *AFM*, this Court has repeatedly reaffirmed — sometimes over explicit minority opinions, and as recently as June 2010 — that the economic loss rule applies to *both* products liability suits where there is no property damage or personal injury *and* to suits for economic losses where the parties are in contractual privity (whether the contract is for products or services). And contrary to Tiara's attempts to convince this Court to revisit those repeated holdings by portraying the

[5] 515 So. 2d 180 (Fla. 1987).

Florida rule as an aberration, many states apply the economic loss rule to contracts for services as well as products. There is no occasion to revisit Florida's long-standing rule here.

Tiara also misreads the Eleventh Circuit's opinion in claiming that the Court somehow already found that the negligence and breach of fiduciary claims are "independent" tort claims premised on alleged breaches of "extra-contractual" duties. Instead, the Eleventh Circuit affirmed the district court's ruling that the alleged tortious acts were intertwined with (if not identical to) the alleged breaches of contract. Had the court concluded otherwise, and found that Tiara's tort claims are truly "independent" of its contract claims, the economic loss rule would not have applied to begin with, and there would have been no need to certify any question to this Court as to whether the "professional service" exception to the economic loss rule applies.

That the "collateral failures" were held not to give rise to breach of contract claims (because they were not among the agreed-upon duties specifically delineated in the detailed contract) does not mean that they provide the basis for "independent" tort claims. To the contrary, the entire purpose of the "contractual privity" economic loss rule is to prevent plaintiffs who have contracted with defendants from imposing, under the guise of "independent torts," duties arising

out of the subject matter of the parties' contract, though not specifically included therein.

Here, Tiara *alleges* that the same failures constituting the supposedly "independent torts" are, in fact, breaches of contract. As numerous courts have held, such claims trigger the economic loss rule. Where a plaintiff alleges breach of fiduciary duty or negligence claims intertwined with the *claim* for breach of contract (that is, part of the subject matter of the contract), the economic loss rule applies. This is true regardless of whether the contract claim has any merit, or actually provides a remedy for the claimed failure, or is even pleaded.

For this reason, Tiara's argument premised on this Court's decision in *Toomey*, that insurance brokers can be liable for breach of fiduciary duty or negligence, is misplaced. *Toomey* did not discuss the economic loss rule, much less reject the proposition that tort claims intertwined with the contract are barred by the rule. Rather, as one court recently noted: "While the economic loss rule does not automatically bar a breach of fiduciary duty claim, the rule does apply when the claim for breach of fiduciary duty is based upon and inextricably intertwined with the claim for breach of contract."[6] That is the case here, as the district court found. Tiara's contention that the only proper questions for

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[6] *Action Nissan, Inc. v. Hyundai Motors of Am.*, 617 F. Supp. 2d 1177, 1192-93 (M.D. Fla. 2008).

certification are whether an insured's claims against a broker for breach of fiduciary duty or negligence are "subject to the economic loss rule" is therefore fundamentally flawed and should be rejected.

ARGUMENT

I. INSURANCE BROKERS ARE NOT "PROFESSIONALS" FOR PURPOSES OF THE ECONOMIC LOSS RULE.

Three prior decisions by this Court establish that the Eleventh Circuit's certified question — whether insurance brokers are professionals for purposes of the economic loss rule — should be answered in the negative.

This Court first established a test for determining whether a given occupation is deemed a "profession" under Florida law in *Pierce v. AALL Insurance Inc.*, 531 So. 2d 84 (Fla. 1988). In *Pierce*, the issue before the Court was whether an *insurance agent* was a "professional" under Section 95.11(4)(a) of the Florida Statutes, Florida's professional malpractice statute of limitations. *Id.* at 85. In analyzing that issue, the Court reviewed not only the statutory language and legislative history, but also the common law usage of the term "professional" and its dictionary meaning. *Id.* at 86-87.

As a result of that analysis, the Court concluded that "[e]ducation is the common factor among all vocations which are considered professions" and "[i]t is this specialized education and academic preparation which we believe distinguishes a profession from other occupations." *Id.* at 87-88. Accordingly, the

Court held that "a profession [is] a vocation requiring, as a minimum standard, a college degree in the specific field." *Id.* at 87. Applying that standard to the defendant in that case, the Court held that *insurance agents are not professionals* for purposes of the statute of limitations, because "no degree in any field is required to become an insurance agent." *Id.* The Court also found it significant that "insurance agents are not subject to discipline for violations of an ethical code," and that "[n]o showing of good moral character need be made by one applying to sell insurance in Florida." *Id.* at 88. *Pierce* is thus virtually on point, yet *Tiara does not even cite it*.[7]

Four years after *Pierce* was decided, in *Garden v. Frier*, 602 So. 2d 1273 (Fla. 1992), this Court again considered the issue of who is deemed a "professional" under Section 95.11(4)(a), this time in a case involving claims brought against a land surveyor. *Id.* at 1274. The Court clarified the test it established in *Pierce* in two respects: first, it held that that "the *equivalent* of a four-year college degree" does *not* satisfy the test; and second, it held that there is "no requirement that the four-year degree itself be in a field of study specifically

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[7] Also not cited by Tiara is *Hardy Equip. Co. v. Travis Crosby & Assocs., Inc.*, 530 So. 2d. 521, 522 (Fla. 1st DCA 1988), which applied *Pierce* to claims against an *insurance broker*, holding that the defendant was not a professional for purposes of malpractice statute of limitations "[s]ince no degree in any field is required to sell insurance."

related to the vocation in question[.]" *Id.* at 1275 (emphasis added). In all other respects, however, the Court stated that it would "continue to adhere to the basic definition [of a professional] adopted in *Pierce*." *Id*. Specifically, "in harmony with the central thrust of *Pierce*," the Court held that "a 'profession' is any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida." *Id.*

Finally, in 1999, in *Moransais v. Heathman*, where this Court first recognized an exception to the economic loss rule for tort claims brought against a "professional," the Court again considered the meaning of the term "professional" under Florida law. 744 So. 2d 973, 977 (Fla. 1999). *Moransais* involved a claim for professional negligence against an engineer. The Court again relied upon — without modification — the test it set forth in *Garden*. *See Moransais*, 744 So. 2d at 976 (quoting *Garden*, 602 So. 2d at 1275). Applying that test, the Court found an engineer to be a "professional" under Florida law because engineers must have a four-year degree to be licensed in Florida. *Id.* at 976. Thus, while *Pierce* and *Garden* may have technically concerned only the definition of a "professional" for purposes of the professional malpractice statute of limitations, *Moransais* makes clear that the same definition and criteria apply for purposes of the "professional services" exception to the economic loss rule established in that case.

Subsequent to the Court's decision in *Moransais*, state and federal courts in Florida consistently have relied upon the "four year degree" definition of "professional" set forth in *Garden* when considering the "professional services" exception to the economic loss rule. *See, e.g.*, *Vesta Constr. & Design, LLC v. Lotspeich & Assocs.*, 974 So. 2d 1176, 1181 (Fla. 5th DCA 2008) ("The *Moransais* 'exception' to the economic loss rule is *limited* to suits against individual 'professionals,' which our supreme court *narrowly defined* as a person engaged in a 'vocation requiring at a minimum a four-year college degree before licensing is possible in Florida.'") (emphasis added) (quoting *Moransais*, 744 So. 2d at 977); *Chicago Title Ins. Co. v. Commonwealth Forest Invs., Inc.*, 494 F. Supp. 2d 1332, 1334 (M.D. Fla. 2007) ("The Court is also unpersuaded . . . that the professional malpractice exception . . . applies. Neither title insurance agents nor title abstractors fall within *Moransais'* definition of 'profession.'"); *Warter v. Boston Sec., S.A.*, 17 Fla. L. Weekly Fed. D507(a), D512 (S.D. Fla. Mar. 22, 2004) ("[A] securities broker is not a 'professional' for purposes of the economic loss rule because securities brokers are not required to obtain a four-year degree for licensing in Florida."); *see also Monroe v. Sarasota Cnty. Sch. Bd.*, 746 So. 2d 530, 533, 539 (Fla. 2nd DCA 1999) (finding that "teachers/administrators are professionals, as that term is defined in *Moransais*" because "they were licensed teachers whose vocation requires a minimum of a four-year college degree").

Tiara does not contend that insurance brokers, such as Marsh, satisfy the test set forth in *Pierce* and *Garden* and applied in *Moransais* and its progeny. Indeed, Tiara concedes that "Florida's licensing scheme for brokers does not impose a four-year college degree requirement." (Tiara Br. at 47.) Nor does Tiara dispute the absence of other relevant factors such as being subject to discipline for violations of an ethical code, or a required showing of good moral character. Simply put, Marsh is not a "professional" under any definition of that term, including for purposes of the "professional services" exception to the economic loss rule.

In the few pages that Tiara devotes to actually addressing the question certified by the Eleventh Circuit, it fails to explain why the Court's prior decisions on this issue should not be followed. Instead, Tiara asserts that — regardless of what Supreme Court precedent holds — Marsh should be considered a professional because (i) an insured relies on its broker for advice on insurance matters within the broker's "superior knowledge and skill"; and (ii) insurance "brokers owe fiduciary duties to the insured." (Tiara Br. at 47-48.) Tiara's arguments are without merit, and do not warrant a change in Florida law.

The mere giving of advice, even by a party with "superior knowledge," does not make that party a professional. In *Pierce*, the broad definition of "profession" *adopted by the district court*, which it held to include an insurance agent, "focused

on the act of the insurance agent giving advice as the primary factor distinguishing professions from other occupations." *Pierce*, 531 So. 2d at 88. In rejecting that definition and reversing the district court's decision, this Court held:

> [W]ithout the requirement of sufficient education, *the agent's act of giving advice is hardly the act of a professional*. It is true that an insurance agent frequently has superior knowledge of the insurance field upon which the client may rely. Nonetheless, if such knowledge is not required, the hollow *act of giving advice does not render the advisor a professional*.

Id. (emphasis added).

Nor is the existence of a fiduciary duty indicative of whether an occupation qualifies as a "profession." Indeed, the fiduciary duty owed under Florida law by insurance agents and brokers — which Tiara asserts has been recognized by Florida courts "[s]ince 1969" (Tiara Br. at 31) — did not influence this Court's determination in *Pierce* that an insurance agent is *not* a professional. The same holds true with other occupations as well. For example, although courts in Florida have held that an escrow agent owes a fiduciary duty to the parties to the escrow transaction, *see Decarlo v. Griffin*, 827 So. 2d 348, 351 (Fla. 4th DCA 2002), "the vocation of escrow agent does not qualify as a profession . . . because a four-year college degree is not required for an escrow agent." *Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A.*, 671 So. 2d 805, 806 (Fla. 3d DCA 1996) (citing *Garden*, 602 So. 2d at 1273).

Accordingly, under this Court's settled precedents, Marsh is not a "professional" for purposes of the *Moransais* professional services exception to the economic loss rule, and the question certified by the Eleventh Circuit should be answered in the negative.

II. TIARA'S EFFORTS TO REPHRASE THE CERTIFIED QUESTION AND ESTABLISH THAT THE ECONOMIC LOSS RULE DOES NOT APPLY TO ITS CLAIMS ARE ALSO WITHOUT MERIT.

Unable to prevail on the actual question certified by the Eleventh Circuit, Tiara seeks to avoid it by "rephrasing" it as two questions: whether an insured's claim against its insurance broker for (1) breach of fiduciary duty and (2) negligence are "subject to the economic loss rule." (Tiara Br. at 1.) Tiara then seeks to answer both questions in the negative, based on two principal contentions, neither of which are correct. *First*, Tiara argues at length that the economic loss rule does not, or should not, apply outside the "products liability" context, and claims that this Court has "receded" from the economic loss rule to the extent it has been applied to "contracts for services." (Tiara Br. at 14-30.) *Second*, Tiara asserts that its claims here for negligence and breach of fiduciary duty are claims based on "extra-contractual duties" and thus are "independent torts excepted from the economic loss rule." (*Id*. at 30-45.)

Tiara's effort to sidestep the certified question is to no avail. Even were the Court to consider the questions as rephrased by Tiara (which it has no obligation to

do), the answers do not aid Tiara on this appeal. That is because (A) the economic loss rule clearly does continue to apply to contracts for services under Florida law; and (B) while claims for negligence and breach of fiduciary duty are not *always* subject to the economic loss rule, they are so subject when, as here, they are intertwined with the claims for breach of contract.

A. The Economic Loss Rule Continues To Apply To Contracts For Services.

Tiara asserts that "an examination of this Court's jurisprudence on the economic loss rule indicates that *the rule no longer applies to a contract for services.*" (Tiara Br. at 10 (emphasis added); *see also id.* ("As it stands, the economic loss rule is apparently limited to the products liability context, and this is not a products liability case.").) These assertions are demonstrably wrong and are contrary to the clear holdings of several decisions by this Court, including one from just over two months ago.

This Court first recognized the economic loss rule in *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So. 2d 899 (Fla. 1987), a products liability case not involving personal injury or damage to property other than the defective goods at issue. And within months of recognizing the rule, the Court also held that the economic loss rule applied outside the products liability context, and specifically to contracts for services. In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180 (Fla. 1987), a business sought to recover economic

losses from its contractual partner, suing in tort based on defendant's alleged negligence. *Id.* at 180-81. On appeal, the Eleventh Circuit certified a question, which this Court restated as follows: "Does Florida permit *a purchaser of services* to recover economic losses in tort without a claim for personal injury or property damage?" *Id.* at 180 (emphasis added). Relying on its decision in *Florida Power & Light*, and applying the economic loss rule, the Court stated that "we answer the question in the negative." *Id.*

This Court has never retreated from that holding, expressly or impliedly, and instead has continually reaffirmed it. In *HTP, Ltd. v. Lineas Aereas Costaricenses*, 685 So. 2d 1238 (1996), which did not involve products liability, the Court cited *AFM* with approval (*id*. at 1239) but applied a "fraud in the inducement" exception to the economic loss rule (an exception not relevant in this case) that would have been unnecessary in that case if the rule were otherwise limited to products liability.

Three years later, in *Moransais*, where the exception for "professionals" was developed, there likewise would have been no need for such an exception if, as Tiara contends, *AFM* were no longer good law. In fact, in *Moransais*, this Court declined to adopt the concurring opinion's view that the economic loss rule "should be limited to cases involving a product which damages itself by reason of a defect in the product" and that *AFM* should be "recede[d] from." 744 So. 2d at

985 (Wells, J., concurring). Likewise, in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1225 (Fla. 1999), the Court reiterated that "the outcome of that case [*AFM*] is sound" and again declined the concurring opinion's invitation to limit the doctrine to "product claims" and to "recede from" *AFM*. *See id*. at 1227.

Then in 2004, in *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004), the Court undertook a comprehensive re-examination of the economic loss rule, its purpose and legal underpinnings, and the Court's prior decisions on the subject, and reaffirmed that it is *not* limited to products liability claims, but applies to any claim, including one for the purchase of services, where the parties are in contractual privity: "We conclude that the 'economic loss doctrine' or 'economic loss rule' bars a negligence action to recover solely economic damages only in circumstances where the parties are ***either*** *in contractual privity* ***or*** the defendant is a manufacturer or distributor of a product." *Id*. at 534 (emphasis added).

The Court explained that the "contractual privity rule" is "designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Id.* at 536; *see also id*. at 537-38 ("the contractual privity economic loss rule [was] developed to

protect the integrity of the contract").[8] The application of this principle was "best exemplified," the Court stated, by its decision in *AFM*. *Id*. at 537. As the Court further held, "*we reiterate that when the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss. Our holding in AFM Corp. illustrates this well-settled rule of law*." *Id*. at 542 (emphasis added).

The Court did go on to say that it was receding from *AFM* to the extent that *AFM*, relying on *Florida Power* (a products liability case), expanded the *products liability* prong of the economic loss rule to encompass claims against a defendant who is "neither a manufacturer nor distributor of a product." *Id*. at 534; *see also id*. ("Because the defendant in this case is neither a manufacturer nor distributor of a product, and the parties are not in privity of contract, the negligence action is not barred by the economic loss rule."). But the Court did not cast the slightest doubt on the continued application of the rule in the services context where there is a

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[8] As this Court had previously recognized, "the law of contracts protects one's economic losses, whereas the law of torts protects society's interest in being free from harm." *Airport Rent-A-Car, Inc v. Prevost Car, Inc.*, 660 So. 2d 628, 631 (Fla. 1995). *See also Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (1993) ("A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.").

contract, and there is no basis whatsoever for Tiara's assertion that "*the rule no longer applies to a contract for services*." (Tiara Br. at 10 (emphasis added).)

Indeed, in a decision issued on June 17, 2010, slightly more than two months ago, this Court once again confirmed the applicability of the economic loss rule in circumstances, such as this case, "where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract . . . ." *Curd v. Mosaic Fertilizer, LLC*, 35 Fla. L. Weekly S341(a), S343 (Fla. June 17, 2010). Tiara's assertion that "the current state of the law appears to be that the economic loss rule is limited to the products liability context" (Tiara Br. at 14-15) is thus totally without basis. Tellingly, the Eleventh Circuit gave no indication that it saw any such limitation, which is why its certified question asks whether an insurance broker provides a "professional *service*" within the meaning of the economic loss rule in Florida.

Finally, Tiara's suggestion that Florida is some sort of "outlier" in applying the economic loss rule to claims for contractual services (Tiara Br. at 20-22 & nn. 78-79), would be irrelevant even were it true, but it is not true in any event. In fact, "[c]ourt decisions from other states support [the] position that, pursuant to the majority view, *the economic loss doctrine does apply to bar tort claims that services were performed negligently*." *Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 145 (D. Me. 1999) (emphasis added) (citing cases applying rule to

services contracts).[9] Tiara further undermines its own argument by citing cases from other states *applying* the economic loss rule to contracts for services.[10] And while Tiara cites a bar journal article criticizing Florida's application of the rule to contracts for services,[11] it neglects to point out that this article, and its particular viewpoint, was considered and obviously rejected by the Court in cases that declined to limit the rule to the products liability context.[12] And even the author of

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[9] *See also Fireman's Fund Ins. Co. v. SEC Donohue, Inc.*, 679 N.E.2d 1197, 1200 (Ill. 1997) ("Just as a seller's duties are defined by his contract with a buyer, the duties of a provider of services may be defined by the contract he enters into with his client. When this is the case, the economic loss doctrine applies to prevent the recovery of purely economic loss in tort.") (citation omitted); *Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 620 N.Y.S.2d 196, 199 (N.Y. App. Div. 1994) ("[T]he economic loss rule serves to limit the liability of providers of services as well as providers of products."); *Wentworth v. Crawford & Co.*, 807 A.2d 351, 357 (Vt. 2002) (invoking economic loss rule to bar recovery for negligent provision of "vocational rehabilitation services"); *Thomson v. Espey Huston & Assocs., Inc.*, 899 S.W.2d 415, 422 (Tex. App. 1995) ("[B]ecause of the economic loss rule, summary judgment [for defendant] was appropriate with respect to [plaintiff's] negligence claims related to [defendant's] services under the [contract].").

[10] *See, e.g.*, Tiara Br. at 22 n.79 (citing *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 742 (Ind. 2010) (holding that "the policy justifications for the economic loss rule discussed throughout this opinion amply support applying the rule to products and services alike").

[11] *See* Tiara Br. at 28 n.83 (citing Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Tort*, 69 Fla. B. J. 34, 36-38, 40 (Nov. 1995) ("Schwiep")).

[12] *See, e.g., Indem. Ins.*, 891 So. 2d at 547 (Cantero, J., concurring) (citing Schwiep, *supra*); *Moransais*, 744 So. 2d at 983 (same).

that article agrees that the rule properly bars "tort claims that are mere subterfuge for skirting the plaintiff's failure to negotiate adequate contract rights." Schwiep, *supra*, at 41.

The law in Florida is settled, and the Eleventh Circuit correctly applied that law: the economic loss rule applies to situations, such as this case, where the parties are in contractual privity and the plaintiff is seeking to recover purely economic damages in tort. Tiara's arguments to the contrary are without merit, and its effort to have this Court revisit application of the economic loss rule to contracts for services should be rejected.

B. Tiara Is Incorrect That Its Claims For Breach Of Fiduciary Duty And Negligence Are Independent Torts Based On Extra-Contractual Conduct.

In a further effort to avoid the certified question, Tiara argues that its claims for breach of fiduciary duty and negligence are not subject to the economic loss rule because (i) as matter of Florida law, a breach of fiduciary duty or negligence claim asserted against an insurance broker is *always* considered extra-contractual, and (ii) in all events, Tiara's tort claims, as asserted, were already deemed extra-contractual by the Eleventh Circuit. (*See* Tiara Br. at 31-46.) Again, Tiara is wrong on both counts.

Tiara asserts, broadly, that "[n]umerous courts have held that breach of fiduciary duty claims are excepted from the economic loss rule." (*Id.* at 32.)

Similarly, Tiara claims that "[i]n a vast majority of jurisdictions, the economic loss rule does not bar claims of broker negligence . . . ." (*Id.* at 36.) From these observations, Tiara leaps to the conclusion that, under Florida law, the economic loss rule *by definition* is inapplicable to any claim for breach of fiduciary duty or negligence against an insurance broker.

The conclusion does not follow, nor do the Florida authorities Tiara cites support it. *See, e.g.*, *Wall St. Mortg. Bankers, Ltd. v. Attorneys Title Ins. Fund, Inc.*, No. 08-21648-CIV, 2008 WL 5378126, at *2 (S.D. Fla. Dec. 23, 2008) (holding only that dismissal of fiduciary duty claims on economic loss rule grounds would be "premature" where the relevant contractual provisions were not yet before the court and where, on a motion to dismiss, the court was limited to considering only the plaintiffs' allegations in the complaint); *Invo Fla., Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263, 1267 (Fla. 3d DCA 2000) (deciding, in an opinion issued years before the Florida Supreme Court's decision in *Indemnity Insurance*, that a breach of fiduciary duty claim by a creditor against a corporation's directors is not barred by the economic loss rule where the fiduciary duty is imposed by law on directors of dissolved corporations in favor of the corporation's creditors and is independent of any contractual relationship between the plaintiff-creditor and the corporation).

And Tiara's assertion that this Court "suggested" in *Indemnity Insurance* that breach of fiduciary claims are "never" subject to the economic loss rule (Tiara Br. at 33) overlooks one salient fact: the Court in *Indemnity Insurance*, in the course of its comprehensive discussion of the economic loss rule, listed the specific, and only, exceptions to the rule — and did not include "breach of fiduciary claims" among them. *See* 891 So. 2d at 542; *see also Lehman Bros. Holdings, Inc. v. Hirota*, No. 8:06-cv-2030-T-24MSS, 2007 U.S. Dist. LEXIS 36818, at *14 (M.D. Fla. May 21, 2007) (explaining that "although the Florida Supreme Court discussed breach of fiduciary duty in *Indemnity Insurance*, *it declined to list that tort as an exception to the economic loss rule*") (emphasis added); *Testa v. S. Escrow & Title, LLC*, 36 So. 3d 713, 715 (Fla. 1st DCA 2010) (observing that the *Indemnity Insurance* Court simply "noted, without approval or disapproval," a possible rule excluding fiduciary duty claims from the economic loss rule).

There is thus no bright line rule that the economic loss rule either always applies, or never applies, to claims for breach of fiduciary duty and negligence. Rather, the test in each case is whether the plaintiff's allegations of breach of fiduciary duty or negligence are *intertwined with* the allegations underlying the claim for breach of contract. Where they are, as here, the economic loss rule applies. *Action Nissan, Inc. v. Hyundai Motor America*, 617 F. Supp. 2d 1177,

1192-93 (M.D. Fla. 2008) ("While the economic loss rule does not automatically bar a breach of fiduciary duty claim, the rule does apply when the claim for breach of fiduciary duty is based upon and *inextricably intertwined with the claim for breach of contract.*") (emphasis added); *N. Am. Clearing, Inc. v. Brokerage Computer Sys., Inc.*, No. 6:07-cv-1503-Orl-19KRS, 2008 U.S. Dist. LEXIS 8295, at *12-13 (M.D. Fla. Feb. 5, 2008) (same).

The conclusion that tort claims "intertwined" with breach of contract claims are barred by the economic loss rule flows from the principle that where contractual privity exists, tort claims may not be advanced "by those who failed to bargain for adequate contract remedies"; otherwise, "'contract law would drown in a sea of tort.'" *See Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993) (quoting *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)). Therefore, to protect the "integrity of the contract," a contracting party is limited by the economic loss rule to contractual remedies and may not "circumvent . . . the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Indem. Ins.*, 891 So. 2d at 536, 538.

Obviously, when a plaintiff's tort claims and allegations literally mimic those of its contract claims, the rationale of the economic loss rule comes into play. *See, e.g., Lehman Bros. Holdings*, 2007 U.S. Dist. LEXIS 36818, at *10 (tort

claims are barred by the economic loss rule where those claims are "substantively indistinguishable" from breach of contract claims).[13] And to the extent a party's tort claims "relate to" the breaching party's performance of the contract, *see id*., or are "inextricably intertwined" with the allegations underlying its claim for breach of contract, the economic loss rule applies as well. *See, e.g., id.* at *11; *Action Nissan*, 617 F. Supp. 2d at 1192-93; *North Am. Clearing*, 2008 U.S. Dist. LEXIS 8295, at *12-13*; cf. HTP*, 685 So. 2d at 1240 (distinguishing fraud in the inducement, which is "extraneous" to the contract and therefore outside the economic loss rule, from "fraud interwoven with the breach of contract," which does not give rise to an independent tort claim) (quotation omitted).

Put another way, the asserted tort duty is not "extra-contractual," and the economic loss rule applies, where the "loss suffered by one who is privy to the

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[13] *See also Branch Banking & Trust Co. v. U.S. Bank Nat'l Ass'n*, No. 07-80508-CIV, 2008 U.S. Dist. LEXIS 67865, at *16 (S.D. Fla. Sept. 8, 2008) ("Given the similarity between the obligations under the contract and the acts that [claimants] identify as constituting a breach of implied fiduciary duty, the breach of implied fiduciary duty, as pled, is barred under . . . Florida law."); *PNC Bank, Nat'l Ass'n v. Colonial Bank, N.A.*, No. 8:08-cv-611-T-24MSS, 2008 U.S. Dist. LEXIS 59895, at *11 (M.D. Fla. July 24, 2008) ("PNC has done no more than allege that the very act that constitutes a breach of the Agreement — failing to remit payments — also constitutes a breach of fiduciary duty. . . . [T]herefore, the breach of fiduciary duty claim is barred by the economic loss rule."); *North Am. Clearing*, 2008 U.S. Dist. LEXIS 8295, at *13 ("In the current case, BCS's claims for breach of contract and breach of fiduciary duty are virtually identical. . . . Here, BCS merely restates its breach of contract claim under a breach of fiduciary label. BCS has failed to plead an independent tort . . . .").

contract . . . involves loss that was the *subject matter* of the contract." *See, e.g.*, *Casa Clara,* 620 So. 2d at 1249 (Shaw, J. concurring and dissenting) (emphasis added). Allowing a plaintiff in contractual privity with the defendant to impose additional tort duties not set forth in the contract, but within the bargained-over subject matter of the contract, would "circumvent[] the allocation of losses set forth in," and "impair the integrity of," the governing contract. *See Indem. Ins.*, 891 So. 2d at 536-38.

The district court here properly found that Tiara's claims for breach of fiduciary duty and negligence were "directly related to" and "based on the same conduct" as the allegations underlying its breach of contract claim. (D179 at 13, 15.) Indeed the allegations are in many instances virtually identical.

For example, in paragraphs 33-36 of the complaint, with respect to its claim for *breach of contract*, Tiara asserts that, "[a]s part of the contractual relationship, MARSH procured a number of insurance policies for TIARA pertaining to the Condominium Project, including, but not limited to, a wind damage policy." (D146 ¶ 33.) Tiara then asserts that based on Marsh's recommendation, it purchased the Policy, that in procuring that Policy, Marsh "owed a duty to TIARA to exercise the degree of care consistent with the greater knowledge and skill possessed by an insurance broker and advisor," and Tiara lays out the precise

duties Marsh undertook. (*Id.* ¶ 36.) These *identical allegations* are set forth in paragraphs 62-66 as part of Tiara's *negligence* claim against Marsh.

Next, in paragraphs *38.a to 38.h*, Tiara sets forth in detail the precise manner in which it claims Marsh "breached its express and/or implied legal duties under *the contract* with TIARA." (*See* D146 ¶ 38 (emphasis added).) Then, in paragraphs *67.a through 67.h*, Tiara sets forth the precise manner in which it claims Marsh was *negligent* — but, Tiara does no more than cut-and-paste the precise allegations contained in paragraphs 38.a through 38.h. In fact, Tiara explicitly alleges that Marsh's *negligence* arises from the breach of "its express and/or implied legal duties *under the contract* with Tiara[.]" (*Id.* ¶ 67 (emphasis added).) Finally, in paragraph 39, Tiara sets forth its description of how it was damaged by Marsh's purported breach of contract. (*See* D146 ¶ 39.) In paragraph 68, using the *identical* words, Tiara sets forth its description of how it was damaged by Marsh's purported negligence. (*See* D146 ¶ 68.) The district court was therefore correct in concluding that because Tiara's negligence claim was "directly related to Marsh's performance of its contractual agreement to act as Tiara's insurance broker," and thus was not "unconnected with a breach of contract," it was subject to the economic loss rule. (D179 at 13-14.)

The same holds true for Tiara's claim for breach of fiduciary duty. In connection with that claim, Tiara asserts that it retained Marsh to act as its

insurance broker and advisor, that it relied on Marsh's advice in deciding that the Policy provided sufficient coverage, and that Marsh breached its fiduciary duties because the Policy did not provide per occurrence coverage and the amount of coverage was insufficient. (*See* D146 ¶¶ 76-85.) Again, these are the very same allegations underlying Tiara's claims for breach of contract and negligence. And in paragraph 86, Tiara sets forth its description of how it was damaged by Marsh's purported breach of fiduciary duty, again using the *identical* words set forth in paragraph 39 (relating to contract damages) and paragraph 68 (negligence damages). (*See* D146 ¶¶ 39, 68, 86.) As the district court correctly found, "Tiara essentially alleges that Marsh breached its fiduciary duty by failing to perform its contractual obligations." (*See* D179 at 15.) The economic loss rule therefore applied to the breach of fiduciary claims as well. (*Id*.)

That some of the alleged tort breaches (*e.g.*, the Underinsurance Claims) were found not to constitute contract breaches (D179 at 8) does not change this result. These various "collateral failures," as the district court termed them (*id*.), were not actionable as breaches of contract due to lack of mutual assent to perform the specific duties alleged to have been breached, but that does not mean they were unrelated to the subject matter of the bargained-for contract and Tiara's breach of contract claims. To the contrary, Tiara itself alleged the various "collateral failures" as part of its breach of contract claim. (*See* D146 ¶ 38.) The whole point

of the "contractual privity" prong of the economic loss rule is to prevent plaintiffs who have contracted with defendants from imposing, under the guise of "independent torts," duties not included in the bargained-for contract. *See, e.g.*, *Casa Clara*, 620 So. 2d at 1246; *Indem. Ins.*, 891 So. 2d at 536. To hold, therefore, that duties not included in the bargained-for contract are automatically deemed independent torts would render the economic loss rule meaningless.

Further, the rule applies whether or not the plaintiff has an actual, viable remedy for breach of contract, or even whether the plaintiff has pleaded a contract claim. *See Airport Rent-A-Car*, 660 So. 2d at 630-31 (holding the economic loss rule applicable to bar tort claims even where the plaintiff has no alternative remedy available); *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113, 1118 (M.D. Fla. 1990) (economic loss rule bars tort claims interwoven with the subject matter of the contract even when plaintiff does not specifically state a breach of contract cause of action). Thus, simply because the alleged "collateral failures" do not support a breach of contract claim does not make them "independent torts" for purposes of the economic loss rule.

Contrary to what Tiara contends, the Eleventh Circuit's opinion is entirely consistent with the district court's conclusion that the so-called "collateral failures" neither supported a breach of contract cause of action nor constituted "independent torts" falling outside the economic loss rule. The circuit court affirmed the district

court's grant of summary judgment on the breach of contract claims, agreeing that "there are no contractual provisions in the oral agreement that extended Marsh's responsibility beyond that which was stated in the written agreement." (Order at 8.) In finding Florida law "not sufficiently clear on *whether* such claims [*i.e.*, those based on "collateral failures"] are barred as extra-contractual under the economic loss rule," (*id*. at 10), the Eleventh Circuit was *not* stating (as Tiara contends) that those claims *were* extra-contractual, in the sense of constituting independent tort claims, for purposes of the economic loss rule. As with the district court's opinion, in describing the Underinsurance Claims as being based on "collateral failures," the circuit court simply was saying that they were collateral to Marsh's primary alleged contractual failure to obtain per occurrence coverage. (*See Id.*)

Had the Eleventh Circuit concluded that Tiara had, in fact, asserted "extra-contractual, independent" tort claims falling outside the economic loss rule, it would have ended its analysis of the economic loss rule right there, and would have had no reason or basis to certify to this Court the question of whether an insurance broker is a "professional" for purposes of the economic loss rule. In fact, the Eleventh Circuit's formulation of the certified question makes clear its view that, in this case, Tiara's tort claims "*arise from the contractual relationship between the insurance broker and the insured*," and hence are within the economic

loss rule *unless* the "professional services" exception recognized in *Moransais* — the only exception relevant to this case — applies. (*See* Order at 13 (emphasis added).) To interpret the Eleventh Circuit's opinion as having already found Tiara to have stated independent tort claims is to assume that it certified a superfluous question to this Court. In fact the reverse is true: it is the certified question — and only that question — that needs to be answered. The federal courts — district and circuit — already have determined that Tiara's tort claims are connected to its contract claims, and there is no basis for revisiting that determination here.

Finally, Tiara is wrong in arguing that this Court's decision in *Wachovia Insurance Services, Inc. v. Toomey*, 994 So. 2d 980 (Fla. 2000), "cannot be reconciled with the doctrine's application to claims for breach of fiduciary duty and negligence against an insurance broker." (Tiara Br. at 11, 35-36.) As Tiara is forced to concede, the decision in *Toomey* does not address the economic loss rule at all. (*See* Tiara Br. at 35, 41.) And the Court certainly did not reject the proposition that tort claims intertwined with the contract or arising from the subject matter of the contract are subject to rule. In fact, it is not clear whether the relevant parties in *Toomey* were in privity at all. If they were, the Court did not have occasion to evaluate the scope of the contractual duties; and the Court's ultimate conclusion was the result of a fact-specific inquiry, where it found the breach of

fiduciary duty claim to be akin to a "bad faith" claim. 994 So. 2d at 987-89. *Toomey* thus has little bearing on this case, and none on the certified question.[14]

CONCLUSION

For all the foregoing reasons, Respondent/Appellee Marsh USA Inc. respectfully submits that the Court should answer the single question certified by the United Court of Appeals for the Eleventh Circuit in the negative.

Dated: September 2, 2010

Respectfully submitted,

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[14] Nor does *Randolph v. Mitchell*, 677 So. 2d 976 (Fla. 5th DCA 1996), support Tiara's position. In that case, which was decided on a motion to dismiss, the court did not have facts concerning whether the parties were in contractual privity or the scope of any such privity. *Id.* at 977-78. More importantly, the plaintiff's claim was for fraudulent inducement, which is a recognized example of an "extra-contractual" violation exempted from the economic loss rule. *Id.* at 977.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been served via Federal Express Next Business Day Delivery on Tiara Condominium Association, Inc.'s attorney Mark L. McAlpine, McAlpine & Associates, P.C., 3201 University Drive, Suite 100, Auburn Hills, Michigan 48326, on September 2, 2010.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief was prepared in Times New Roman 14-point font.

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