SUPREME COURT OF FLORIDA

CASE NO. SC10-1022

TIARA CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, in its own name and as agent for all owners of record of all individual condominium parcels with the Tiara Condominium,

Movant/Appellant,

v.

MARSH & MCLENNAN COMPANIES, INC., a Delaware corporation; MARSH, INC.; and MARSH, USA, INC.,

Respondent/Appellee.

Lower Tribunal No. 09-11718-GG

MOVANT/APPELLANT'S INITIAL BRIEF

QUESTION CERTIFIED FROM THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION OF LAW CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Does an insurance broker provide a "professional service" such that the 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?

QUESTIONS OF LAW AS REPHRASED BY TIARA

1. Is an insured's claim against its insurance broker for breach of fiduciary duty subject to the economic loss rule?

2. Is an insured's claim against its insurance broker for negligence subject to the economic loss rule?

STATEMENT OF THE CASE

Tiara Condominium Association, Inc. ("Tiara") sued Marsh USA, Inc. ("Marsh"), its insurance broker, in the United States District Court for the Southern District of Florida. Tiara asserted claims for (1) breach of contract; (2) negligent misrepresentation; (3) breach of the covenant of good faith and fair dealing; (4) negligence; and (5) breach of fiduciary duty. Tiara based the first three claims primarily on allegations that Marsh failed to procure a policy providing "per occurrence" coverage. Tiara based its latter two claims for negligence and breach of fiduciary duty on allegations that Marsh was negligent in failing to procure an insurance policy providing appropriate coverage and that Marsh's actions fell short of performing its duties as Tiara's insurance broker and fiduciary. The district

court dismissed all counts on summary judgment,[1] and it denied without opinion Tiara's Motion to Alter or Amend Judgment and for Relief from Judgment.[2]

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed dismissal of Tiara's claims for breach of contract, negligent misrepresentation, and breach of the covenant of good faith and fair dealing.[3] The court affirmed dismissal of the breach of contract claim holding that the "there are no contractual provisions in the oral agreement that extended Marsh's responsibility beyond that which was stated in the written agreement" to procure the policy.[4] The court affirmed dismissal of the negligent misrepresentation claim, holding that "Marsh correctly interpreted the policy as containing a per-occurrence limit of liability."[5] And the court affirmed dismissal of the breach of the covenant of good faith and fair dealing claim citing a lack of "evidence that any of the alleged errors made by Marsh were intentional or made in bad faith."[6]

As for the breach of fiduciary duty and negligence claims, the court recognized that, under Florida law, "insurance agents and insurance brokers have

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[1] Docket 179.

[2] Docket 180; Docket 187.

[3] *Tiara Condo. Assn v. Marsh & McLennan Cos., Inc*., — F.3d —, 2010 WL 2105923 (11th Cir. May 27, 2010).

[4] *Id*. at *3.

[5] *Id*.

[6] *Id*.

some extra-contractual duties."[7] Despite these extra-contractual duties, the court decided "Florida law is not sufficiently clear" on whether the tort claims are barred under the economic loss rule "to the extent that Tiara's claims are based on [extra-contractual] collateral failures" such as "Marsh's failure to advise Tiara of its belief that it was under-insured and properly advise it regarding its complete insurance needs."[8] Noting that an "exception to the economic loss rule applies where the contract at issue relates to the provision of professional services," the court held that it is "not clear whether an insurance broker provides professional services under Florida law."[9] The court "conclude[d] that the question of whether the economic loss rule bars tort claims brought against insurance brokers is unsettled under Florida law and should be certified to the Supreme Court of Florida" under Fla. R. App. P. 9.150(a).[10]

[7] *Id*. at *4.

[8] *Id*.

[9] *Id*.

[10] *Id*. at *4-5.

STATEMENT OF THE FACTS[11]

A. Tiara's Relationship with Marsh.

Tiara is a condominium association whose members own homes in the Tiara condominium tower on Singer Island, Florida. Tiara is managed by an all-volunteer Board of Governors (the "Board"), which relies upon the advice of retained professionals in making business decisions and in administering the common elements of the condominium property.[12]

In 2002, Tiara interviewed several firms vying to become its insurance broker and risk manager.[13] Tiara retained Marsh based on Marsh's claims of exceptional size, experience, resources, and service beyond that offered by other insurance brokers and risk managers.[14] Marsh made clear that it was not only Tiara's exclusive broker, but also Tiara's "exclusive insurance, risk management, and risk financing advisor."[15] From that point forward, Tiara relied on Marsh to advise it with respect to the universe of Tiara's insurance needs and potential risks.[16] Indeed, the Marsh account executive in charge of Tiara's account, Neil

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[11] Tiara respectfully offers this abbreviated Statement of Facts to exclude those facts that are not directly related to the issues under review by this Court.

[12] Docket 104-2 at 116:15-117:11.

[13] Docket 104-4, Quinlan Dep. at 37:8-13; 45:12-46:23.

[14] Docket 104-4, Quinlan Dep. at 38:2-13.

[15] *Id*.

[16] Docket 104-4, Quinlan Dep. at 28-32.

Hewitt,[17] was the most integral member of Tiara's insurance committee, regularly attending and participating in insurance committee meetings.[18]

Upon its engagement, Marsh undertook a review of Tiara's insurance coverages.[19] Marsh specifically agreed to determine whether coverage should be increased.[20] Toward that end, Tiara provided Marsh with a March 1, 2002 appraisal (itself based on a 1998 appraisal), which had been performed by Allied Appraisal Services, Inc. ("Allied").[21] Tiara asked Marsh whether the 2002 Allied appraisal was sufficient for insurance purposes, and Marsh responded that it was.[22]

In April 2004, Marsh presented an insurance proposal to Tiara for the renewal of Tiara's Windstorm coverage with Citizens Property Insurance Corporation ("Citizens").[23] Marsh proposed that Tiara obtain a Windstorm Policy with a limit of $49,970,350,[24] which it represented as being sufficient for Tiara's

[17] Docket 180 at 9.

[18] Docket 104-4, Quinlan Dep., at 60:3- 15; 78:2-14.

[19] Docket 104-4, Quinlan Dep., at 32:5-17; Docket 104-5, Croes Dep., at 27:12-16.

[20] Docket 104-5, Croes Dep., at 27:12-28:13, 41:1-8; Docket 104-4, Quinlan Dep., at 30:9-12.

[21] Docket 104-8.

[22] Docket 104-4, Quinlan Dep., at 123:11-15; Docket 104-23, February 18, 2004 Marsh Letter.

[23] Docket 104-4, Quinlan Dep., at 182:2-16.

[24] Docket 104-2 at 9.

needs.[25] Following Marsh's advice, Tiara accepted the coverage that Marsh proposed.[26]

B. Tiara's Insurance Shortfall.

Tiara sustained substantial damage from both Hurricane Frances and Hurricane Jeanne in 2004. Tiara's damages substantially exceeded $100 million (more than twice its policy limit). Thus, it became clear that Tiara was woefully underinsured. Marsh's Neil Hewitt now admits that, when Marsh proposed Tiara's Windstorm coverage, he believed Tiara to be underinsured.[27] Nonetheless, he did not instruct Tiara to get a new appraisal or to increase its coverage limits.[28]

To increase its insurance recovery from Citizens, Tiara argued that it should receive two policy limits because the damage it suffered came from two separate hurricanes. In July 2005, Citizens notified Tiara of its position that two policy limits were not available under the Policy. When Tiara brought action against Citizens, Citizens defended against Tiara's claims on grounds that (a) Tiara had been underinsured (thus violating Tiara's "co-insurance requirement" and relieving Citizens of significant payment obligations) and (b) only one policy limit was

[25] Docket 104-4, Quinlan Dep., at 188:21-189:2.

[26] Docket 104-4, Quinlan Dep., at 187:16-24.

[27] Docket 104-6, Hewitt Dep., at 178:14-16.

[28] Docket 104-4, Quinlan Dep., at 243:22-23.

available.[29] Tiara later settled its lawsuit with Citizens for an amount that represented an insurance shortfall of more than $30 million.[30]

C. Marsh's Breach of Its Duties to Tiara.

Tiara argued in the district court and before the Eleventh Circuit that Marsh was contractually obligated to properly advise Tiara on its complete insurance needs. The Eleventh Circuit, however, found that Tiara's oral contract with Marsh was limited to the contents of the engagement letter, *i.e.*, to procure insurance coverage.[31] Thus, the court concluded that any obligation of Marsh to advise Tiara that it was under-insured, or to properly advise Tiara regarding its complete insurance need, was "extra-contractual."[32]

Marsh never informed Tiara of any co-insurance requirement of the Citizens Wind Policy, and it never informed Tiara of any other underinsurance risk that Tiara faced.[33] Yet Marsh recognized that, as Tiara's broker and advisor (and thus

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[29] Docket 104-3, Adams Dep., at 180:23-181:10; 183:14-184:3; Docket 104-9, Kass Dep., at 146:23 25; 148:18-25.

[30] Docket 104-9, Kass Dep., at 131:12-21; Docket 180-2 at 4-6.

[31] *Tiara Condo. Assn v. Marsh & McLennan Cos., Inc.*, — F.3d —, 2010 WL 2105923, at *3 (11th Cir. May 27, 2010) (holding that there were no "contractual provisions in the oral agreement that extended Marsh's responsibility beyond that which was stated in the written agreement").

[32] *Id*. at *4.

[33] Docket 104-3, Quinlan Dep., at 153:8-17.

fiduciary), it owed a significant standard of care to Tiara irrespective of the contract.[34]

Tiara produced three reports of experts who offered opinions to the effect that Marsh breached its duties as Tiara's insurance broker; that Marsh should have known that Tiara was under-insured; that such under-insurance offered Citizens a defense to coverage; and that Marsh's breach of its duties caused Tiara to incur more than $40 million in losses.[35] With these opinions and the other evidence presented to the court, Tiara argued that Marsh tortiously breached its duties to Tiara in the following ways:

- **Failing to Obtain Adequate Coverage Limits.** Marsh knowingly based its coverage limits on an out-dated appraisal that understated Tiara's value. Thus Marsh knew that Tiara was underinsured. Marsh failed to advise Tiara to obtain an updated appraisal or the correct type of appraisal (including debris removal), and it specifically denied that an updated appraisal was necessary. These failures by Marsh not only left Tiara with insufficient coverage for Tiara's entire loss, but they enabled

[34] Docket 104-6, Hewitt Dep., at 122:21-22.

[35] Docket 104-26, Report of Wlliam Walker (detailing duties and breaches of insurance broker); Docket 104-27, Report of William D. Hager (breach of duty); Docket 104-28, Report of Carl Fedde (drying equipment rental charges alone exceed $19 million).

Citizens to assert a defense to coverage based on the Windstorm Policy's co-insurance requirement.

- **Failing to Obtain "Law or Ordinance Coverage."** Marsh failed to obtain coverage (through Citizens or other supplemental insurance provider) for the costs of repairing the building in accordance with contemporary laws and ordinances. Marsh knew that Tiara would be required to make any repairs in accordance with those contemporary law and ordinances, and it acknowledged the importance of law or ordinance coverage as it was preparing an insurance package for Tiara. Marsh, however, failed to inform Tiara that its coverage limits were insufficient to cover all costs of repair (less deductible), and it failed to advise Tiara to obtain supplemental coverage to address the additional repair costs occasioned by contemporary laws and ordinances.

- **Failing to Obtain Coverage for Remediation and Other "Soft Costs."** Marsh failed to advise Tiara of the substantial remediation expenses that occur in connection with hurricane repairs, and it failed to obtain for Tiara insurance coverage limits that would address those additional expenses. Instead, Marsh based Tiara's coverage limits solely on an appraisal of Tiara which, on its face, did not account for remediation costs, for catastrophe-related labor and material cost increases, and for other

so-called soft costs such as debris removal, protection of the building, or temporary construction costs.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit has requested clarification from this Court as to whether breach of fiduciary duty and negligence claims against an insurance broker qualify for the economic loss rule's exception for professional malpractice. But regardless of whether insurance brokers are "professionals," the economic loss rule does not apply. First, an examination of this Court's jurisprudence on the economic loss rule indicates that the rule no longer applies to a contract for services. Although this Court applied the economic loss rule to a case involving a contract for services in *AFM Corp. v. Southern Bell Tel. & Tel. Co.*,[36] it later receded from *AFM* to the extent that its result was based on the economic loss rule. As it stands, the economic loss rule is apparently limited to the products liability context, and this is not a products liability case.

Second, even if the economic loss rule did apply to a services contract, an exception applies to independent torts. Both of Tiara's claims are independent torts premised on extra-contractual conduct. Florida courts, including this one, have recognized that insurance brokers owe extra-contractual duties to an insured. Marsh violated its extra-contractual duties by, among other things, failing to advise

[36] 515 So. 2d 180 (Fla. 1987).

Tiara of its belief that Tiara was under-insured and failing to properly advise Tiara regarding its complete insurance needs. Because such duties are extra-contractual, Tiara has no recourse in contract; its recourse instead lies in well-established common law causes of action: breach of fiduciary duty and negligence.

Third, in *Wachovia Ins. Servs., Inc. v. Toomey*,[37] this Court recently held that the trial court erred in dismissing an insured's claims against its insurance broker for breach of fiduciary duty and negligence, notwithstanding the privity of contract between the insured and broker. Although the Court's decision does not discuss the economic loss rule, *Toomey* cannot be reconciled with the doctrine's application to claims for breach of fiduciary duty and negligence against an insurance broker.

Finally, insurance brokers are "professionals" for purposes of the economic loss rule because an insurance brokerage contract is not an ordinary contract for goods or services: Brokers owe fiduciary and other duties to the insured that are akin to the professional duties owed by attorneys and accountants.

For these reasons, this Court should answer the certified question by holding that Tiara's claims for breach of fiduciary duty and negligence are not barred by the economic loss rule.

[37] 994 So. 2d 980 (Fla. 2008).

ARGUMENT

A. Legal Standards.

Because the question certified by the Eleventh Circuit Court of Appeals is a pure question of law, the standard of review is de novo.[38]

B. This Court Should Restate the Certified Questions.

This Court has wide discretion to reframe the certified issues as it sees fit.[39] The Eleventh Circuit itself noted in its opinion that this Court "retains the discretion to restate the issue and to answer the question in the manner it chooses."[40] A restatement is necessary here because the Eleventh Circuit's certified question improperly assumes that the viability of Tiara's claims rests on whether brokers are "professionals":

> DOES AN INSURANCE BROKER PROVIDE A "PROFESSIONAL SERVICE" SUCH THAT THE 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?[41]

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[38] *Jackson-Shaw Co. v. Jacksonville Aviation Auth*., 8 So. 3d 1076, 1085 (Fla. 2008).

[39] *See, e.g,. Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc*., 891 So. 2d 532, 534 (Fla. 2004) (rephrasing certified questions from the Eleventh Circuit relating to the economic loss rule); 5 Am. Jur. 2d Appellate Review § 916 ("Unless constrained by a statute, a state supreme court may dispense with or disregard the question certified to it and proceed to determine what it considers to be the true issues in the case").

[40] *Tiara Condo. Assn,* 2010 WL 210592, at *5.

[41] *Id*.

The court's question is burdened by a false premise: Brokers need not be "professionals" for Tiara's claims to be excepted from the economic loss rule. To be sure, professional malpractice claims are indeed excepted from the economic loss rule as held by this Court in *Moransais v. Heathman.*[42] But this exception is one of many. *Moransais*' holding, moreover, is simply an expression of the broader principal that torts based on extra-contractual duties are excepted from the economic loss rule.[43] In *Moransais*, the Court took care to "emphasize that by recognizing that the economic loss rule may have some genuine, but limited, value in [Florida's] damages law, [the Supreme Court] never intended to bar well-established common law causes of action."[44] So the true issue is whether an insured's claims for negligence and breach of fiduciary duty are "well-established common law causes of action." This inquiry requires an examination of the cause of action—not the label given to the tortfeasor.

Because there are two causes of action at issue in this case, there should be two separate questions restated as follows:

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[42] 744 So.2d 973 (Fla. 1999).

[43] *See Witt v. La Gorce Country Club, Inc*., -- So. 3d --, 2010 WL 2292104, at *4 (Fla. 3d DCA June 9, 2010) (noting that in *Moransais*, "the Florida Supreme Court implicitly acknowledged that claims of professional negligence operate outside of the contract").

[44] *Id*. at 983.

I. IS AN INSURED'S CLAIM AGAINST ITS INSURANCE BROKER FOR BREACH OF FIDUCIARY DUTY SUBJECT TO THE ECONOMIC LOSS RULE?

II. IS AN INSURED'S CLAIM AGAINST ITS INSURANCE BROKER FOR NEGLIGENCE SUBJECT TO THE ECONOMIC LOSS RULE?

Under this Court's jurisprudence on the economic loss rule, neither claim is subject to the economic loss rule. Both are well-established common law causes of action. And both are excepted from the economic loss rule as independent torts premised on extra-contractual duties.

C. Since 1987, This Court Has Consistently Limited the Application of the Economic Loss Rule to Products Liability Cases.

On twelve occasions this Court has examined the economic loss rule, a judicial creation,[45] beginning with a trio of cases in 1987. Although on one occasion the Court held that the economic loss rule applies in the context of a services contract, it has since receded from that holding, rationalizing the result on contractual principles, rather than the economic loss rule. As a consequence, the

[45] *See Moransais*, 744 So. 2d at 979 ("The 'economic loss' rule is a court-created doctrine which prohibits the extension of tort recovery for cases in which a product has damaged only itself and there is no personal injury or damage to 'other property,' and the losses or damage are economic in nature.") (quoting *Southland Const., Inc. v. Richeson Corp*., 642 So. 2d 5, 7 (Fla. 5th DCA 1994)) (emphasis added)); *Fla. Power & Light Co. v. Westinghouse Elec. Corp*., 510 So.2d 899, 900-01 (Fla. 1987) (noting that a majority of jurisdictions have adopted the economic loss doctrine based on a judicial policy determination that contract principles are more appropriate than tort principles for resolving certain economic loss claims).

current state of the law appears to be that the economic loss rule is limited to the products liability context.

The first of the 1987 cases was *Florida Power & Light Co. v. Westinghouse Elec. Corp*.[46] There, an energy company contracted with a manufacturer for the provision of two nuclear steam systems, which proved defective. This Court surveyed the two leading cases on the products liability economic loss doctrine: the California Supreme Court's decision in *Seely v. White Motor Co*.[47] and the United States Supreme Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc*.[48] Both cases held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."[49] Finding these cases persuasive, this Court held that a purchaser of goods could not recover economic losses in tort without a claim for personal injury or damage to property other than the defective goods.[50]

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[46]510 So. 2d 899 (Fla. 1987).

[47]63 Cal. 2d 9 (1965) (holding that "[e]ven in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone").

[48] 476 U.S. 858 (1986).

[49] *Id.* at 871; *see also Indem. Ins. Co. of N. Am.*, 891 So. 2d at 540 ("Relying on *Seely* and *East River*, this Court adopted the products liability economic loss rule in *Florida Power & Light Co.* []").

[50] *Fla. Power & Light Co.*, 510 So. 2d at 902.

Florida Power & Light's application of the economic loss rule in the products liability context was grounded in the rationale that a buyer of a product had alternative remedies to tort when a product injures itself. This Court observed that the UCC afforded warranty remedies to a purchaser of a defective product and that certain consumers may benefit from the ability to exchange those warranties for a lower price:

> We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The lack of a tort remedy does not mean that the purchaser is unable to protect himself from loss. We note the Uniform Commercial Code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view [which places a duty of care on a manufacturer]. Further, the purchaser, particularly in a large commercial transaction like the instant case, can protect his interests by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price.[51]

The rationale supporting application of the economic loss rule in *Florida Power & Light, i.e.*, the availability of alternative remedies from tort, do not apply

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[51] *Id.* at 902; *see also Comptech Intl, Inc. v. Milan Commerce Park, Ltd.*, 753 So.2d 1219, 1224 (Fla. 1999) ("Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or in other words, that the customer has received 'insufficient product value.' The maintenance of product value and quality is precisely the purpose of express and implied warranties. Therefore, a claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract") (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986)).

to Tiara; because Marsh breached extra-contractual duties, contract remedies are not available, and there is no UCC warranty. Tiara's only remedies are longstanding causes of action for breach of fiduciary duty and negligence.

In the second of the 1987 decisions, *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc.*,[52] this Court again held that a purchaser of a product cannot maintain a tort action against a manufacturer absent personal injury or property damage, reaffirming its decision in *Florida Power & Light*.[53]

In the third decision, this Court for the first time applied the economic loss rule outside of the products liability context, to a services contract. In *AFM Corp.*,[54] a business contracted with an advertiser for referral services, and the advertiser mistakenly caused the business's old telephone number to be distributed and the referral system to be disconnected.[55] The injured business sued the advertiser, but only on a claim for negligent breach of the contract.[56] This Court held that there was "no basis for recovery in negligence" because the business "has not provided that a tort independent of the breach itself was committed."[57] The Court reasoned that a breach of contract must be attended "by some additional

[52] *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc*., 511 So. 2d 992 (Fla. 1987)

[53] *Id.* at 994.

[54] 515 So. 2d 180 (Fla. 1987)

[55] *Id*. at 180-81.

[56] *Id*. at 181.

[57] *Id*.

conduct amounting to an independent tort" for such breach to constitute negligence.[58] *AFM* is the only case in which this Court has applied the economic loss rule to a contract for services. Later decisions, moreover, have limited *AFM's* holding, explaining that the result is justified by contract principals—not the economic loss rule; so as its now stands, the rule of *AFM* is that a breach of a contract, standing alone, does not constitute a tort.[59] This is not an expression of the economic loss rule.

The next time this Court addressed the economic loss rule was in its 1993 decision in *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc*.[60] There, this Court again applied the economic loss rule in the products liability context, holding that "the economic loss rule applies to the purchase of houses."[61] The Court upheld the economic loss rule's application to homeowner's tort claims against a supplier of a product used in the construction of the home because, the Court reasoned, the homeowners have remedies other than in tort, including warranty

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[58] *Id*. (citing *Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co*., 428 So.2d 518, 519 (Fla. 3d DCA 1986)).

[59] *See, e.g*., *Moransais*, 744 So. 2d at 980–81 (While we continue to believe the ***outcome of that case is sound***, we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles.") (emphasis added)).

[60] *Casa Clara Condo. Assn v. Charley Toppino & Sons, Inc*., 620 So. 2d 1244 (Fla. 1993)

[61] *Id.* at 1248.

law, to protect homeowners from defects in their homes.[62] Again, the policy rationale supporting application of the economic loss rule in *Case Clara*, as in *Florida Power & Light*, does not apply to Tiara: Tiara's remedies for Marsh's breach of extra-contractual duties do not lie in warranty; its remedies lie in causes of action for breach of fiduciary duty and negligence.

Two years later, in *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*,[63] this Court again applied the economic loss rule in the products liability context holding that the economic loss rule applies to negligence claims relating to the manufacture of a defective product where the only damages claimed are to the product itself and where the plaintiff claims to have no alternative theory of recovery.[64]

From 1996 through 2010, this Court announced a series of exceptions to the economic loss rule. In *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,[65] the Court held that the economic loss rule does not apply to fraudulent inducement claims, reasoning that the "rule has not eliminated causes of action based upon

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[62] *See Id.* at 1247 ("There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects. Coupled with homebuyers' power to bargain over price, these protections must be viewed as sufficient when compared with the mischief that could be caused by allowing tort recovery for purely economic losses.") (footnotes omitted)).

[63] 660 So. 2d 628, 630 (Fla. 1995)

[64] *Id.* at 630.

[65] 685 So. 2d 1238 (Fla. 1996).

torts independent of the contractual breach even though there exists a breach of contract action," so that "[w]here a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."[66] In *PK Ventures, Inc. v. Raymond James & Assocs., Inc.*,[67] this Court held, under the same reasoning, that a buyer of commercial property is not prevented by the economic loss rule from recovering damages for negligent misrepresentation against the seller's broker.[68] In *Woodson v. Martin*,[69] this Court held, under the same reasoning, that a buyer of residential property is not 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.

In *Moransais v. Heathman*,[70] this Court held that the economic loss rule does not apply to well-established causes of actions in tort, including professional malpractice actions.[71] In *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*,[72] the

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[66] *Id.* at 1239.

[67] 690 So. 2d 1296 (Fla. 1997).

[68] *Id.* at 1297.

[69] 685 So. 2d 1240, 1241 (Fla. 1996).

[70] 744 So. 2d 973 (Fla. 1999).

[71] *Id.* at 983 ("The rule, in any case, should not be invoked to bar well-established causes of actions in tort, such as professional malpractice.").

[72] *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999).

Court held that "the economic loss rule does not bar statutory causes of action."[73] In *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*,[74] the Court held that the economic loss rule does not apply where the claim "does not involve a cause of action against a manufacturer or distributor for economic loss caused by a product which damages itself," and where the parties are not in privity of contract.[75] And in *Curd v. Mosaic Fertilizer, LLC*,[76] this Court reaffirmed that the economic loss rule does not apply where "[t]he parties to this action are not in contractual privity" and "the defendant in this case is not a manufacturer or distributor of a defective product that has caused damage to itself."[77]

Because this Court has receded from *AFM* relative to its application of the economic loss rule in the services context, it should now hold that the economic loss rule applies only in products liability cases.[78] Such a holding would be in line

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[73] *Id.* at 1223.

[74] *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).

[75] *Id.* at 541.

[76] *Curd v. Mosaic Fertilizer, LLC*, -- So. 3d ---, 2010 WL 2400384 (Fla. June 17, 2010).

[77] *Id.* 2010 WL 2400384, at *5.

[78] *Cf. Comptech Int'l, Inc.*, 753 So. 2d at 1227 ("I concur in the well-reasoned analysis of the majority opinion. I write only to reiterate my view expressed in my concurring opinion in *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999), that in order to clarify the application of the economic loss rule, I would expressly state that its application is limited to product claims and would recede from *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla. 1987).") (Wells, J., concurring, joined by Pariente and Lewis, JJ.).

with the majority of courts that adhere to the economic loss rule.[79] Many jurisdictions do not apply the economic loss rule when there is a special

[79] *See* **Alabama**: *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc*., 901 So. 2d 84, 106–107 (Ala. 2004) ("The economic-loss rule prevents tort recovery when a product damages itself, causing economic loss, but does not cause personal injury or damage to any property other than itself."); **Connecticut**: *Connecticut v. Maximus, Inc*., No. X06CV075011488S, 2009 WL 1142570, at *9 (Conn. Super. Ct. Apr. 1, 2009) ("[T]he court concludes that the economic loss rule as recognized by the Supreme Court [of Connecticut], applies to cases involving the UCC. Because the allegations of the complaint indicate that the contract between the parties involved a services contract, and not a sales contract governed by the UCC, the economic loss doctrine is inapplicable."); *Hoydic v. B & E Juices, Inc*., No. X08CV034010104S, 2008 WL 803642, at *6 (Conn. Super. Ct. Feb. 27, 2008) ("Since the tort claims in this case arise out a claim of breach of a contract for distribution and sales services, and not a sale of goods transaction under the UCC, the economic loss doctrine does not bar the plaintiff's tort claims."); **Delaware**: *In re Oakwood Homes Corp*., 340 B.R. 510, 520-21 (Bkrtcy. D. Del. 2006) (noting exceptions to the economic loss rule for: (1) a "tort malpractice action when the underlying contract is for the rendering of professional services" and (2) "where a party is seeking to recover economic loss damages on a theory of negligent performance of a contract for services") (applying Delaware, North Carolina, and New York law); **Hawaii**: *Va. Sur. Co. v. Am. Eurocopter Corp*., 955 F. Supp. 1213, 1217 (D. Hawaii 1996) (holding that the economic loss doctrine barred in tort action for damage to helicopter from defective fitting because the contract at issue, for the sale of the helicopter, was for sale of product, rather than contract for services); *State ex rel. Bronster v. U.S. Steel Corp*., 919 P.2d 294, 302 (Hawaii 1996) (adopting the rule "insofar as it applies to claims for relief based on a product liability or negligent design and/or manufacture theory"); **Indiana**: *Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard*, P.C., -- N.E.2d ---, 2010 WL 2594314, at *16 (Ind. June 29, 2010) ("[T]he economic loss rule is a general rule that admits of exceptions for contracts for services in appropriate circumstances. Indeed, we have mentioned possible exceptions (for purposes of illustration only)-lawyer malpractice, breach of a duty of care owed to a plaintiff by a fiduciary, breach of a duty to settle owed by a liability insurer to the insured, and negligent misstatement-that suggest situations in which the economic loss rule would not apply in the services context."); **Kansas**: *Prendiville v. Contemporary Homes, Inc*., 83 P.3d 1257, 1264 (Kan. Ct. App. 2004) (holding that

the economic loss doctrine applies to a claim against a contractor in residential construction defect cases where the rights and liabilities of the parties are governed by contract and an express warranty); **Kentucky**: *Grace v. Armstrong Coal Co*., No. 4:08-cv-109-JHM, 2009 WL 366239, at *5 (W.D. Ky. Feb. 13, 2009) ("Kentucky has given no indication that it would extend the rule to contracts for services. . . . Accordingly, the Court finds that the economic loss rule does not apply."); **Maryland**: *Chi. Title Ins. Co. v. Allfirst Bank*, 905 A.2d 366, 383 (Md. 2006) ("An action for negligence, where the damages are only economic, may be brought . . . where there is no violation of the provisions of the UCC, and where duty is established by a sufficient intimate nexus between the [defendant] and the [plaintiff], through privity or its equivalent."); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig*., 613 F. Supp. 2d 108, 127 (D. Me. 2009) (holding that "the economic loss doctrine as Maine's Law Court has described it does not apply to prevent negligence-based tort recovery here" because "[t]his is not a case about a defective product that [the defendant] sold to the consumer."); **Massachusetts**: *Gateway Condominium Trust v. Clinton*, 1996 WL 655784, at * 2 (Mass. Super.1996) (declining to extend economic loss doctrine to plaintiff's claim where defendant did not supply allegedly defective product, but rather provided allegedly defective engineering plan, referred to as "professional services rendered in connection with improvements to real property"); **Michigan**: *Quest Diagnostics, Inc. v. MCI WorldCom, Inc*., 656 N.W.2d 858, 863 (Mich. Ct. App. 2002) ("This Court has declined to apply the economic loss doctrine where the claim emanates from a contract for services."); **Minnesota**: *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc*., 410 N.W.2d 312, 315 (Minn.1987) (explaining that the rationale behind the economic loss rule is that "a recognition of tort actions in cases under the U.C.C. would upset the remedies contained in the U.C.C.; when the rationale is not applicable, i.e., when the U.C.C. does not apply, there is no reason for the [economic loss] rule to apply"); **Missouri**: *Self v. Equilon Enters., LLC*, No. 4:00CV1903TA, 2005 WL 3763533, at *11 (E.D. Mo. Mar. 30, 2005) ("The Court determines that the general rule limiting plaintiffs to contract damages for economic loss governs inasmuch as the contracts at issue were for the sale of goods, not services."); **Mississippi**: *Lyndon Prop. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 274 (5th Cir. 2007) ("The economic loss rule is a doctrine restricting recovery in products liability to damages for physical harm, thereby excluding recovery for purely economic damages like those alleged here. [The defendant] points to no Mississippi case law applying this doctrine outside of the realm of products liability. In this diversity case, we seek to apply the law of Mississippi as we believe the Supreme Court of Mississippi would. We therefore decline to apply the economic loss doctrine to this tort case involving a duty

shaped by contract.") (internal citation omitted) (applying Mississippi law)); *Miss. Phosphates Corp. v. Furnace & Tube Serv., Inc*., No. 1:07CV1140 LG-RHW, 2008 WL 313770, at *1 (S.D. Miss. Feb 1, 2008) ("[T]he contract at issue here is for performance of services rather than purchase of a product. Furthermore, none of the claims asserted are in the nature of products liability. The economic loss doctrine is therefore inapplicable . . . ."); **Nebraska**: *Natl Crane Corp. v. Ohio Steel Tube Co*., 213 Neb. 782, 790, 332 N.W.2d 39, 44 (1983) (holding that "the purchaser of a product pursuant to a contract cannot recover [purely] economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability"); **New Jersey**: *Alloway v. General Marine Indus*., 695 A.2d 264, 267 (1997) (stating that the rule applies to "claims arising out of the manufacture, distribution, and sale of defective products"); *Consult Urban Renewal Dev. Corp. v. T.R. Arnold & Assoc., Inc*., No. 06-1684 (WJM), 2009 WL 1969083, at *4 (D.N.J. July 1, 2009) ("While some jurisdictions have chosen to extend the economic loss doctrine to services, there is no evidence to suggest that New Jersey has done so."); **North Carolina**: *Ellis-Don Constr., Inc. v. HKS, Inc*., 353 F. Supp. 2d 603, 606 (M.D.N.C. 2004) ("[N]or is there any indication that the courts of North Carolina have expanded the [economic *8 loss rule] beyond its traditional role in products liability cases."); **North Dakota**: *Dakota Gasification Co. v. Pascoe Bldg. Sys*., 91 F.3d 1094, 1098 (8th Cir. 1996) (holding that the economic loss rule applies because "the 'thrust' of the contract was the sale of goods") (applying North Dakota law)); **New York**: *Am. Tel. & Tel. Co. v. New York City Human Res. Admin*., 833 F. Supp. 962, 983 (S.D.N.Y. 1993) ("[A]n exception to the economic loss rule exists, under limited circumstances, for claims for negligent performance of contractual services."); *Ajax Hardware Mfg. Corp. v. Indus. Plants Corp*., 569 F.2d 181, 185 (2d Cir. 1977) (explaining, in considering a service contract, that "[n]egligent performance of a contract may give rise to a claim sounding in tort as well as one for breach of contract"); *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp*., 725 F. Supp. 656, 660 (N.D.N.Y.1989) (holding that New York precedent "can reasonably be construed as standing for the proposition that the negligent performance of a contract for services states a cause of action in tort under New York law") (emphasis added); *Consolidated Edison Co. of New York, Inc. v. Westinghouse Elec. Corp*., 567 F.Supp. 358, 364 (S.D.N.Y.1983) (recognizing an exception to the economic loss rule for service contracts because a cause of action is recognized under New York law for negligent performance of contractual services); **Oklahoma**: *Okla. Gas & Elec. Co. v. McGraw-Edison Co*., 834 P.2d 980, 982 (Okla. 1992) (stating that the rule applies to "manufacturers' products liability"); *Compsource Okla. v. BNY Mellon, N.A*., No. CIV-08-469-KEW, 2009 WL 2366112, at *2 (E.D. Okla. July

31, 2009) ("This Court is troubled by the application of the economic loss rule in this case on multiple fronts. No authority has been cited from a court in Oklahoma specifically adopting the economic loss rule outside of the products liability arena. . . . [T]his Court is not prepared to conclude Oklahoma would adopt the economic loss rule in the context of this case [involving investor's claims against investment company for breach of fiduciary duty, and negligence claims]."); **Pennsylvania**: *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc*., 247 F.3d 79, 104 n.11 (3d Cir. 2001) (noting that the economic loss doctrine "does not quite fit" outside of the context of products actions "because that doctrine developed in the context of courts' precluding products liability tort actions in cases where one party contracts for a product from another party and the product malfunctions, injuring only the product itself") (applying Pennsylvania law)); **Rhode Island**: *Ciccone v. Pitassi*, No. Civ.A. PB 97-4180, 2004 WL 2075120, at *6 (R.I. Super. Ct. Aug. 13, 2004) ("[T]his Court rules that the economic loss doctrine does not apply to preclude Plaintiffs' negligence claim against [bank] for its services."); **South Carolina:** *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 703 (D.S.C. 2004) ("While the court cannot identify any relevant South Carolina law addressing this issue, numerous other states have held that if the contract is one for services, the economic loss doctrine does not apply, and a negligence claim is permissible.") (footnote omitted)); *Palmetto Linen Serv., Inc. v. U.N.X., Inc*., 205 F.3d 126, 129 (4th Cir. 2000) (holding that the economic loss rule a negligence claim where the "services involved in the transaction . . . were merely incidental to the sale of goods") (applying South Carolina law)); **South Dakota**: *South Diamond Surface. Inc. v. State Cement Plant Comm'n*, 583 N.W.2d 155, 161 (S.D. 1998) (stating that the rule applies when the "predominate purpose" of a transaction is the "sale of goods"); **Texas**: *Quicksilver Res., Inc. v. Eagle Drilling, L.L.C*., No. H-08-868, 2009 WL 1312598, at *13 (S.D. Tex. May 9, 2009) ("The case law is murky, but, where the UCC governs, a negligence claim does not lie. Rather, the UCC provisions provide the plaintiff with an appropriate remedy."); **Tennessee**: *Ham v. Swift Transp. Co., Inc*., No. 2:09-cv-02145, -- F. Supp. 2d ---, 2010 WL 937599 (W.D. Tenn. March 17, 2010) (noting that "Tennessee's highest court has never addressed whether the economic loss doctrine applies outside of the products liability context," and holding that "[c]onsidering all appropriate indicia, . . . the Tennessee Supreme Court would decline to extend the economic loss doctrine to cases involving the provision of services if squarely faced with this question"); *Pascarella v. Swift Transp. Co., Inc*., No. 2:09-cv-02549, -- F.Supp.2d ---, 2010 WL 937817 (W.D. Tenn. March 17, 2010) (same)); *Lott v. Swift Transp. Co., Inc*., No. 2:09-cv-02287, -- F.Supp.2d ---, 2010 WL 937769 (W.D. Tenn. March 17, 2010) (same)); **Wisconson**: *Ins. Co. of N. Am. v. Cease Elec. Inc*., 688 N.W.2d

relationship between the parties giving rise to an extra-contractual duty.[80] Under this principal, some courts have expressly sanctioned tort claims against an

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462, 472 (Wis. 2004) ("[W]e determine that the economic loss doctrine is inapplicable to claims for the negligent provision of services. This bright line rule will limit the uncertainty and increased litigation that would accompany any other decision."). Other jurisdictions have not adopted the doctrine generally. **Arkansas**: *Rush v. Whirlpool Corp*., No. 07-2022, 2008 WL 509562, at *2 (W.D. Ark. Feb. 22, 2008) ("The economic loss doctrine bars recovery in tort for economic damages caused by a defective product unless those losses are accompanied by some form of personal injury or damage to property other than the defective product itself. While California and Maryland adhere to this doctrine, Arkansas does not.") (citing *Farm Bureau Ins. Co. v. Case Corp*., 878 S.W.2d 741, 743-44 (Ark. 1994) (internal citations omitted)); **Mississippi**: *In re Chinese Manufactured Drywall Prods. Liab. Litigation*, 680 F. Supp. 2d 780, 795 (E.D. La. 2010) (noting that "the Mississippi Supreme Court has yet to adopt the [economic loss rule]") (applying Mississippi law)). In at least two jurisdictions, the economic loss rule does not apply when the parties ***lack*** privity of contract. **Georgia**: *Malta Const. Co. v. Henningson, Durham & Richardson, Inc*., 716 F. Supp. 1466, 1468 (N.D. Ga. 1989) (noting that the "Georgia economic loss rule which bars recovery in tort where the parties are not in privity and where plaintiff's damages are purely economic"); *Carolina Cas. Ins. Co. v. R.L. Brown & Assocs., Inc*., No. Civ.A. 1:04-CV-3537-, 2006 WL 3625891, at *5 (N.D. Ga. Dec. 11, 2006) ("The economic loss rule thus bars a plaintiff from recovering in tort where the party is not in privity with the defendant and the plaintiff's damages are purely economic."); **Virginia**: *Crawford v. Deutsche Bank AG*, 244 F. Supp. 2d 615, 616 (E.D. Va. 2003) ("Virginia law is clear that, absent privity of contract, the economic loss rule prevents a plaintiff from maintaining a negligence action against an individual to recover purely economic losses").

[80] *See* **California**: *J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979) ("Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity."); **Colorado**: *Town of Alma v. Azco Const., Inc*., 10 P.3d 1256, 1263 (Colo. 2000) (noting that some special relationships by their nature automatically trigger an independent duty of care, i.e. "duty independent of any contractual obligations," which supports a tort action even when the parties have entered into a contractual relationship, including the "quasi-fiduciary nature of insurer-insured relationship" which "creates independent

duty of care"); *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc*., 114 P.3d 862, 866 (Colo.2005)(finding the economic loss rule inapplicable due to an independent duty owed by builders to homeowners); *DerKevorkian v. Lionbridge Techs., Inc*., No. 04-CV-01160-LTB-CBS, 2006 WL 197320, at *8 (D. Colo. Jan. 26, 2006) ("Colorado's economic loss rule is not applicable here, however, because I have determined that Plaintiff has adequately stated facts to support a finding of an independent fiduciary duty."); **Idaho**: *Blahd v. Richard B. Smith, Inc*., 108 P.3d 996, 1001 (Idaho 2005) (recognizing two special relationships as exceptions to the economic loss rule: (1) "where a professional or quasi-professional performs personal services"; and (2) "where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function"); **Iowa**: *Burns Philp Inc. v. Cox, Kliewer & Co*., 2000 WL 33361992, at *8 (S.D. Iowa Nov.2, 2000) ("[T]he Court thinks that the only interpretation of the Iowa Supreme Court's holding in Kemin is that the economic loss doctrine does not apply to professional negligence claims."); *Kemin Indus., Inc. v. KPMG Peat Marwick LLP*, 578 N.W.2d 212, 221 (Iowa 1998) (holding that a negligence claim against an accounting firm is not subject to the economic loss rule); **Mississippi**: *Magnolia Const. Co., Inc. v. Mississippi Gulf South Engineers Inc*., 518 So. 2d 1194 (Miss. 1988) (holding breach of architect's duty to contractor gives rise to tort action for damage recovery); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc*., 463 S.E.2d 85, 88 (S.C. 1995) (holding that the economic loss rule does not apply where "there is a special relationship between the alleged tortfeasor and the injured party not arising in contract"); **New Mexico**: *Farmers Alliance Mut. Ins. Co. v. Naylor*, 480 F. Supp. 2d 1287, 1290 (D.N.M. 2007) ("Under New Mexico law, therefore, the economic loss rule does not bar tort claims arising from an independent duty of care."); **Texas**: *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 n.1 (Tex. 1991) (observing in a case involving the economic loss rule that "some contracts involve special relationships that may give rise to duties enforceable as torts, such as professional malpractice"); **Utah**: *Hermansen v. Tasulis*, 48 P.3d 235, 240 (Utah 2002) ("When an independent duty exists, the economic loss rule does not bar a tort claim 'because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule'").

insured's broker.[81] In several jurisdictions, the economic loss rule does not apply to breach of fiduciary duty claims.[82] Finally, many commentators have criticized

[81] *See* **Illinois**: *Kanter v. Deitelbaum*, 648 N.E.2d 1137, 1140 (Ill. App. Ct. 1995) (holding that the "economic loss doctrine does not bar [insured]'s recovery of their economic damages under a tort theory for [broker]'s negligent breach" of contract because "an insurance broker, admittedly having a fiduciary duty to an insured, is in no different position than an attorney or an accountant in relationship to [insureds]" and because "[the broker]'s duty to . . . his insureds, in performing insurance brokerage services was not solely defined by contract, but rather was extracontractual in nature"); **Nevada**: *SMI Owen Steel Co. v. Marsh USA, Inc*., 520 F.3d 432, 443 (5th Cir. 2008) ("We conclude that Nevada's economic loss doctrine does not bar negligence claims involving the violation of a professional, extra-contractual duty imposed by law.") (applying Nevada law)).

[82] **Arizona**: *Hall Family Props., Ltd. v. Gosnell Dev. Corp. of Ariz. (In re Gosnell Dev. Corp. of Ariz.)*, 331 F. App'x 440, 441–42 (9th Cir. 2009) (holding that under Arizona law, economic loss rule did not bar creditor's proof of claim for breach of fiduciary duty against bankruptcy debtor); **Colorado**: *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd*., 210 F.3d 1207, 1226-27 (10th Cir. 2000) (declining to extend the economic loss rule to a breach of fiduciary duty claim when the fiduciary duty existed independently of the contract) (applying Colorado law)); **Illinois**: *Beesen-Dwars v. Morris*, No. 06 C 5593, 2007 WL 2128348, at *14 (N.D. Ill. July 24, 2007) (holding that "the economic loss doctrine does not bar negligence claims premised on a breach of a fiduciary duty that arose out of a contract"); **Indiana**: *Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.*, -- N.E.2d ---, 2010 WL 2594314, at *10 (Ind. June 29, 2010) (noting that the economic loss rule is "open to appropriate exceptions, such as (for purposes of illustration only) lawyer malpractice, breach of a duty of care owed to a plain tiff by a fiduciary, breach of a duty to settle owed by a liability insurer to the insured, and negligent misstatement") (emphasis added)); **Massachusetts**: *Clark v. Rowe*, 701 N.E.2d 624, 626 (Mass. 1998) ("We have not applied the economic loss rule to claims of negligence by a fiduciary, such as a lawyer").

expansion of the economic loss rule doctrine to contracts for services, and especially claims for breach of fiduciary duty.[83]

Should this Court expressly limit the economic loss rule to products liability cases, the economic loss rule would necessarily have no application here. An

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[83] *See* P. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, Fla. B.J. 34, 40 (1994) ("[C]ases 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. 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?"); id. at 42 ("Clearly . . . 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."); *Moransais v. Heathman*, 744 So. 2d 973, 980 (Fla. 1999) ("We must acknowledge that our pronouncements on the rule have not always been clear and, accordingly, have been the subject of legitimate criticism and commentary.") (citing P. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, Fla. B.J. 34 Nov. 1995 at 34, 36-38)); *see also* J. 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) ("Although the economic loss doctrine is appropriate in actions involving product liability and some service contracts, the doctrine's rationale breaks down when expanded to cover relationships involving fiduciary duties."); A. Esquibel, *The Economic Loss Rule And Fiduciary Duty Claims: Nothing Stricter Than The Morals of The Marketplace?*, 42 Vill. L. Rev. 789, 852-853 (1997) ("Shielding a wrongdoing fiduciary from fully restoring his or her victim and, perhaps, from paying punitive damages is against a long history of public policy in favor of protecting a beneficiary of a fiduciary relationship to the utmost and, correspondingly, deterring bad conduct by fiduciaries. . . . For this reason, the [economic loss rule] should not operate to bar claims for breach of fiduciary duty."); D. Bachi & B. Rockenbach, *The Practical Limitations of the Economic Loss Rule*, Fla. B.J., 69 Fla. Bar J. 89, 92 (1995) ("In the final analysis, perhaps it is time to recognize that the ELR has no 'exceptions' within, and no application outside, the field of products liability. In cases involving services, professional or otherwise, the independent tort doctrine remains a viable boundary between contract and tort law").

insurance contract is not "goods" subject to the UCC,[84] so a brokerage contract for the procurement of insurance necessarily is not subject to the UCC. Accordingly, an insurance brokerage contract would not be subject to the economic loss rule.

D. Claims Based On Extra-Contractual Duties Are Independent Torts Excepted From the Economic Loss Rule.

Even if the economic loss rule otherwise had application outside the products liability context, *i.e.*, when the parties are in privity, it would not apply to torts based on extra-contractual duties. In *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, this Court held that "independent torts" are excepted from the economic loss rule.[85] More specifically, the Court held that "[t]he economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action," and that

[84] *See Elrad v. United Life & Acc. Ins. Co.*, 624 F. Supp. 742, 744 (N.D. Ill. 1985) (holding that a life insurance policy is not "goods" under Illinois's definition of goods, identical to definition found at Cal. U. Com.Code, § 2105, subd. (1)); *Bartley v. National Union Fire Ins. Co*. 824 F. Supp. 624 (N.D. Tex. 1992) (holding that insurance contracts do not fit within definition of goods promulgated by UCC); *Oxford Lumber Co. v. Lumbermens Mutual Ins. Co.*, 472 So.2d 973 (Ala. 1985) (holding that the issuance of insurance contract is a service, not product subject to sale of goods provisions of UCC*); State Comp. Ins. Fund v. Notis Enters., Inc*., No. BC365647, 2010 WL 2253238, at *6 (Cal. Ct. App. June 7, 2010).

[85] *HTP*, 685 So. 2d at 1238; *see also Indem. Ins. Co. of N. Am.*, 891 So. 2d at 537.

"[w]here a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."[86]

So the question now becomes: Does a fiduciary relationship give rise to extra-contractual duties, which when breached, are actionable in tort despite the economic loss rule? And, likewise, does the recognized duty owed by a broker to an insured give rise to extra-contractual duties which, when breached, are actionable in tort despite the economic loss rule? As set forth below, the answer is yes.

E. Tiara's Breach of Fiduciary Duty Is an Independent Tort.

Since 1969, Florida courts have held that a broker and insured are in a fiduciary relationship.[87] In its 2008 *Toomey*[88] decision, this Court cited the Fifth

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[86] *HTP*, 685 So. 2d at 1239.

[87] *See Wachovia Ins Servs, Inc v Toomey*, 994 So 2d 980, 990 (Fla. 2008) ("[I]nsurance brokers will often have both a fiduciary duty to their insured-principals and a common-law duty to properly procure requested insurance coverage."); *Moss v. Appel*, 718 So. 2d 199, 201 (Fla. 4th DCA 1998), *abrogated on other grounds, Wachovia Ins. Servs., Inc. v. Toomey*, 994 So. 2d 980, 990 (Fla. 2008) ("An insurance broker is in a fiduciary relationship with an insured."); *Southtrust Bank & Right Equip. Co. of Pinellas County, Inc. v. Exp. Ins. Servs., Inc*., 190 F. Supp. 2d 1304, 1308 (M.D. Fla. 2002) ("An insurance broker has a fiduciary relationship with an insured."); *Sewall v. State*, 783 So. 2d 1171, 1178 (Fla. 5th DCA 2001) (noting that "insurance agent stood in a fiduciary relationship" with insured); *Randolph v. Mitchell*, 677 So. 2d 976, 978 (Fla. 5th DCA 1996) ("[A]n insurance broker, admittedly having a fiduciary duty to an insured, is in no different position than an attorney or an accountant in relationship to plaintiffs.") (quoting *Kanter v. Deitelbaum*, 271 Ill.App.3d 750, 755, 208 Ill.Dec. 215, 218, 648 N.E.2d 1137, 1139-40 (1995)); *Beardmore v. Abbott*, 218

Circuit Court of Appeals decision in *Randolph v. Mitchell*[89] for the proposition that "an insurance broker owes a fiduciary duty to the insured-principal."[90] An insurance broker, as a fiduciary, must inform the insured of "all material facts within the broker's knowledge that may affect the transaction or the subject matter of the relationship."[91] An insured's breach of fiduciary duty claim, moreover, exists separate from a negligence claim.[92] And numerous courts have held that breach of fiduciary duty claims are excepted from the economic loss rule.[93]

So. 2d 807, 808–09 (Fla. 3d DCA 1969) ("We accept the view that the record herein establishes that a confidential relationship existed between the parties and that it was one in which [the insured] reposed trust and confidence in his insurance counselor . . . .").

[88] 994 So. 2d 980 (Fla. 2008).

[89] *Randolph v. Mitchell*, 677 So.2d 976 (Fla. 5th DCA 1996).

[90] *Toomey*, 994 So. 2d at 990 (citing *Randolph*, 677 So.2d at 978).

[91] *Southtrust Bank*, 190 F. Supp. 2d at 1309 (internal quotation marks omitted)

[92] *Toomey*, 994 So. 2d at 990 (Fla 2008) ("Under Florida law, negligence claims and breach of fiduciary duty are separate causes of action. Indeed, insurance brokers will often have both a fiduciary duty to their insured-principals and a common-law duty to properly procure requested insurance coverage. As a result, negligence and breach of fiduciary duty can be pled in the alternative." (citations omitted)).

[93] *See also Wall Street Mortgage Bankers, Ltd. v. Attorneys Title Ins. Fund, Inc*., 2008 WL 5378126, at *2 (S.D. Fla. 2008) (denying a motion to dismiss a claim for breach of fiduciary duty on grounds of the economic loss rule even though the Plaintiff asserted a claim for breach of an underlying contract in the complaint); *Stateline Power Corp. v. Kremer*, 404 F. Supp. 2d 1373, 1380 (S.D. Fla. 2005) (denying a motion to dismiss a breach of fiduciary duty claim where the economic loss rule was invoked even in the face of an underlying employment agreement); *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc*., 842 So. 2d 204, 209 (Fla. 3d DCA 2003) (citing *Invo Florida, Inc. v. Somerset Venturer, Inc*., 751 So. 2d 1263

In 2004, this Court suggested that a breach of fiduciary duty claim is an exception from the economic loss rule in *Indemnity Insurance Company Of North America v. American Aviation, Inc*.[94] In that case, this Court favorably cited later decisions extending the exception to breach of fiduciary actions:

> Although we limited our holding in *Moransais* [*v. Heathman*] to situations involving professional malpractice, we note that some courts have extended the exception to the application of the economic loss rule created in *Moransais* to causes of action for breach of fiduciary duty, even if there was an underlying oral or written contract. *See Invo Fla., Inc. v. Somerset Venturer, Inc*., 751 So.2d 1263, 1266 (Fla. 3d DCA 2000); *Performance Paint Yacht Refinishing, Inc. v. Haines*, 190 F.R.D. 699, 701 (S.D. Fla. 1999).[95]

Thus, this Court suggested that breach of fiduciary duty claims, like the professional malpractice actions, are well-established common law causes of actions to which the economic loss rule was never meant to apply.

This Court should now hold that Tiara's breach of fiduciary duty claim is an independent tort.[96] Like fraudulent inducement, it too requires proof of facts

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(Fla. 3d DCA 2000) for the proposition that the "economic loss rule does not abolish cause of action for breach of fiduciary duty, even if there is an underlying contract."); *Cunningham v. PFL Life Ins. Co*., 42 F. Supp. 2d 872, 887 n.10 (N.D. Iowa 1999) (noting that "the economic loss rule often does not preclude claims for breach of fiduciary duty under Florida law").

[94] *Indem. Ins. Co. of N. Am.*, 891 So 2d at 532.

[95] *Id*. at 542.

[96] *See Invo Fla.*, 751 So. 2d at 1266–267 ("The [economic loss] rule, in any case, should not be invoked to bar well-established causes of actions in tort. Breach of fiduciary duty is one of those well-established torts. It is clear that the law imposes fiduciary duties on directors of dissolved corporations, such that they are bound to

separate and distinct from the breach of contract.[97] A breach of fiduciary duty claim generally requires "proof of the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages."[98] As this Court has noted, liability for breach of a fiduciary duty "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation."[99] So while an insured's relationship with its broker gives rise to a fiduciary relationship, the parties' contract does not limit the duty.

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exercise diligence and good faith in dealing with the properties of the corporation, to the end that the creditors' interests may be protected. Thus, we believe that Moransais makes it clear that the economic loss rule has not abolished the cause of action for breach of fiduciary duty, even if there is an underlying oral or written contract.") (internal citations, quotation marks, and alterations omitted)); *See Crowell v. Morgan Stanley Dean Witter*, 87 F. Supp. 2d 1287 (S.D. Fla. 2000) (held breach of fiduciary duty claims are not barred by the economic loss rule); *Medalie v. FSC Secs. Corp*., No. 98-3183-CIV-GOLD, 2000 WL 255918 (S.D. Fla. Feb. 1, 2000) ("[T]he court cannot hold that a claim of breach of fiduciary duty is not barred by the economic loss rule in light of *Moransais*.").

[97] *See, e.g., Collins v. Countrywide Home Loans, Inc*., 680 F. Supp. 2d 1287, 1297 (M.D. Fla. 2010) ("In this case, Plaintiffs have pleaded breach of fiduciary duty, a tort independent of a breach of contract. Plaintiffs have not pleaded that Countrywide failed to honor provisions of the contract, but rather that Countrywide violated its fiduciary duty by encouraging Plaintiffs to enter the contract in the first place. The Economic Loss Rule does not bar Plaintiffs' breach of fiduciary duty claim").

[98] *Gracey v. Eaker*, 837 So. 2d 348, 353 (Fla. 2002).

[99] *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002) (quoting Restatement (Second) of Torts § 874 cmt. b (1979)).

Where, as here, the allegations of the breach of the fiduciary duty do not mirror provisions in the contract, it follows that proof of the claim "requires proof of facts separate and distinct from the breach of contract."[100] The Eleventh Circuit held that Tiara's breach of fiduciary duty claim is indeed premised on extra-contractual "collateral failures":

> Tiara contends that Marsh was negligent in failing to procure for it an insurance policy providing appropriate coverage and that Marsh's actions fell short of performing its duties as insurance broker and fiduciary. Specifically, Tiara cites several "collateral failures" such as Marsh's failure to advise Tiara of its belief that it was under-insured and properly advise it regarding its complete insurance needs. To the extent that Tiara's claims for negligence or breach of fiduciary duty rest on Tiara's incorrect interpretation of the Citizens policy as per-occurrence, the district court's grant of summary judgment on these claims was appropriate; however, to the extent that Tiara's claims are based on collateral failures, we find that Florida law is not sufficiently clear on whether such claims are barred as extra-contractual under the economic loss rule.[101]

Because Tiara's breach of fiduciary duty claim is premised on extra-contractual conduct as determined by the Eleventh Circuit, the claim is an independent tort and, thus not subject to the economic loss rule.

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[100] *HTP*, 685 So. 2d at 1239; *see also Greenfield v. Manor Care, Inc.*, 705 So. 2d 926, 932 (Fla. 4th DCA 1997) ("We hold that, based on these allegations, appellant's breach of fiduciary duty claim is not barred by the economic loss doctrine. Since she properly alleged a fiduciary duty between Manor Care and it residents, which arose out of a special relationship independent of the contract, and a breach of same, it was error for the trial court to dismiss [the breach of fiduciary duty count]") (receded from on other grounds)).

[101] *Tiara Condo. Ass'n*, 2010 WL 2105923, at *4.

Finally, application of the economic loss rule to Tiara's breach of fiduciary duty claim would be inconsistent with this Court's *Toomey*[102] decision. In *Toomey* (the facts of which are more fully described below), this Court squarely held that an insured may assert a breach of fiduciary duty claim against an insurance broker, notwithstanding the existence of privity. Although the Court did not discuss the implication of the economic loss rule, it cited with approval *Randolph v Mitchell*,[103] which held that claims against insurance brokers for fraud are excepted from the economic loss rule.[104] So it appears that this Court held, *sub silentio*, that the economic loss rule does not apply to claims against an insurance broker for breach of fiduciary duty.

Accordingly, this Court should answer the first rephrased question in the negative.

F. Tiara's Negligence Claim Is an Independent Tort.

In a vast majority of jurisdictions, the economic loss rule does not bar claims of broker negligence,[105] as recently noted by United States Court of Appeals for the Fifth Circuit in *SMI Owen Steel Co. v. Marsh USA, Inc*.:

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[102] *Toomey*, 994 So. 2d at 980.

[103] 677 So.2d at 978.

[104] *Toomey*, 994 So. 2d at 990.

[105] *See McAlvain v. Gen. Ins. Co. of Am*., 554 P.2d 955, 958 (Idaho 1976) ("When an insurance agent performs his services negligently, to the insured's injury, he

> Based on our review of case law from other jurisdictions, we conclude that the majority of those jurisdictions hold that the economic loss doctrine does not bar a claim against an insurance broker for negligent failure to procure insurance.[106]

In *SMI Owen Steel*, the court concluded that the economic loss rule does not apply to broker negligence claims reasoning that the economic loss rule does not apply to claims based on an "independent duty of care under tort law," and the "Nevada Supreme Court has imposed 'an independent duty of care' on insurance brokers."[107]

The same rationale applies under Florida law such that claims of broker negligence are excepted from the economic loss rule: Under *HTP*, this Court held that "[t]he economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract

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should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services."); *Joseph Forest Prods., Inc. v. Pratt*, 564 P.2d 1027, 1029 (Or. 1977) (referring to the action as one for breach of contract to procure insurance and for negligence in failing to procure insurance and stating that liability may be based on either or both); *Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 519 N.W.2d 674, 678 (Wis. Ct. App. 1994) (stating that an agent may be "liable in tort" to the insured for failing to procure insurance).

[106] *SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 443 (5th Cir. 2008) (citing *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1271 & n. 4 (Colo. 2000); *Kanter v. Deitelbaum*, 648 N.E.2d 1137, 1139-40 (1995); *Steiner Corp. v. Johnson & Higgins*, 196 F.R.D. 653, 656-57 (D. Utah 2000)).

[107] 520 F.3d at 444.

action"[108] And Florida cases have long held that "when a breach of contract is attended by some additional conduct which amounts to an independent tort, such a breach can constitute negligence."[109]

A negligence claim by an insured against its broker is one such tort given that brokers owe an insured an independent duty of care. This Court recently affirmed the vitality of a broker negligence claim in *Wachovia Ins. Servs., Inc. v. Toomey*,[110] noting that an insurance broker has a "common-law duty to properly procure requested insurance coverage."[111]

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[108] *HTP*, 685 So. 2d at 1239.

[109] *Floyd v. Video Barn, Inc*., 538 So. 2d 1322, 1324 (Fla. 1st DCA 1989).

[110] *Toomey*, 994 So. 2d at 980.

[111] *Toomey*, 994 So. 2d at 990 (Fla. 2008) (citing cases); *see also Romo v. Amedex Ins. Co*., 930 So. 2d 643, 653 (Fla. 3d DCA 2006) (holding that insured states of cause of action with allegation that insurance agents negligently failed to procure a policy with same coverage for organ transplants when insureds switched to renewal policy with increased deductible and decreased lifetime maximum); *Klonis for Use & Benefit of Consol. Am. Ins. Co. v. Armstrong*, 436 So.2d 213 (Fla. 1st DCA 1983)("[W]here an insurance agent or broker undertakes to obtain insurance coverage for another person and fails to do so, he may be held liable for resulting damages to that person for breach of contract or negligence."); *Bennett v. Berk*, 400 So.2d 484, 485 (Fla. 3d DCA 1981)("An insurance broker may be liable for damages where there is an agreement to procure insurance and a negligent failure to do so."); *Caplan v. La Chance*, 219 So.2d 89 (Fla. 3d DCA 1969) (holding that an insurance agent's negligence in failing to procure the proper insurance coverage requested by the insured is a recognized cause of action).

The Fifth Circuit District Court of Appeals' decision in *Randolph v Mitchell*,[112] moreover, illustrates the extra-contractual nature of the duty owed by a broker to the insured. In that case, the court found persuasive an Illinois decision finding that the duty owed to an insured was extra-contractual, akin to the professional duties owed by attorneys and accountants. Thus:

> In the present case, [the broker] agreed to procure health insurance coverage suitable to plaintiff's needs. Thereafter, plaintiffs fully satisfied all conditions and requirements in order to obtain health insurance, including the payment of certain sums of money. [The broker] falsely informed plaintiffs that he had obtained health insurance for them. He failed to do so.
>
> When asked by Plaintiffs whether he had secured such coverage, he gave plaintiffs bogus insurance cards containing their names and addresses. This hoax was revealed after one of the plaintiffs was hospitalized and required medical attention....
>
> We hold that under these facts and circumstances, an insurance broker, admittedly having a fiduciary duty to an insured, is in no different position than an attorney or an accountant in relationship to plaintiffs.... Because plaintiffs were relying on his knowledge and expertise, the value of [the broker]'s services lay beyond the policy, which is tangible in nature.... Moreover, [the broker] breached his duty to exercise reasonable skill and diligence in obtaining health insurance for plaintiffs. We find that this failure was a breach of his duty to observe reasonable professional compliance which existed independently of the insurance policy or contract.... ***We therefore find that [the broker]'s duty to plaintiffs, his insureds, in performing insurance brokerage services was not solely defined by contract, but rather was extracontractual in nature***.[113]

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[112] 677 So.2d at 978.

[113] *Id*. at 978 (quoting *Kanter v. Deitelbaum*, 648 N.E.2d 1137, 1139-40 (1995) (emphasis added)).

Because Florida law holds that a broker owes extra-contractual duties to an insured, a claim for negligence based on the breach of such extra-contractual duties satisfies the independent tort exception to the economic loss rule.

For still stronger reason, application of the economic loss rule to a claim for broker negligence is inappropriate in light of this Court's recent decision in *Toomey*.[114] There, on review of certified questions from the Eleventh Circuit, this Court held, *sua sponte*, that the federal district court erred in dismissing the negligence claim against a broker, and it did so despite the contractual privity between the insured and the broker.

In *Toomey*, two employees had sued their employer for breach of their written contracts. Meanwhile, the employer had maintained an employment practices liability insurance policy covering breaches of employment contract claims. Because the policy had been due to expire during litigation, the employer extended its coverage with the broker to cover potential claims. In extending the policy, however, the broker removed coverage for breach of employment contract claims without the insured's knowledge. After the employees obtained a judgment for $1.8 million against their employer, the employer discovered that it had lost the policy's coverage for breach of employment contract claims. As part of the later settlement, the employer assigned to the employees all of the potential claims

[114] *Toomey*, 994 So. 2d at 980.

against its broker. The employees brought direct and assigned breach of fiduciary duty claims and direct and assigned negligence claims against the broker. The trial court then dismissed all of the claims except for the assigned breach of fiduciary duty claim, and essentially held that the fiduciary duty claim subsumed the negligence claim. The Eleventh Circuit ultimately certified the issues of whether the employer's claims could be assigned to the employees. But this Court, citing its "broad latitude to address the determinative, substantive issues of Florida law"[115] held that the trial court erred in dismissing the negligence actions, because:

> [u]nder Florida law, negligence claims and breach of fiduciary duty are separate causes of action. Indeed, insurance brokers will often have both a fiduciary duty to their insured-principals and a common-law duty to properly procure requested insurance coverage.[116]

Although the Court did not discuss the economic loss rule's application, it "conclude[d] that the jury in this case should have been allowed to consider [the employees'] negligence claim, a claim that is assignable under Florida law."[117] This is despite the existence of privity given that the employees' negligence claim against the broker was assigned by the employer that engaged the broker. If the

[115] *Id*. at 989.

[116] *Id*. at 990.

[117] *Id*. at 989.

negligence claim was barred by the economic loss rule, this Court presumably would not have held that it should be reinstated.

This Court's decision in *AFM*, as modified by *Moransais*, is not to the contrary. *AFM* is the only decision by this Court purporting to apply the economic loss rule to bar a contract for services. In *AFM*, this Court held that there was "no basis for recovery in negligence" because the plaintiff "has not provided that a tort independent of the breach itself was committed."[118] The Court based its reasoning on the proposition that a breach of contract must be attended "by some additional conduct amounting to an independent tort" for such breach to constitute negligence.[119] Although this Court broadly concluded that that the economic loss rule applied in the context of a services contract, the case now stands for the more narrow proposition that when the parties enter into a contract, a party cannot assert a negligence claim based entirely on a breach of the contract. This proposition is not so much an application of the economic loss rule as a reiteration of longstanding principals of contract.

Later Supreme Court cases have limited *AFM's* holding to this more narrow proposition. Thus:

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[118] *Id*.

[119] *Id*. (citing *Electronic Security Systems Corp. v. Southern Bell Telephone & Telegraph Co.*, 428 So.2d 518, 519 (Fla. 3d DCA 1986)).

> Unfortunately, however, our subsequent holdings [from *Fla. Power & Light Co. v. Westinghouse Elec. Corp*[120]] have appeared to expand the application of the [economic loss rule] beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent. For example, in *AFM Corp.*, we extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional services context. In that case, AFM contracted with Southern Bell for a referral service for AFM's customers. However, Southern Bell mistakenly listed the wrong telephone number in its yellow pages and inadvertently disconnected the referral system by giving a different customer AFM's old telephone number. Because AFM's damages resulted from a breach of the underlying contract and not any independent tort, we held that *AFM* was limited to contractual remedies only. 515 So.2d at 181. In other words, we held that a purchaser of services could not recover purely economic loss due to negligence arising from a breach of contract where the purchaser has not shown the commission of a tort independent of the breach itself. *Id*. ***While we continue to believe the outcome of that case is sound, we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles***.[121]

This Court further limited *AFM*'s holding in *Indemnity Insurance Co. of North America*, in which this Court expressly "recede[d] from *AFM Corp*. to the extent that it relied on the principles adopted by this Court in *Florida Power*," *i.e.,* the economic loss rule.[122] After noting that "[s]everal justices on this Court have supported expressly limiting the economic loss rule to its principled origins," this Court limited the holding of *AFM* to the principle that a breach of contract does

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[120] *Fla. Power & Light Co.*, 510 So. 2d at 899.

[121] *Moransais*, 744 So. 2d at 980–81 (footnote omitted) (emphasis added).

[122] *Indem. Ins. Co. of N. Am.*, 891 So. 2d at 542.

not, standing alone, constitute a tort (which is not an expression of the economic loss doctrine):

> We now agree that the economic loss rule should be expressly limited. First, 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. However, because it may appear that *AFM Corp*. also expanded the products liability economic loss rule, we recede from *AFM Corp*. to the extent that it relied on the principles adopted by this Court in *Florida Power*. As we recognized in *Moransais*, *AFM Corp*. was "unnecessarily over-expansive in [its] reliance on the economic loss rule as opposed to fundamental contractual principles."[123]

Under *AFM*, a negligence claim will lie so long as it is attended by additional tortuous conduct. For instance, in *Floyd v. Video Barn, Inc.*, a bride's parents engaged a videographer to record their daughter's wedding. After the videographer "mistakenly videotaped a wedding that was taking place at an adjacent church," the parents sued the videographer for breach of contract and

[123] *Indem. Ins. Co. of N. Am.*, 891 So. 2d at 542–43 (internal citations omitted); *see also Comptech Int'l, Inc.*, 753 So. 2d at 1225–226 (stating that "the economic loss rule cannot be used as a barrier to legitimate causes of action whether they be statutory or common law" because "the rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts") (quoting *Moransais*, 744 So.2d at 983)); *see also Hilliard v. Black*, 125 F. Supp. 2d 1071, 1079 (N.D. Fla. 2000) ("The Florida Supreme Court stated that while it believes 'the outcome of [*AFM Corp*.] is sound,' it 'may have been unnecessarily overexpansive in [its] reliance on the economic loss rule as opposed to fundamental contractual principles.'") (quoting *Moransais*, 744 So.2d at 981)); *Crowell v. Morgan, Stanley, Dean Witter Servs. Co.*, 87 F. Supp. 2d 1287, 1293 (S.D. Fla. 2000).

negligence. Despite evidence that "the parking lot of the church was full" and that the videographer did not attempt to enter the church,[124] the trial court directed a verdict for the videographer on the negligence count.[125]

The First District Court of Appeals reversed the trial court's dismissal of the negligence count.[126] Noting that a negligence claim may be premised on a breach of contract if "attended by additional conduct amounting to an independent tort,"[127] the court held that the negligence claim was properly before the jury because "the jury could have inferred that the [the videographer] assumed a duty to [the parents] to videotape their daughter's wedding and that they breached this duty."[128] The Court cited the following conduct by the videographer as attendant to the breach:

> [The videographer] assured [the parents] that the [the videographer] knew where the wedding would take place and that [the videographer] would be there. However, on the date of the wedding, despite evidence that the church parking lot was filled to capacity and despite evidence that appellants' son was outside the church [during the half-hour before the wedding started], the [videographer] failed to locate the church and videotape the wedding.[129]

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[124] *Id*. at 1323–24.

[125] *Id*. at 1324.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

Thus, due to the videographer's assurances that it knew of the wedding's location, the court reinstated the negligence claim despite the existence of the contract between the parties.

Here, Tiara's negligence claim was attended by conduct apart from any alleged breach of the contract. Marsh held itself out as Tiara's "exclusive insurance, risk management, and risk financing advisor." After attending regular meetings on Tiara's insurance committee; after undertaking an assessment of Tiara's insurance needs; after reviewing the appraisal upon which Tiara's insurance was based; and after receiving express inquiries into the adequacy of that appraisal, Marsh recommended that Tiara procure a Windstorm Policy that was *substantially* inadequate to meet Tiara's needs. The Eleventh Circuit has held that the terms of Marsh's agreement with Tiara did not require Marsh to disclose to Tiara its belief that Tiara was underinsured, or to avoid any of the other collateral failures that Tiara identified in the lower court. Clearly, then, those duties were extra-contractual and subject to negligence principles.

Accordingly, this Court should answer the second rephrased question in the negative.

G. Marsh Is a "Professional" Under *Moransais*.

If this Court were to decline Tiara's request to recast the questions presented and limit the scope of its review to whether an insurance broker qualifies as a

"professional," Marsh still would qualify as a "professional" under *Moransais.* In *Moransais*, this Court held that "the economic loss rule does not bar a cause of action against a professional for his or her negligence."[130] The Court held that an engineer was, *per se*, a professional because, for purposes of the statute of limitations, the practice of engineering is a vocation requiring state licensing which, in turn, requires "at a minimum a four-year college degree before licensing is possible in Florida."[131]

To be sure, insurance brokers are not automatically "professionals" by virtue of the licensing scheme in Florida because Florida's licensing scheme for brokers does not impose a four-year college degree requirement. But insurance brokers nonetheless are professionals under *Moransais*. In *Moransais*, this Court observed that where a "negligent party is a professional, the law imposes a duty to perform the requested services in accordance with the standard of care used by similar professionals in the community under similar circumstances."[132] This stands in

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[130] *Moransais v. Heathman*, 744 So. 2d at 973, 983.

[131] *Id*. at 977 (quoting *Garden v. Frier*, 602 So.2d 1273, 1275 (Fla.1992)); *see also* Fla. Stat. § 95.11 (defining professional as "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida" for purposes of the statute of limitations).

[132] *Moransais v. Heathman*, 744 So. 2d 973, 975–76 (Fla. 1999).

contrast to those duties "imposed under an ordinary contract for goods or services.[133]

An insurance brokerage contract is not "an ordinary contract for goods or services." Florida courts have consistently recognized that brokers owe fiduciary duties to the insured and are subject to extra-contractual liability in negligence.[134] That is in accord with the holdings of other states. Indeed, the Idaho Supreme Court has held that insurance agents have a "special relationship" with their insureds because an insurance agent represents to the public that she has expertise relevant to a specialized function and, in doing so, induces reliance on her superior knowledge and skill:

> A person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in this complicated and specialized field. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state; pass an examination administered by the state; and meet certain qualifications. An insurance agent performs a

[133] *Id*. at 976.

[134] *See Toomey*, 994 So. 2d at 990 (noting that "insurance brokers will often have both a fiduciary duty to their insured-principals and a common-law duty to properly procure requested insurance coverage"); *Adams v. Aetna Cas. & Sur. Co*., 574 So. 2d 1142, 1155 (Fla. 1st DCA 1991); *Woodham v. Moore*, 428 So. 2d 280, 281 (Fla. 4th DCA 1983)). Although it is unsettled in Florida, there is indication that expert testimony may be required for claims of insurance broker negligence as in professional malpractice actions. *See Necessity of Expert Testimony to Show Standard of Care in Negligence Action Against Insurance Agent or Broker*, 52 A.L.R.4th 1232 (2004) (noting that "several courts have taken the position that expert testimony as to the standard of care is required where the breach involves the agent's professional skills and expertise").

> personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.[135]

The same policy considerations for not applying the economic loss rule to negligence claims against engineers applies to insurance brokers. In *Moransais*, the Court emphasized that an engineer's professional obligations extend beyond those obligations expressly contained in a contract:

> While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice. Further, the mere existence of a contract between the professional services corporation and a consumer does not eliminate the professional obligation of the professional who actually renders the service to the consumer or the common law action that a consumer may have against the professional provider. While the parties to a contract to provide a product may be able to protect themselves through contractual remedies, we do not believe the same may be necessarily true when professional services are sought and provided. Indeed, it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting.[136]

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[135] *McAlvain v. Gen. Ins. Co. of Am.*, 554 P.2d 955, 958 (Idaho 1976) (internal citations omitted)).

[136] *Moransais*, 744 So. 2d at 983.

Insurance brokers, similarly, may not limit their obligations by contract, because of their well-recognized extra-contractual duties. But even if they could, Marsh did not do so here. Marsh qualifies as a professional under *Moransais*, and the economic loss rule does not apply to Tiara's tort claims.

Accordingly, should this Court answer the certified question as phrased by the Eleventh Circuit, it should answer that question in the affirmative.

CONCLUSION

This Court should restate the certified question and respond that, under Florida Law, the economic loss rule does not foreclose causes of action against insurance brokers based on breach of fiduciary or negligence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing was filed with the Clerk of the Florida Supreme Court by e-mailing the MS Word version to the Court and an original and seven copies were sent to the Court by U.S. mail on July 9, 2010; and the parties listed below were served by U.S. mail on July 9, 2010.

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