INSURANCE DAY

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Economic loss doctrine returned to its roots

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On March 7, 2013, the Florida Supreme Court in *Tiara Condominium v Marsh & McLennan Companies Inc* returned the economic loss doctrine to its roots by limiting its application to product liability cases.

The majority claims the decision will neither expand liability since tort claims cannot be asserted in breach of contract cases unless a tort was committed independent of the contract breach, nor depart from past precedent since the court long ago had limited the application of the economic loss doctrine.

In contrast, the dissent predicted an avalanche of new tort claims and remedies, including civil conspiracy claims based on the failure to honour an insurer's duty to defend.

While only time will tell, the probable outcome of the decision in *Tiara* will probably land in the middle – more claims, but not the dire consequences the dissent predicted.

What is the immediate impact on insurers? Tort claims more often will accompany contract claims, thereby increasing defence costs. Whether those claims ultimately will survive until trial will depend on the ability of the plaintiff to assert a tort claim independent of the contract claim.

Whether *Tiara* will substantially increase insurers' indemnity obligation is another question. In *US Fire v JSUB*, the court observed the basic coverage language of the commercial general liability (CGL) policy does not support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage.

The court also observed the term "occurrence" is not defined by reference to the legal category of the claim and the word "tort" does not appear in the CGL policy. Thus, before *Tiara*, an insurer may have been obligated to indemnify a pure contract claim depending on the facts of the case.

As the *Tiara* court observed, the economic loss doctrine did not apply if there was damage to other property. It only precluded claims for damages to repair the product itself or the consequent loss of profits because of the defective product.

These damages were already excluded by the "your product" and "your work" exclusions. Moreover, if only the defective product or work was damaged, that damage, under the court's decision in *Pozzi Windows*, did not meet the definition of "property damage" and insurers were already not obligated to pay for those damages under a CGL policy.

Tiara should not unduly expand extra-contractual claims or remedies against insurers. Florida law previously allowed policyholders and in certain cases, third parties, to sue insurers for bad faith and unfair claims handling and to recover damages that reasonably flowed from the breach of an insurer's obligations under the policies it issued. ■