A POST-TIARA & CHINESE DRYWALL

Approach to Florida's ELR

by Greg Weiss, Diana Martin & Brad R. Sohn

For decades Florida courts have imposed a murky Economic Loss Rule (the "ELR") upon cases in which the plaintiff is in "privity" or has a contractual relationship with the defendant. *See, e.g., Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987) (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1921), for the proposition that "contract principles are more appropriate than tort principles for resolving economic loss claims"). The ELR, as traditionally understood, restricted litigants' ability to assert tort claims in the presence of any type of "economic bargain" or "meeting of the minds." Such a "bargain" normally took the form of an express contract, but it could equally frustrate putative tort claims cognized via implied warranty. *Compare Airport Rent-A-Car v. Prevost Car*, 660 So. 2d 628 (Fla. 1995) (reviewing express contract or the "contract-ELR") with *Casa Clara Condo. Ass'n v. Charley Toppino & Sons*, 620 So. 2d 1244 (Fla. 1993) (reviewing implied warranty or the "product-liability ELR").

This past month, the Florida Supreme Court made a significant change in Florida's jurisprudence by receding from, or even abandoning, Florida's contract-ELR in *Tiara Condominium Assoc. v. Marsh & McClennan Companies*, So.3d , 38 FLW S151 (Fla. 3-7-13). In *Tiara*, the Tiara Condominium Association had entered into a contract with its insurance broker, Marsh & McClenan Companies ("Marsh"), to place insurance on the buildings that comprised the condominium association. Marsh bound the policies, and after two hurricanes damaged the Tiara Condominium property, the condominium

association sued its insurer. The condominium association eventually settled with its insurer, but, having not been made whole, it sued Marsh for underinsuring the property. Because the condominium association was in privity with Marsh, any tort claims against Marsh would previously have been barred by the ELR.

The *Tiara* Court reviewed the underpinnings of Florida's ELR, including the previously well-established principle that when "parties are in privity, contract principles are generally more appropriate for determining remedies [thus] a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract." *Tiara* at 7. Stating that the "Court has been concerned with what it perceived as an over-expansion of the economic loss rule" it held that "the application of the economic loss rule is limited to products liability cases." *Id* at 19. Undoubtedly, *Tiara* can be seen as a decisive and complete victory for those litigants wishing to bring business tort claims alongside their contract claims.

Whether the *Tiara* opinion is a harbinger of further erosion of the ELR, including in the products context, is yet to be seen. Justice Labarga's majority opinion goes out of its way to note that the "expansion of the rule beyond its origins was unwise and unworkable in practice." *Id*. at 18. Indeed, *Tiara* attempts to rein the ELR back in to situations in which there are express economic bargains, but litigants should still consider applying these same principles, along with the persuasive arguments made in recent Chinese Drywall cases, when contending with products-ELR defenses as well.

As *Tiara* discusses, the products-ELR originates out of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1921), and *Seely v. White Moto* Co., 403 P. 2d 145, 149 (Cal. 1965). Determinative for *Seely* was the issue of whether the product disappointed a purchaser's reasonable economic expectations, and thus warranty law governed. The exception to this rule, however, through which products claims enjoy a certain amount of freedom from what some scholars have termed the "tort-eating monster", is where a product does damage to "other property." *See., e.g., Comptech Int'l v. Milam Commerce Park*, 753 So. 2d 1219 (Fla. 1999) (allowing tort recovery on the basis of the "other property" exception and clearly delineating the phrase's meaning).

Damage to "other property" falling outside the purview of the products-ELR has gained traction in a few high-profile decisions involving Florida claims of late. Judge Eldon Fallon's opinion in *In re Chinese Manufactured Drywall Products Liability Litigation* ("CDW") in MDL 2047 (applying Florida law), and Judge Joseph Farina's Order in the Florida state court CDW proceedings, reflect identical approaches to "other property." *See In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 680 F. Supp. 2d 780 (E.D. La. 2010); *In re: Chinese Drywall Litigation*, No. 09-200,000 CA 42 (Fla. 11th Cir. Ct. Dec. 18, 2009) (Farina, J.). Both of these Orders denied motions to dismiss tort claims based on Florida's ELR.

Judge Fallon's Order begins by asserting reliance—at least in part—on what he deems to be reasoning "consistent with the [Florida ELR] jurisprudence" (citing the *Casa Clara* holding), in reaching his decision to deny the Defendants' Motion to Dismiss. Defendants had also relied upon *Fishman v. Bolt*, 666 So. 2d 273 (Fla. 1st DCA 1996), which precluded tort recovery for damages caused by a defective seawall to a pool, patio, and home on account that these items did not constitute "other property", and *Pulte Home Corp. v. Osmose Wood Preserving*, 60 F.3d 734 (11th Cir. 1995), which precluded damages where chemicals in plywood used for roofing rendered the roof defective because the roof was not "other property."

Judge Fallon, while not expressly citing to *Comptech International v. Milam Commerce Park*, 753 So. 2d 1219 (Fla. 1999), appeared to be following its rationale that the ELR analysis is defined by the "integral function" of the components purchased. He first dismissed claims based on homeowners who had expressly purchased new sheets of drywall, before devoting a great deal of analysis to those claims for people buying homes containing the defective drywall sheets. Judge Fallon also referenced Judge Farina's Florida Drywall Order, which makes an interesting legal argument: "having considered *Casa Clara*, its progeny and its predecessors, this Court finds that the plaintiffs are not in a category of persons that the economic loss rule intended to limit … it has not failed to match the plaintiffs' economic expectations … unlike … *Casa Clara* … the drywall at issue here continues to perform its intended purpose and function … the [problem at issue] has not caused the drywall to fail at its general purpose and function."

These CDW Orders, when read with *Comptech*, and taken in the context of *Tiara*'s holding receding the ELR, at least arguably support a showing that courts seem to be deciding "other property" issues based upon what they deem to be integral parts of products' general purpose and functions, and, encouragingly, may allow future product-liability claims to survive as "other property" absent a showing of actual physical injury.

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