



BACHARA
CONSTRUCTION LAW GROUP

Current State of the Economic Loss Rule:
A Building Is Still A Product

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Overview

1. Introduction and Brief History of ELR
2. Impact of *Tiara*
3. *Casa Clara* (in dormancy)
4. 3d DCA Breathes New Life Into *Casa Clara*
5. ELR: *Where is it now?*
6. Application in Construction Cases
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What is the Economic Loss Rule?

Economic Loss: “damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damage to other property.” *Casa Clara Condo. Ass’n v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993).

What is the Economic Loss Rule?

“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 damages.”
Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999).

What is the Economic Loss Rule?

“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.”

Moransais v. Heathman, 744 So. 2d 973, 979 (Fla. 1999).

What is the Economic Loss Rule?

- Example:
 - Blender that explodes
(no one is injured; no other property damaged).



What is the Economic Loss Rule?

- Example:
 - Blender that explodes
 - Remedy? Depends on the Warranty
 - Out of warranty = Out of luck

History of Economic Loss Rule

Contractual Privity Economic Loss Rule:

- “The prohibition of tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort.” *Indem. Ins. Co. of N. Am v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004).

History of Economic Loss Rule

Product Liability Economic Loss Rule:

- “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.” *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987).

History of Economic Loss Rule

A building is a product. *Casa Clara Condo. Assn., Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

- Toppino = concrete supplier
- Concrete contained high salt content.
- Chunks of concrete breaking off.
- No injuries to persons.

History of Economic Loss Rule

A building is a product. *Casa Clara Condo. Assn., Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

- Claims against Toppino:
 - Breach of common law implied warranty
 - Products liability
 - Negligence
 - Violation of building code

History of Economic Loss Rule

A building is a product. *Casa Clara Condo. Assn., Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

- “Other Property”:
 - Homeowners argued other building components = other property
 - Court: other property = something other than the finished buildings

History of Economic Loss Rule

A building is a product. *Casa Clara Condo. Assn., Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

- Holding: Economic Loss Rule applies to purchase of houses
- Reasoning: Homeowners bought finished products (dwellings). “The concrete became an integral part of the finished product and, thus, did not injure “other” property. *Casa Clara*, 602 So. 2d at 1247.

Impact of *Tiara Condominium*

- In 2013, the Florida Supreme Court eliminated the Contract Economic Loss Rule. *Tiara Condo. Assn., Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013).
- Facts: Association claim against insurance broker for misrepresenting the amount of insurance coverage in place for storm damage.
- \$50 million per occurrence (\$100 million aggregate) vs. \$50 million (aggregate)

Impact of *Tiara Condominium*

- Holding and Reasoning:
- Eliminated Contract Economic Loss Rule.
- Discussed the lengthy history of the ELR and “unprincipled expansion.”
- ELR now applies only in the products liability context.
- Red flag on *Casa Clara*.

Casa Clara in Dormancy

- After *Tiara*, only the product liability ELR remains.
- Despite the red flag on *Casa Clara*, trial courts began dismissing tort claims involving construction defects.
- For seven years, there were no appellate court opinions on the product liability ELR.

3d DCA Breathes Life Into *Casa Clara*

- *2711 Hollywood Beach Condo. Assn., Inc. v. TRG Holiday, Ltd.*, 307 So. 3d 869 (Fla. 3d DCA 2020).
- Facts:
 - CPVC incompatibility case.
 - Components:
 - Blazemaster chlorinated polyvinyl chloride pipe (CPVC)
 - Galvanized steel pipe, lined with antimicrobial coating
 - CPVC fittings (some purchased from Nibco – supplier)

3d DCA Breathes Life Into *Casa Clara*

- *2711 Hollywood Beach Condo. Assn., Inc. v. TRG Holiday, Ltd.*, 307 So. 3d 869 (Fla. 3d DCA 2020).
- Holding:
 - Product liability ELR bars negligence and strict liability claims
- Reasoning:
 - Association purchased a completed building from developer.
 - Nibco fittings were “an integral part of the finished product and, thus, did not injure ‘other’ property.
 - “Injury to the building itself is not injury to ‘other’ property because the product purchased by the Association was the building.” *Id.* at 870.

ELR: *where is it now?*

- *Knauf* cases:
 - *Vest v. Knauf Gips KG*, 2024 WL 835777 (M.D. Fla. Feb. 28, 2024):
 - Plaintiff purchased a home in which a prior owner installed Chinese drywall, and no remediation occurred.
 - Product purchased by plaintiff = home.
 - Drywall = integral part of the home.
 - Damages sought: to home, personal property, and loss of use.
 - Only personal property damages are recoverable.

ELR: *where is it now?*

- *Knauf* cases:
 - *Vest*:
 - Application of prior Chinese Drywall MDL decision in 2010 (MDL-2047).
 - MDL judge found an exception to ELR because the drywall “involves a potential hazard to health and property” and plaintiffs had “alleged actual physical injury” due to the Chinese drywall. Thus, *Casa Clara* does not apply.
 - MDL decision distinguishable because in *Vest* no personal injury alleged.
 - Law of the case doctrine not applicable.

ELR: *where is it now?*

- *Knauf* cases (other citations):
 - *MCF Enterprises, Inc. v. Knauf Gips KG*, 2024 WL 835773 (M.D. Fla. Feb. 28, 2024).
 - *Judge v. Knauf Gips KG, et al.*, 2024 WL 835764 (M.D. Fla. Feb. 28, 2024).
 - *CDO Investments, LLC v. Knauf Gips KG, et al.*, 2024 WL 832377 (M.D. Fla. Feb. 28, 2024).

ELR: *where is it now?*

- *Dero Roofing, LLC v. Triton, Inc.*, 2022 WL 14636884 (M.D. Fla. 2022).
 - Facts: Roof repair performed on existing condominium after hurricane damage.
 - Repairs caused damage to the roof as well as damage to screens, gutters, and other related areas.
 - All damage to roof dismissed based on ELR, but damage to other areas survived motion to dismiss.

ELR: *where is it now?*

- *NBIS Construction & Transport Insurance Services, Inc. v. Liebherr-America, Inc.*, 93 F.4th 1304 (11th Cir. Feb. 29, 2024).
- Certified Question to Florida Supreme Court:
 - Whether, under Florida law, the economic loss rule applies to negligence claims against a distributor of a product, stipulated to be non-defective, for the failure to alert a product owner of a known danger, when the only damages claimed are to the product itself?

ELR: *where is it now?*

- *NBIS*:
- Facts:
 - Collapse of a crane boom.
 - Liebherr-Germany: manufacturer
 - Liebherr-America: distributor (party)
 - Sims Crane & Equipment: owner
 - *NBIS*: third-party administrator for owner's carrier (party)

ELR: *where is it now?*

- *NBIS:*
- *Facts:*
 - Distributor trained the owner how to assemble the boom.
 - Distributor failed to warn the owner about danger caused by incorrectly installing pins needed for assembly.
 - Distributor failed to send its safety bulletin to the owner that warned of a potential collapse if pins not installed correctly.
 - Boom collapsed when extended, causing a fatality and crane damage.

ELR: *where is it now?*

- *NBIS:*
- Claims: negligence, negligent training, and violation of FDUTPA.
- Posture: Carrier sought recovery only for the cost of the crane damage, not the personal injury.
- Key Stipulation: the crane was not defective, and the accident was not caused by a defect in the crane.

ELR: *where is it now?*

- *NBIS:*
- Federal District Court findings:
 - ELR does not apply because the case is not a product liability action.
 - Rather, it's an "action alleging negligent services provided by Liebherr-America."
 - Distributor had a duty to provide training and breached the duty.
 - Breach was proximate cause of \$1.7M damage to crane.

ELR: *where is it now?*

- *NBIS*:
- 11th Circuit Analysis:
 - Products liability claims include the duty to warn.
 - Distributors of inherently dangerous products have a duty to notify user of possible consequences of use and misuse.
 - “A manufacturer has a duty to warn of dangerous contents in its product which could damage or injure even when the product is not used for its intended purpose.” *Id.* at 1312 (citing *Westinghouse*).
 - Duty to warn exists even if the product is non-defective.
 - A product may be defective due to an inadequate warning.

ELR: *where is it now?*

- *NBIS*:
- 11th Circuit Analysis:
 - Liebherr position: both theories of negligence (failure to adequately train and failure to send safety bulletin) are failure to warn claims.
 - *Airport Rent-A-Car, Inc. v. Prevoost Car, Inc.*, 660 So. 2d 628 (Fla. 1995)(holding “failure to warn, without the requisite harm [to person or other property], will not circumvent the economic loss rule”).
 - *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992)(holding economic loss rule applied to bar failure to warn claim).

ELR: *where is it now?*

- *NBIS*:
- 11th Circuit Analysis:
 - *NBIS* position:
 - *Airport* and *FPL* cases are distinguishable because plaintiffs in both cases alleged defects with the products.
 - Here, the parties stipulated no defect with the crane.

ELR: *where is it now?*

- *NBIS*:
- 11th Circuit Analysis:
 - Florida law unclear on application of ELR in these facts.
 - Echoes of *Tiara* from Justice Pariente's concurrence:
 - "We now eliminate once and for all any confusion in the application of the economic loss rule . . . and clearly espouse Justice Wells' view that 'the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product.'" *Tiara*, 110 So. 3d at 410 (emphasis added).

ELR: *where is it now?*

- *NBIS:*
- Open Questions:
 - Will the stipulation of “no product defect” kill application of the ELR?
 - Will the Florida Supreme Court “expand” the ELR to include failure to warn products liability claims where there is no “product defect”?

Application in Construction Cases

- ELR only eliminates tort claims (not FBC violation, common law indemnity, etc.).
- Narrowing the issues and claims.
- Scenario: contractual privity exists, but tort claims expand available damages.
- Scenario: no contractual privity exists, and no FBC violation occurred.

Application in Construction Cases

- Scenario: no contractual privity exists, and FBC does not apply (suppliers).
- Scenario: negligence and common law indemnity are the only claims.
- Impact on insurance coverage if tort claims dismissed?
- Other applications?

QUESTIONS?

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