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Florida Supreme Court Limits Economic Loss Doctrine to Product Liability Cases

By [Gary Wickert](#) | November 7, 2013

In what will go down in legal history as one of the clearest and most forthright decisions in recent memory, the Florida Supreme Court has issued an opinion which limits the application of the Economic Loss Doctrine (ELD) to cases involving product liability. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, No. SC10-1022 (Fla. 2013). The products liability ELD was developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. As the theory of strict liability replaced the theory of implied warranties with regard to actions based on defective products that resulted in personal injury, the issue arose as to whether the courts should permit a cause of action in tort by one who suffered purely economic loss due to a defective product. The ELD was over-expanded and over-extended by court decisions through time to prevent tort suits between virtually any two parties who had entered into a contract. On March 7, 2013, the Florida Supreme Court did something rare. It admitted its mistake and righted its wrong. The application of the ELD is now limited to cases involving products liability.

Simply put, the ELD is a judicially-created Doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532 (Fla. 2004). The exact origin of the ELD is subject to some debate and its application and parameters are somewhat ill-defined. *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). In its simplest form, the Doctrine appeared initially in both state and federal courts in products liability-type cases. It was introduced to address attempts to apply tort remedies to traditional contract law damages. In *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993), Florida recognized the ELD as “*the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.*” However, Florida recognized several exceptions:

Service Contracts. The ELD does not apply to service contracts. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532 (Fla. 2004). It applies to homeowners. *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla. 1993).

No Alternative Theory of Recovery. Florida recognizes a “no alternative theory of recovery” exception to the ELD. *Airport Rent-a-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995). However, this exception applies only when there is a supervisory relationship between the parties. *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973).

Privity of Contract. In 2004, the Florida Supreme Court further declared that the ELD did not bar a tort action against a company which was neither a manufacturer nor distributor of a product, as the parties were not in privity of contract. *Am. Aviation, Inc.*, supra. The ELD applies where the parties are in contractual privity or the defendant is a manufacturer of a product. *Id.* Lack of privity is a defense if it is a service rather than product liability.

Statutory Violation. Another exception to the ELD is for statutory violations. *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999).

Other Property. Florida recognizes an exception to the ELD if there is damage to property other than the product. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla. 2004). A roof of a building is an integral part of the building. *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 804 F. Supp. 1471 (M.D. Fla. 1992). A seawall is an integrated component part of a house, pool, and patio, despite

the fact that it is physically distinctive and geographically separate from the other parts of the house. The “product” is the home with all of its component parts. *Fishman v. Boldt*, 666 So.2d 273 (Fla. App. 1996). The analysis isn’t as simple as determining whether the product “came with” the finished product. For example, an under-counter coffee maker which came with a motor home was not an “integral component” of the motor home and the home constituted “other property” in an action against the manufacturer of the coffee maker, Black & Decker. *McAteer v. Black & Decker, Inc.*, 1999 WL 33836701 (M.D. Fla. 1999).

Sudden and Calamitous Event. Florida has rejected the “sudden, calamitous event” exception. *Casa Clara Condo, Ass’n*, 620 So.2d 1244 (Fla. 1993).

Despite its underpinnings in the products liability context, the ELD in Florida was, over time, slowly applied to other circumstances where the parties have entered into a contract and one party seeks to recover damages in tort for matters arising from the contract. The prohibition against tort actions to recover solely economic damages for those in contractual privity was designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490 (Fla. App. 1994). When the parties were in privity, contract principles were held to be generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts held that a tort action was barred where a defendant had not committed a breach of duty apart from a breach of contract. *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100 (Fla. App. 1969). The ELD did not eliminate causes of action based upon torts independent of the contractual breach even though a breach of contract action exists. Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from the acts that breached the contract. These included:

Fraudulent Inducement. Fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract. *PK Ventures, Inc. v. Raymond James & Assocs.*, 690 So.2d 1296 (Fla. 1997).

Professional Malpractice. Another situation in which liability is not limited to the terms of the contract involves negligence in professional services. Although seemingly in conflict with the *AFM Corp.* and *Casa Clara* decisions, the Florida Supreme Court has declared that the ELD will not apply to professional negligence claims against professionals such as engineers and lawyers. *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1997). However, the ELD will preclude a

negligence claim arising from a breach of a service contract in a non-professional context. See AFM, 515 So.2d at 181.

Negligent Misrepresentation. Negligent misrepresentation is yet another claim in which liability is not limited by the ELD. *PK Ventures, Inc. v. Raymond James & Ass'ns, Inc.*, 690 So.2d 1296 (Fla. 1997). The ELD does apply, however, in negligent-failure-to-warn cases. *Airport Rent-A-Car, Inc. v. Prevoist Car, Inc.*, 660 So.2d 628 (Fla. 1995).

Manufacturer or Distributor In A Commercial Relationship. A manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532 (Fla. 2004).

In *Moransais*, *Comptech*, and *American Aviation*, Florida hinted that the ELD might have been extended beyond its original scope and expressed a desire to return the ELD to its intended purpose – to limit actions in the products liability context. However, nothing was done. Finally, in 2013, however, Florida significantly limited the application of the ELD to its principled origins.

Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.

In *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, Tiara Condominium Association (Tiara) retained Marsh & McLennan (Marsh) as its insurance broker. One of Marsh's responsibilities was to secure condominium insurance coverage. Marsh secured windstorm coverage through Citizens Property Insurance Corporation (Citizens), which issued a policy that contained a loss limit in an amount close to \$50 million. In September 2004, Tiara's condominium sustained significant damage caused by hurricanes Frances and Jeanne. Tiara began the process of loss remediation. After being assured by Marsh that the loss limits coverage was per occurrence (meaning that Tiara would be entitled to almost \$100 million rather than coverage in the aggregate, which would be half of that amount), Tiara proceeded with more expensive remediation efforts. However, when Tiara sought payment from Citizens, Citizens claimed that the loss limit was \$50 million in the aggregate, not per occurrence. Eventually, Tiara and Citizens settled for approximately \$89 million, but that amount was less than the \$100 million spent by Tiara. In October 2007, Tiara filed suit against Marsh, alleging (1) breach of contract, (2) negligent misrepresentation, (3) breach of the implied covenant of good faith and fair dealing, (4) negligence, and (5) breach of fiduciary duty. The trial court granted summary judgment in favor of Marsh on all claims and Tiara appealed to the Eleventh Circuit. The Appeals Court concluded that summary judgment was

proper as to the breach of contract, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing claims.

At the Florida Supreme Court, the Court finally limited the application of the ELD when it wrote, “*Subsequent to our ruling in Florida Power, however, we issued a number of rulings which, as aptly stated in Moransais, ‘appeared to expand the application of the 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’*”. The Court announced that they have been “over-expansive” in their reliance on the ELD as opposed to fundamental contractual principles. As of March 7, 2013, the ELD in Florida is now limited to cases involving products liability.

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