LAWYER

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REMNANTS OF *TIARA*: A BUILDING IS STILL A PRODUCT

Construction Law Section
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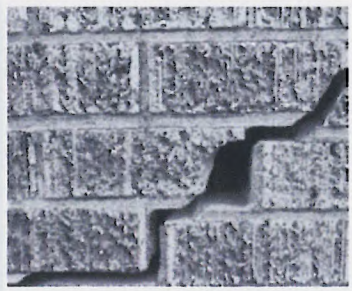
When *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), was decided, many construction practitioners were concerned with the additional tort exposure implications. *Tiara* dealt with whether the economic loss rule (ELR) would bar certain tort claims against an insurance broker where the parties were in contractual privity. A divided Florida Supreme Court, however, passed over this narrow question and instead wiped out the contract ELR entirely.

Though uncertainty abounds in the wake of *Tiara*, two things remain unchanged: The ELR still applies to products, and a building is still a product. The product ELR prevents a plaintiff from recovering in tort when a product damages only itself and does not cause personal injury or damage to other property.



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Twenty years prior to *Tiara*, the landmark case of *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), was decided. In *Casa Clara*, homeowners filed suit against a concrete supplier because a faulty mix corroded the

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rebar, resulting in concrete falling off of the buildings. The homeowners attempted to skirt application of the ELR by asserting a "home was different," and the defective concrete caused damage to "other products" (namely the buildings themselves). The court held that the tort claims were barred by the ELR because the "homeowners bought finished products — dwellings — not the individual components of those dwellings." *Id.* at 1247.

Curiously, a red flag now appears on the *Casa Clara* decision, which denotes "no longer good for at least one point of law," referencing *Tiara*, and the Westlaw summary states "the Supreme Court reced[ed] from *Casa Clara*." Yet, the admonitions of law school professors demand that we not blindly rely on case summaries or the color of case flags.

The *Tiara* court only receded from prior rulings "to the extent that they have applied the economic loss rule to cases other than product liability." *Tiara*, 110 So. 3d at 407. *Tiara* generously cites and never expressly recedes from *Casa Clara*. In fact, the court cites *Casa Clara*'s holding in its discussion of the product liability ELR. *Id.* at 405 ("In *Casa Clara*, we held that the [ELR] barred a cause of action in tort for providing defective concrete where there was no personal injury or damage to property other than to the product itself.")

A recent Ninth Circuit Court opinion has upheld application of *Casa Clara* in the construction setting: "Nothing in *Tiara* appears to alter the precedent set in cases examining the ELR in products liability action. ... [T]he finished product is the entire structure, not the individual units." *Sienna at Celebration Master Ass'n v. Winter Park Constr. Co.*, Case No. 2009 CA 006474 CN (Fla. Cir. Ct. Sept. 4, 2013). For now, *Casa Clara*'s broad definition of the term "product" appears to remain intact and should provide contractors and subcontractors a defense to basic tort claims involving construction of buildings.

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