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IN THE SUPREME COURT
STATE OF FLORIDA

CASA CLARA CONDOMINIUM ASSOCIATION, INC., ET AL.,

Petitioners,

v.

CHARLEY TOPPINO AND SONS, INC., ET AL.

Respondents.

CASE NO. 79-127

CHRISTOPHER H. CHAPIN, ET AL.,

Petitioners,

v.

CHARLEY TOPPINO AND SONS, INC., ET AL.

Respondents.

CASE NO. 79-128

Respondent's Answer Brief on the Merits

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Introduction

Petitioners' consolidated cases against Charley Toppino & Sons, Inc. ("Toppino"), and others, advocate the adoption of tort causes of action for simple negligence and strict liability, to recover purely economic losses to their dwellings. The Third District Court of Appeal, in the two decisions consolidated by the Court for review, rejected the creation of a new tort and applied previous decisions of its own and of this Court to bar a tort recovery for economic loss.

The petitioners have not expressly advocated expunging the economic loss rule from Florida law. Rather, they propose a status-based exemption from its application for home and condominium owners. In this brief, Toppino will expose this proposed exemption as uniquely lawless, and inconsistent with the rationale for the existence of an economic loss rule in the first place.

These cases are truly about the disappointed contractual expectations of a class of product buyers. The petitioners have ignored, and have attempted to recast to their own purposes, the very real and legally significant differences between what is remediable in tort and what is properly recompensed only from contractual sources. There is a fundamental difference between the safety interests which tort law has evolved to preserve, and the product quality interests that the law requires be resolved under contract law. Toppino will show that the petitioners have obfuscated this demarcation in their quest for a tort remedy with which to rectify their allegedly disappointed contract interests.

The amici supporting petitioners go much farther down the continuum of eroding existing law. In one case an amicus (Pulte Homes) suggests a fraud exemption, although it has no grounding in these particular cases. In another an amicus (Polk County) invites a governmental exemption similarly unrelated to any facts here. The suggestion by these and

other amici that they present a logical part of petitioners' proposed program gives substance to Toppino's contention that the Court cannot rationally carve out the status-based exemption from the economic loss rule which petitioners seek, since any rationale for doing so will inevitably foul the policy underpinnings of the doctrine.

Statement of the Case and Facts[1/]

1. Introduction.

Petitioners have to some extent identified the parties and the judicial acts which frame the posture in which these cases reach the Court. Some of the critical elements of the case are omitted or tucked away in footnotes, however. Under the circumstances, Toppino feels compelled to bring to the fore certain record events relating to the case which will necessarily impact the Court's ultimate decision.

2. Statement of the Case.

Petitioners' brief contains no Statement of the Facts. It begins with a "Statement of the Case" which is anything but a statement of "the case." Petitioners' Statement includes a discussion of factual matters as to which there is no record support whatsoever, characterizations which are pure advocacy, and an incomplete identification of the procedural posture of their appeals. This section of the brief will supplement petitioners' Statement, and distinguish for the Court those recitations in petitioners' Statement which must be disregarded as lacking any record foundation.

1/ For the Court's convenience, Toppino will use the same symbols and abbreviations for the parties, their respective cases and record references which appear in petitioners' brief, with one exception. References to the consolidated *Casa Clara* and *Ontario* cases will be "R. ___," rather than "*Casa Clara/Ontario* R. ___." (See footnote 1 on page 1 of petitioners' brief.) References to petitioners' initial brief will be made as "Pet. brief at __."

(a) In general. This appeal brings to the Court seven individual lawsuits that were brought in the Monroe County Circuit Court against Toppino and various other defendants. All of the counts against Toppino which appeared in the complaints filed by the seven petitioners were dismissed by the trial court.[2/] These counts alleged negligence, strict product liability, breach of implied warranty and violation of the Florida Building Codes Act (in particular, section 553.84, Florida Statutes).

As noted by the Third District, the counts for implied warranty were dismissed for lack of privity.[3/] The court did not note, but this Court should know, that petitioners did not appeal these dismissals to the Third District. Those rulings, consequently, can form no part of the Court's analysis in these cases.

The building code violation counts were dismissed on the basis that, as a materialman, Toppino was not governed by the Florida Building Codes Act. The negligence and product liability counts were dismissed on the basis of an application of the economic loss rule.[4/] The compensatory damages sought from Toppino in petitioners' negligence and product liability counts consist of building repair costs that have been

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2/ *Casa Clara* R. 1576-78; *Ontario* R. 764-65; *Blatt* R. 428; *Chapin* R. 403; *Johnson* R. 563; *Roper* R. 473-74; *Wolszczak* R. 407-08. The particular complaint for each petitioner, and its location in the record, are identified in footnote 17 on page 7 of petitioners' brief.

3/ *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So.2d 631, 633 (Fla. 3d DCA 1991); *Chapin v. Charley Toppino & Sons, Inc.*, 588 So.2d 634 (Fla. 3d DCA 1991) (relying on *Casa Clara*).

4/ Id.

incurred, future repair or replacement costs, and loss in the value of their homes.[5/] Petitioners have also asserted a right to punitive damages in their tort-based claims.[6/]

(b) Casa Clara. Casa Clara Condominium Association, Inc., brought suit on behalf of unit owners who own individual apartment units and undivided interests in the common elements of three condominium buildings. It sought damages against 15 persons, individually and as partners of two partnerships, two partnerships, three banks,[7/] two engineers, one architect, one general contractor, and Toppino. (R. 1201-17). The general contractor, the developer partnerships and partners, and the banks were sued for breach of statutory implied warranty, breach of common law implied warranty, negligence and violation of the Florida Building Codes Act. The engineer and the architect were sued for negligence and violation of the same state Act.

The trial court's dismissal of the counts of Casa Clara's Amended Complaint directed at Toppino was affirmed by the Third District Court of Appeal in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*, 588 So. 2d 631 (Fla. 3d DCA 1991). The counts against the other defendants were not dismissed and remain pending in the circuit court.

(c) Ontario. 642053 Ontario, Inc. is the owner of a 3-bedroom residential home and lot in Monroe County. It sued the general contractor of that home, as well as Toppino. (R. 450-77). The general contractor was sued for breach of contract, breach of express

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5/ *Chapin* R. 363 (Amended Compl. pp. 11 and 13); *Roper* R. 427 (Amended Compl. pp. 8 and 12); *Johnson* R. 527 (Amended Compl. pp. 5-6); *Blatt* R. 397 (Amended Compl. pp. 11-12); *Wolszczak* R. 304 (Amended Compl. pp. 11-12); *Ontario* R. 450 (2nd Amended Compl. pp. 8 and 10); *Casa Clara* R. 1201 (Amended Compl. pp. 12-13).

6/ Pet. brief at 42.

7/ The complaint named City National Bank of Miami, Third National Bank of Nashville, Tennessee, and Marine Midland Bank of New York City as "developers."

warranty and implied warranty, for negligence, and for violation of the building code statute.

The *Ontario* case proceeded before the trial court as the "test case" for all seven proceedings. (*Ontario* R. 1080-1116).[8/] In that case, and in the five other cases in which they were filed, the trial court struck from the record two engineering reports which had been attached to the complaints. (*Ontario* R. 1071; *Blatt* R. 274-75; *Chapin* R. 238-39; *Johnson* R. 306-07; *Roper* R. 305-06; *Wolszczak* R. 167-68).[9/] When Ontario's oral motion to file a Third Amended Complaint was denied by the trial court (see Pet. brief at 7, n. 18), it filed a motion for reconsideration of that denial to which Ontario again attached the engineering reports. The motion for reconsideration was denied. (R. 1071-73). The trial court's dismissal of the counts of Ontario's Second Amended Complaint addressed to Toppino was affirmed by the Third District in the *Casa Clara* decision.

(d) Chapin. Claire H. Chapin was the owner of a 2-bedroom house and lot in Monroe County. She sued her general contractor for negligence, breach of express warranty, breach of contract, and violation of the state building code, and she sued Toppino. The trial court's dismissal of Chapin's Amended Complaint as to Toppino was affirmed by the Third District in *Chapin v. Charley Toppino & Sons, Inc.*, 588 So. 2d 634 (Fla. 3d DCA 1991), on the basis of the court's *Casa Clara* decision. Her case against the contractor was not dismissed.

8/ This characterization was made by petitioners in their brief in *Chapin* in the Third District, at page 6, n. 13. See, as well, the transcript of the November 30, 1989 hearing in *Ontario* at *Ontario* R. 1080-1116, pages 7, 22 and 29.

9/ One report is identified in footnote 9 on page 4 of petitioners' brief. No engineer's report was attached to the Casa Clara Amended Complaint. Petitioners improperly use materials from the stricken reports in their brief, although there is no suggestion that the order striking these was erroneous.

(e) Roper. Lloyd Roper owns a 2-bedroom house and lot in Monroe County. He sued only Toppino, alleging the involuntary dissolution of his corporate general contractor. (*Roper* R. 427; ¶ 6). In response to interrogatories, Roper admitted that he had contracted with an architect and with an engineer to prepare the plans and specifications for his residence. (*Roper* R. 138, 142). The dismissal of Roper's Amended Complaint was affirmed by the Third District in its *Chapin* decision.

(f) Johnson. Wilburn Johnson is the owner of a home and lot in Monroe County. His suit against Toppino alleged that he purchased his residence from the owner/builder of the structure, who he believed contracted directly with Toppino for concrete. (*Johnson* R. 527, ¶ 5).

Before filing his suit against Toppino, Johnson had sued and settled with the owner/builder, and released him from all claims arising from the sale and construction of his structure. (Johnson R. 422-27, 510-26). Toppino filed a motion to strike an earlier version of Johnson's complaint as a sham pleading for omitting these material facts. (Johnson R. 422-27, 527-29, 550-51). Johnson subsequently agreed to eliminate the phrase "Plaintiff does not have a basis to recover damages against the previous owner for the defective concrete," from paragraph 4 of his "Corrected Amended Complaint," after which he filed his final "Re-Corrected Amended Complaint." The trial court's dismissal of Johnson's Re-Corrected Amended Complaint was affirmed by the Third District in its *Chapin* decision.

(g) Blatt. Arnold Blatt is the owner of a 2-bedroom home and lot in Monroe County. Blatt sued his corporate general contractor for breach of contract, breach of express warranty, negligence and violation of the Florida Building Codes Act, and sued

Toppino as well. (*Blatt* R. 397). The trial court's dismissal of Blatt's Amended Complaint as to Toppino was affirmed by the Third District in its *Chapin* decision.

(h) Wolszczak. Andrew J. and Patricia Wolszczak are owners of a 3-bedroom home in Monroe County. They sued the developer/general contractor of their home for breach of contract, breach of express warranty, negligence and violation of the Florida Building Codes Act, as well as Toppino. (*Wolszczak* R. 304). The trial court's dismissal of Wolszczak's Amended Complaint as to Toppino was affirmed by the Third District in its *Chapin* decision.

3. Statement of the Facts.

The petitioners have no Statement of the Facts in their brief. Several of the fact-like recitations in their Statement of the Case are not supported in the record, and the most significant of those departures from the record are identified in the very next subsection of this brief. A complete statement of the operative facts relevant to the legal issues on review appears in the *Casa Clara* decision of the Third District, 588 So.2d at 632, as follows.

> The homeowners allege that they have been damaged by the alleged use of defective concrete used to build their homes. The alleged defect is the excessive content of chlorides in the concrete which caused the reinforcing steel to rust and expand. This expanding steel, in turn, caused (and continues to cause) the structural components of the building to crack and pieces of the concrete to fall off the building. The result of this deterioration process is a substantial loss of structural integrity in the homes and buildings requiring vast repair work to or replacement of the homes and buildings.

4. Non-"Fact" Recitations in Petitioners' Statement of the Case.

Petitioners' brief contains a Statement of the Case which includes a number of statements that are written as if they were factual in nature, but which are not "facts" as

they are not supported in the record. The most significant of these non-record statements are identified here.

(a) Petitioners' brief asserts that they "face the inevitable destruction of their homes."[10/] They say that Toppino is "responsible for this certain destruction," and that "[t]otal ruin is only a matter of time."[11/] No allegation in any of the seven complaints alleges the total and inevitable destruction of the residence units of the petitioners.

(b) Petitioners' brief states:

> A concrete supplier tailors each batch to the particular job, thus contributing a 1service' to the construction process in addition to the 'products' (cement, rock and water) that go into its concrete. Functionally, a concrete manufacturer is as much a building subcontractor as a material supplier.[12/]

There is no allegation in any of the seven complaints as to a tailoring of each batch of concrete to a particular job, and none which describes Toppino as either providing a service or acting as a building subcontractor. In suggesting, as if it were a fact, that a concrete supplier contributes a "service" to the construction process and is therefore functionally a building subcontractor, petitioners are simply advocating a legal position. They are also, however, contradicting their own subsequent statement that Toppino prepared and delivered concrete "upon the orders of those responsible for building the structures."[13/]

10/ Pet. brief at 1.

11/ Id.

12/ Pet. brief at 3-4.

13/ Pet. brief at 7.

(c) Petitioners declare in their brief that standards developed by the American Concrete Institute ("ACI") "have been adopted as part" of local building codes.[14/] This is a bare legal conclusion which is contradicted in Toppino's brief, and certainly does not constitute a declaration of fact.

(d) Petitioners assert that concrete "is rarely tested for the presence of chlorides or other chemical substances."[15/] There is no allegation in any of the seven complaints which supports that assertion.

(e) In their section entitled "Rulings by the Trial Court," petitioners state the trial court dismissed the counts against Toppino by "ruling that destruction of the homes . . . was not damage to property other than the concrete itself . . . ."[16/] This statement is doubly wrong. The trial court made no ruling whatsoever about destruction of the homes, as none had been alleged to have been destroyed. Nor did the trial court rule that "concrete" was the product damaged. He ruled, rather, that the "homes" were the product as to which the economic loss rule bars recovery in tort. The Third District affirmed on the basis that the homes or structures, not the concrete, were the products.[17/]

(f) Petitioners assert that the "law as now declared" by the Third District is that "a concrete supplier is immune from liability to third parties, even where its defective product demolishes homes."[18/] Given the absence of any allegation of demolished homes,

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14/ Pet. brief at 4.

15/ Pet. brief at 6.

16/ Pet. brief at 7.

17/ *Casa Clara*, 588 So.2d at 633.

18/ Pet. brief at 9.

and given the legal possibility of suits or claims brought by architects, engineers, general contractors and others in the chain of contract for third-party liability against materialmen, this statement by the petitioners is without record, factual or legal support.

Toppino anticipates that the Court will ignore these misstatements without need for a separate, formal motion to strike these inappropriate aspects of petitioners' Statement of the Case.

Summary of Argument

The so-called "economic loss rule" constitutes an integral part of the law of Florida. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *AFM Corporation v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987). The *Florida Power & Light Co.* decision (hereinafter "the *FP&L* decision") adopted both the holding and rationale of the lead United States Supreme Court decision in the field, *East River Steamship Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858 (1986), and three earlier decisions of Florida district courts of appeal. The force and reasoning of the *FP&L* decision, as well as the fact that the decision was written in the context of a certified question from the Eleventh Circuit Court of Appeals, compel the conclusion that it governs this proceeding. Prior district court decisions on which petitioners rely are inconsistent with *FP&L*. The attempt of petitioners to differentiate between realty and personal property with respect to the operation of the economic loss rule is not substantiated factually or in the case law.

Toppino and other material suppliers do not provide a "service" to new homeowners, as petitioners suggest. Their role and responsibilities are completely different from professionals or others in the hierarchy of home construction who design, direct the

construction, select the appropriate materials to be supplied, and direct the installation and integration of component products. Toppino is a materialman and supplier of a manufactured product. There is no sound basis to extend tort liability to these classes of remote, non-privity persons.

Petitioners suggest that the removability and separate identity of certain house components makes them "other property" which can be damaged when a defective building component, such as concrete, causes damage. Neither this argument, nor the fact that homeowners do not have available to them a direct warranty from suppliers under the Uniform Commercial Code, justifies a tort cause of action running from homeowners to material suppliers. Neither fact, even if true, brings materialmen into the dominion for which tort causes of action are created -- safety concerns related to personal injury and damage to distinct "other" property.

A majority of states adhere to the economic loss rule for the same policy reasons which prompted its adoption in Florida. Many decisions in those states make no exception for an "other property" injury when one building component is claimed to have injured other components or the building itself. *E.g.*, *Redarowicz v. Ohlendorf*, 441 N.E.2D 324 (Ill. 1982); *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988). The damages which petitioners seek in their seven amended complaints are precisely the forms of economic loss which are embraced within the economic loss rule.

Florida law does not permit a tort duty of responsibility for potential and unrealized physical injuries. The rationale of the Court's decision in *FP&L* in fact eliminates any such argument. The few Florida decisions which have adopted a consumer-oriented remedial approach to component-caused injuries are inconsistent with Florida's embedded doctrine that speculated damages are not recoverable either in contract or in tort. In any event, the

suggestion that "risk" of injury should be compensated is nothing but a stalking horse for petitioner's effort to recoup purely economic loss -- that is, the repair, replacement and loss of value to their homes. To the extent that speculative damages for potential physical injury could be awarded, the effect would be to forestall the injury in fact, and simply to recompense homeowners for their repairs.

Petitioners attempt to justify an exception to the economic loss rule on the ground that homeowners are in an unequal bargaining position with respect to their residences. There is no record support for that thesis. An array of contractual opportunities and protections are available for all homeowners, not the least of which is the presence of an attorney who can advise on risks and their allocation. Were their empirical evidence, the Court would find that homeowners are not a homogeneous body of unsophisticated and hapless real property purchasers in any event. There is evidence in this record that they range from "typical" homeowners like Mr. Johnson, who in this case had successfully sued and settled with the owner/builder of his home before ever instituting suit against Toppino, to the purchasers of condominium units who have been given an abundance of protections by the Florida Legislature.

Based on *Latite Roofing Co., Inc. v. Urbanek*, 528 So.2d 1381 (Fla. 4th DCA 1988), the petitioners suggest that a tort cause of action at least exists where no contractual remedy is available to a home buyer. The *Latite* decision does not exactly stand for the proposition which petitioners urge, since it involved the contract remedies which the plaintiff would not have against only one particular defendant, not others. Significantly moreover, six of the seven petitioners in this case have had no difficulty whatsoever seeking other forms of relief in contract from persons with whom they are in privity. Petitioners are in no position to assert hypothetically that an exception to the economic loss rule is needed

when and if a home buyer lacks all contractual remedies. More importantly, the policy basis adopted by this Court in *FP&L* was to reject the relief-focused result in *Latite*, in favor of a focus on the nature of the duty being imposed. To adopt a "no other remedy" approach, as petitioners request, is to undermine the policy of encouraging negotiation and bargaining in contracts.

Petitioners contend that Toppino violated section 553.84, Florida Statutes (1991), which provides them with a private cause of action for a violation of local building codes. The district court correctly held that materialmen such as Toppino are expressly excluded from coverage under the statute. The applicable Monroe County Building Code, moreover, also excludes Toppino from its coverage.

Argument

1. The Economic Loss Rule Does Bar Petitioners' Tort Claims.

(a) Introduction.

Stripped of all theatrical trappings, the outcome which petitioners seek is, plain and simply, the creation in Florida of a new, previously unknown and previously unavailable tort cause of action. Petitioners want the Court to make available to home buyers a newly-minted cause of action in tort against any component supplier or subcontractor or materialman whose product or service is incorporated into a residence. If petitioners and their friends have their way,[19] the repair or replacement of plumbing fixtures, electrical conduits and switches, plaster board, drywall sheeting, nails, brackets, roof trusses, tar paper, and every other form of definable house component (including paint) which at any time becomes affected adversely by another but flawed component of the house, can be

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19/ Petitioners position in the case is supported by four friend of the court briefs.

compensated in tort.[20/] Materialmen and suppliers will become fair game for lawsuits alleging defective manufacture, loss of value, and structural concerns that pose, but have not produced, a threat to life and limb. All unseen structural components of a residence -- in petitioners' terms called "latent defects" -- can become the basis of a lawsuit which alleges an interaction of one component with other components, a lack of structural integrity, or other verbal outrages which can be paraded before a jury. Punitive damages can and will be sought.

Petitioners are offering the Court a fictional foundation for their new tort lawsuits. They would have the Court announce that homeowners in reality don't buy a finished product called a "home" or a "residence," but rather contract to purchase the joists, concrete foundations, slabs, lintels, electrical conduits, and every other component part which comprises the finished product in which they will reside. They are asking the Court to advance dramatically the frontier of tort recoveries.

There is no need for the Court to create this new tort cause of action against materialmen and subcontractors. Homeowners already have adequate opportunity and incentive to secure the remedies that will make them financially whole should structural trouble occur. Homeowners can protect themselves with insurance, with bonds, and through contract with their builder, general contractor, architect, and engineer. Homeowners already have the right to sue the party or parties with whom they are in privity in order to obtain complete restitution of value, or to repair and replace their residences. They have attorneys who can counsel them on opportunities for contractual protections. These points are discussed more fully in the paragraphs that follow.

20/ Pet. brief at 13.

(b) Status of the law.

Two decisions of the Court have recently made clear that the "economic loss" rule constitutes an integral part of the law of Florida. *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987); *AFM Corporation v. Southern Bell Telephone and Telegraph Co.*, 515 So.2d 180 (Fla. 1987).[21] These cases, with *FP&L* at the forefront, set to rest the notion that an obligation -- a duty of care -- exists in tort to protect against economic loss to property.

The critical feature of *FP&L* is its discussion -- with approval -- of the United States Supreme Court's decision in *East River Steamship Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858 (1986), and of three decisions of the district courts which had applied the economic loss rule to the satisfaction of the Court. *See GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA), *rev. denied*, 453 So.2d 45 (Fla. 1984); *Cedars of Lebanon Hospital v. European X-ray Distributors*, 444 So.2d 1068 (Fla. 3d DCA 1984);[22] *Monsanto Agricultural Products Co. v. Edenfield*, 426 So.2d 574 (1st DCA 1982). Those cases (and therefore *FP&L* and *AFM*) put to rest petitioners' assertion that a tort law duty in negligence should be imposed on a manufacturer to produce goods which meet the economic expectations of purchasers, or that strict products liability should be extended to homeowner cases even where there are no personal injuries or damage to other property.

The Court recognized in *FP&L* that the questions of what duty is owed, and to whom, form the fundamental parameters of analytical focus differentiating contract and tort.

21/ *FP&L* was recognized with approval as well in *Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.*, 511 So.2d 992 (Fla. 1987). As the controlling precedent in Florida, *FP&L* has been followed faithfully by the district courts of appeal.

22/ This case contains a scholarly discussion of the distinctive and distinguishable purposes of tort and contract law, a division which petitioners seek to blur and obfuscate in their presentation to the Court. (444 So.2d at 1070-71).

The tort duty of care imposes responsibility on a manufacturer for distributing safe products which do not cause physical injury to persons or to other property. A divergent impulse directs contract duty. The underpinning of the economic loss rule is explained in *FP&L* by express reference to Justice Traynor's now-famous formulation in *Seely v. White Motor Co.*, 403 P.2d 145, 151 (1965), that a

> duty of care . . . is particularly unsuited to the vagaries of individual purchasers' product expectations. As important, under the minority view, a manufacturer faced with this kind of liability exposure must raise prices on every contract to cover the enhanced risk. Clearly, product value and quality is covered by express and implied warranties, and warranty law should control a claim for purely economic losses.

510 So.2d at 901. The protection of purchaser expectations, related to the quality and fitness of the product for the purpose for which it is intended, is definable by warranty because the parties have the opportunity for a meeting of the minds in framing their agreement.

It is regrettable that the label "economic loss" has been adopted, as it tends to distort the true picture of what is discussed in *FP&L* and other cases. There is no magic to that label. The phrase is itself somewhat ambiguous, since economic losses come in all forms.[23/] To the degree that labels are useful shorthand, the economic loss rule could more appropriately be identified as the "contractual expectation" doctrine. In that way, judges and lawyers confronted with only the label, and unfamiliar with the rich history of the doctrine, would be instantly aware that it springs from contract law duty, designed to redress a purchaser's quality expectations.

[23/] At times, economic loss in the form of lost wages or business profits will follow on the heels of personal injury, too.

The law of Florida has long been that a legal duty in tort does not exist to protect another's property from economic deprivation alone. *FP&L*, 510 So.2d at 902. Economic injury to property has been treated, at common law in Florida and most everywhere else, within the sphere of contract law which orbits around implied and expressed warranty, including the statutory imposition of privity-based warranties through operation of the Uniform Commercial Code.

The lengthy legacy of the economic loss rule in Florida contradicts the revisionist history set forth in the petitioners' and the various amici briefs. Those briefs endeavor to sneak petitioners through the door shut by the court in *FP&L* and *AFM*, carrying piggyback various commercial and governmental interests, by urging that the Court's articulation of the economic loss rule did not change the holdings or reasoning of a handful of previous district court decisions.[24/] Neither *FP&L* nor *AFM* support that attempt to preserve prior contradictory decisions, however.

In *FP&L*, the Court explained that the absence of duty in tort in purchase and sale transactions has roots long preexisting its recharacterization as the "economic loss" rule. The Court in no way recognized, let alone sanctified, the few district court decisions which had strayed from the foundations of a contractual expectation doctrine and had allowed a tort recovery for mere disappointment as to the quality of the product bargained for. There is no mention in *FP&L* or in *AFM*, let alone a preservation of any district court decision,

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[24/] Petitioners' greatest reliance is placed on these pre-*FP&L* decision: *Simmons v. Owens*, 363 So.2d 142 (Fla. 1st DCA 1978); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. 2d DCA 1979); *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. 4th DCA 1979); *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA), *rev. dism'd*, 411 So.2d 380 (Fla. 1981); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. 4th DCA 1981). Other than *Adobe*, each of these cases involved a builder or developer with ultimate authority over the nature of the housing project and the materials utilized.

which contravenes the preexisting principle which *FP&L* and *AFM* for the first time labeled in Florida as the "economic loss rule."

Petitioners frame their contention that the *FP&L* and *AFM* decisions did not erode contrary district court decisions from the Court's comment in *FP&L* that its decision "does not change any decision of this Court or modify any past principles of law . . . ." 510 So.2d at 900 (repeated at 902). That declaration is misperceived by petitioners. It was an essential proclamation for the Court to make in light of the manner in which the *FP&L* case came to the Court: on a question certified by the Eleventh Circuit Court of Appeals. Following its responsibility under Article V, Section 3(b)(6) of the Florida Constitution, the Court was answering a question as to which there was "no controlling precedent of the Supreme Court of Florida." That fact explains why the Court began and ended its opinion by declaring it was not changing any decision "of this Court."

The Court's decision in *FP&L*, of course, served to add to Florida's jurisprudence the missing "controlling precedent," and to that extent necessarily affirmed consistent district court precedents and swept away those in disharmony. It was neither necessary nor appropriate in that context to provide a litany of every prior district court decision that might have touched on the rule of law raised by the Eleventh Circuit's question.

Petitioners contend that the Court in *FP&L* approved prior, inconsistent district court decisions *sub silentio* when it said the Court's decision did not "modify any past principles of law." They read into that phraseology more than the Court could or intended to deliver. "Past principles of law" were conflicting and irreconcilable, as the Eleventh Circuit observed

when it certified the case.[25] The Court could only have meant that past mainstream principles were being approved from the body of decisions that were consistent with the *FP&L* outcome.

Whatever the Court's choice of words, it is fundamental to the task that was being performed that every prior decision of the district courts in the field was inherently being reconciled by the Court's pronouncement of "controlling precedent." This effect was recognized with regret by retired Justice Adkins in his dissent:

> The opinion of the majority is inconsistent with [the *Moyer* and *First American* decisions], and other cases holding that liability can be imposed for economic loss in tort.

FP&L, 510 So.2d at 902 (emphasis added). The present case, arising under the Court's "conflict" jurisdiction, really presents the first occasion[26] on which the Court can undertake to assess specific lower court decisions which appear to be inconsistent with *FP&L*.

(c) The economic loss rule recognizes no distinction between realty and products.

Petitioners contend that the economic loss rule, which we have redesignated the "contractual expectation doctrine," does not apply to any form of real property at all. Petitioners' reasoning would have the Court ignore the grounding for that doctrine -- the nature of the duties imposed respectively in contract and in tort -- in favor of a property

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25/ In its opinion certifying the case, the Eleventh Circuit stated:

> We have reviewed the Florida authority . . . [listing *Moyer* and 5 district court decisions] and are persuaded that there is no clear and controlling precedent in the Florida courts.

Florida Power & Light Co. v. Westinghouse Electric Corp., 785 F.2d 952 (11th Cir. 1986).

26/ While the *AFM* case came after *FP&L*, it too came to the Court on a certified question from the Eleventh Circuit.

distinction useful for a host of other legal matters but wholly irrelevant to the tort/contract policy dichotomy. This tack by petitioners is tantamount to arguing that the law of gravity does not apply equally to people and rocks, because one is "animal" and the other is "mineral."

The analysis provided by petitioners to support their request for a real property carve-out can be short-stopped readily with the simplest of recognitions: *FP&L* was a real property case! That case involved Westinghouse's agreement to "design, manufacture, and furnish two nuclear steam supply systems, including six steam generators." *FP&L*, 510 So.2d at 900. Those nuclear steam supply systems were as surely a unique and individualized improvement to real property, affixed to *FP&L*'s land, as are the homes and condominium buildings which the petitioners occupy. Those plants were hardly, as petitioners have described their view of the doctrine, "[g]oods (toasters, televisions, automobiles, and the like)" which are "fungible," "mass-produced" and "distributed to an anonymous market."[27/]

Notwithstanding that the realty/personalty distinction that petitioners conjure is obviated by *FP&L* itself, and that *FP&L* has necessarily displaced all prior district court decisions that conflict with *FP&L*, Toppino will discuss the cases on which petitioners premise their theory that real property stands outside the doctrine. Any analysis begins with *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA), *adopted*, 264 So.2d 418 (Fla. 1972). In that case, the Fourth District determined that implied warranties of fitness and merchantability would be extended to the purchase of new condominium units acquired from builders, arising not from the Uniform Commercial Code but as a product of the common law. The

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27/ Pet. brief at 16, n. 27.

case involved a malfunctioning air conditioning system which was an unremovable fixture constituting a part of the premises.

The defendant in *Gable* was both the builder and developer of the condominiums. Consequently, express privity existed between the plaintiff unit owners and the defendant. 258 So.2d at 12. (That situation, of course, does not correspond with the situation here, where a materialman supplier is not in privity with the homeowners.) In the course of its opinion, the Fourth District determined that it should join the modern trend to shed the notion that implied warranties for breach of contract do not apply to realty.

The *Gable* decision does not make the case for creating a real property exception to the contractual expectation rule as applied to non-privity suppliers. In point of fact, the decision reflects a judicial leaning which favors treating improvements to realty no differently than other products, for purposes of common law implied warranty. 258 So.2d at 14-16. The case is a recognition that the contractual expectation doctrine addresses "property" damage, not "product" damage[28/] and property, of course, can be personalty or realty.

A house, a condominium unit or a nuclear power plant, including their improvements, constitute an amalgamated piece of property -- albeit sometimes characterized for tax law, for property devolution or for other legal purposes as "realty." A duty in tort no more springs from the nature of the property when a defective component causes the need to repair it or to recoup a diminution in value -- a home, a condominium unit or a nuclear power plant -- than it springs from that same contractual disappointment

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28/ Strict liability, of course, requires that a "product" be identified as the source of physical harm. *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976). In any event, the Court has recently reiterated that injury caused by a product constituting an improvement to real property will not serve as a basis for a strict liability action. *Easterday v. Masiello*, 518 So.2d 260 (Fla. 1988).

in a non-realty setting. There is nothing in *Gable* which should prompt the Court to consider (as petitioners would have the Court worry) whether the concrete sold by Toppino became an improvement or fixture to realty, or whether it was transformed into realty or remained personal property. The implied warranty claim recognized and adopted in *Gable* for an in-privity builder was purely an outgrowth of contract law, not an expansion of tort "duty."

Interestingly, this Court's decision in *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983), decided over ten years after *Gable*, took a very different slant on this issue than that advocated by petitioners. *Conklin's* holding was its refusal to extend the implied warranty for home first purchasers to incidental improvements to the underlying realty, in that case a seawall. 428 So.2d at 659. A seawall was deemed more akin to an improvement on vacant land, for which implied warranty protection was deemed inappropriate. The justification for this distinction was described in part as a recognition that "the purchase of a residence is in most cases the purchase of a manufactured **product** -- the house." *Conklin*, 428 So.2d at 657, *quoting from Smith v. Old Warson Development Co.*, 479 S.W. 2d 795, 799 (Mo. 1972) (emphasis added). According to *Conklin*, the essence of *Gable* was to extend an implied warranty to the first purchaser of a home, based on modern-day home-buying practices, because a new home is the equivalent of a manufactured product. The "realty" aspect of the transaction, the purchase of the land on which the home is built, was found to be very much a secondary concern for most home buyers. 428 So.2d at 657.

Conklin's importance cannot be underemphasized, for at least two reasons. For one thing, the decision belies petitioners' effort to disengage a home from the constituency of products in the modern world. Almost a decade ago in *Conklin*, the Court recognized that a home-purchase decision is the equivalent of a product-purchasing decision. The Court

acknowledged the reality that home buyers bargain for and purchase a completed product -- a residential unit -- and not for its unassembled, component parts.

For another thing, the *Conklin* decision evidences the Court's correct concern with extending implied warranties in a contract setting beyond that established by *Gable*. Petitioners, of course, seek far more. They and their friends urge a radical facelift of Florida law, including an acknowledgement that they also want the ever-attendant step up to punitive and other forms of damages which are presently unavailable in implied or express warranty contractual contexts.[29/]

Petitioners offer in support of their position the decision in *Adobe Building Centers, Inc. v. Reynolds*, 403 So.2d 1033 (Fla. 4th DCA), *rev. dismissed* 411 So.2d 380 (Fla. 1981), which was a suit against a materials manufacturer. In *Adobe*, several developers and contractors not in privity with the manufacturer sued in tort for defective stucco. The defect caused a "pop-out" phenomenon which caused aesthetic injury to the stucco exterior of the houses. 403 So.2d at 1033. The district court concluded that "a retail or wholesale seller" may be held strictly liable in tort for damage occasioned to the property of one who purchases the product and prepares it for use by an ultimate consumer. 403 So.2d at 1034. Strictly speaking, the court was not concerned with applying strict liability for economic loss to a manufacturer, such as Toppino. It is also clear from the factual recitation in the opinion that the property injury was confined to the product itself, the exterior stucco work, and that there was no damage to other areas of the house. Nonetheless, these reasonable

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29/ See Pet. brief at 42. Their invitation for the Court's erosion of the contractual expectation doctrine is also but a short step to a request that the Court revisit *Lewis v. Guthartz*, 428 So.2d 222 (Fla. 1982).

distinctions aside, *Adobe* cannot plausibly be considered good law after the decisions in *FP&L* and *AFM*.[30/] *Adobe* preceded *FP&L*, and that sufficiently dooms its present vitality.

Other pre-*FP&L* district court decisions on which petitioners rely are equally irreconcilable with *FP&L* and *AFM*. *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. 2d DCA 1979), ignored entirely the contract-tort duty distinction when it permitted a negligence action to be pursued by a condominium association against a builder and an architect, with which it was not in privity, for the negligent construction of the condominium roof. The court focused primarily on the foreseeable nature of the injury suffered by the condominium association (373 So.2d at 691) and applied the "product's negligence line of cases" without either physical injury to persons or damage to other property. Id. This is contrary to this Court's subsequent analysis in *FP&L*, and to *FP&L*-adopted cases such as *Cedars of Lebanon*.[31/]

The approval by other courts of a *Navajo Circle*-mere foreseeability test for negligent construction claims against builders or architects by secondary purchasers, in one instance even relying on *Navajo Circle*, has also been superseded by *FP&L* and *AFM*. These now-

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30/ Petitioners contend that the Third District "earlier recognized" *Adobe* in *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors of America, Inc.*, 444 So.2d 1068 (Fla. 3d DCA 1984). The Third District's mention of *Adobe* in *Cedars of Lebanon* was limited to a historical identification of the case. The court in fact rejected its conclusion, by applying the economic loss rule to bar a strict liability claim unrelated to physical injury or damage to other property. *Cedars of Lebanon* was cited with approval in *FP&L*.

31/ *Navajo Circle* relied chiefly on *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973), to support a broad foreseeability standard encompassing legal tort duty for economic losses. *Navajo Circle*, 373 So.2d at 691. Since then, *Moyer* has been narrowly restricted by the Court to pertain to circumstances where professionals possess absolute authority and control over the manner in which a subordinate party performs its contractual covenants with the second contracting party. *See First American Title Insurance Co., Inc. v. First Title Service Co. of The Florida Keys, Inc.*, 457 So.2d 467, 471 (Fla. 1984), where the Court emphasized that it was the total dependency of the contractor on the supervising architect or engineer of the project which made it impossible for the contractor to "take steps independently to protect itself against the consequences of the negligence of the architect or engineer." 457 So.2d at 472. Unlike *Navajo Circle*, the Court has been unwilling to recognize *Moyer* as the touchstone for creating a mere foreseeability test for the application of tort principles in the absence of personal injury or damage to other property.

invalid prior decisions are *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. 4th DCA 1980); *Simmons v. Owens*, 363 So.2d 142 (Fla. 1st DCA 1978); *Drexel Properties, Inc. v. Dade Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. 4th DCA 1981). The frontier aspect of petitioners' position is seen in the fact that none of these cases sustained negligence or strict liability claims against a material supplier such as Toppino. Consequently, there still remains the fundamental difference between Toppino, who had no control over the manner in which its products were selected or used in the construction of these homes, and a builder or developer who exercises that control.

Not satisfied to invite a complete upheaval of Florida law for mere tort suits, petitioners urge that "strict liability" in tort be created under Florida common law where a defective product used to improve realty causes damage to that real property. (Pet. brief at 14). This suggestion, of course, defies the Court's express adoption in *FP&L* of the statement made in *Cedars of Lebanon* that

> strict liability should be reserved for those cases where there are personal injuries or damage to other property only, [citation omitted], precluding the recovery for economic loss in tort.

FP&L, 510 So.2d at 902, *quoting from Cedars of Lebanon*, 444 So.2d at 1071. Petitioners' propose this legal leap based on a passing footnote statement made in *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So.2d 551 (Fla. 1986), and a decision of the Fifth District Court of Appeal. These decisions are not, however, a suitable springboard.

In *Chadbourne*, the Court held that a private corporation constructing a public road could not be held liable in strict products liability in tort to a driver and passenger sustaining fatal and non-fatal injuries, respectively, as a result of a defect in the road. In a footnote, the Court hypothesized circumstances where the private entity might be

susceptible to a strict liability suit from the manufacture and sale of asphalt mix or a roadway, such as a personal injury caused by fumes from the mix, or damage to other property if a hypothesized private roadway disintegrated during a rainstorm and polluted a nearby water supply. 491 So.2d at 553. These hypothetical scenarios carefully mirror the product-caused "personal injury or damage to other property" thesis identified as the foundation for strict liability in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976). Those examples do not invite the notion that the economic loss rule accommodates a strict products liability action. In the Court's hypothetical, an underground well for water is indeed "other" property harmed by the roadway, even though real property. That example in no way suggests that petitioners' homes or components are property independent of "other" component products.

Craft v. Wet'n Wild, Inc., 489 So.2d 1221 (Fla. 5th DCA 1986), is factually and legally more remote than *Chadbourne*. It involved personal injuries to an individual while riding a large water slide. The court held that strict liability did not apply to structural improvements to real property. The court went on to state, again hypothetically, that a strict products liability action might lie if the product manufactured by the defendant, which was incorporated as an improvement to the realty, itself caused the injury. The court relied for that suggestion on the First District's decision in *Chadbourne* which, of course, was later overturned by this Court. *Vaughn v. Edward M. Chadbourne, Inc.*, 462 So.2d 512 (Fla. 1st DCA 1985), *rev'd* 491 So.2d 551 (Fla. 1986). The holding of *Craft* was a denial of recovery, on the ground that the waterslide was the product which had caused the injury, and plaintiff's strict products liability action was based on the "defectiveness of the structural improvement itself." 489 So.2d at 1222. The *Craft* decision hardly benefits petitioners' position here.

(d) Services versus product.

Petitioners provide a completely different focus when they suppose a dichotomy between "services" and "products" which has some application here. (Pet. brief at 16-18). This section of their brief contains an alchemist's brew of two supposed legal elements: (1) that a contractor who provides services does not provide UCC warranties when improving realty; and (2) that a product once affixed to realty may be detached and subsequently sold again as an individual product. The assemblage of these two elements produces only fool's gold, however. It produces, unremarkably, two legal elements which sit side by side and never alloy.

Petitioners start by declaring that a UCC warranty is not extended by a contractor to a home buyer, as a consequence of which (they say) a home buyer has no UCC protection or contractual right vis-a-vis a product supplier with whom the general contractor contracts. They then attempt to parlay that premise and the *Gable* decision into a gap in the law. Their premise is correct, but that fact does not erode the *Gable* court's holding that a non-UCC based implied warranty is available to new home purchasers in privity with a builder-developer of condominiums. Nor does it account for the effects of the chain of product warranties which exist between material suppliers and the homeowner, which as petitioners admit (Pet. brief at 17) have a statutory foundation in the UCC. As nothing in that chain of relationships and warranties denies an in-privity homeowner a cause of action against his builder, it is an exaggeration for petitioners to conclude that there is a break in warranty protection between a component supplier and a buyer such that a homeowner is left without recourse against his or its builder, developer, or contractor.

Petitioners' second point here, that a product once affixed to a home may be removed and later resold, has no logical bearing on the issues at hand. A retention of

identity, or the removability of the copper pipe in the plumbing system of a house, for example, may be an interesting fact, but that hardly defines its status as "other property" in the context of injury from another home component. In Toppino's case, of course, the manufactured products -- structural concrete in the form of slabs, columns or beams (Pet. brief at 2) -- are as permanent a fixture in a home as can be found; certainly more than the air conditioning system found in *Gable* to constitute a part of the house for purposes of an implied warranty suit. Those slabs and columns certainly can not be removed from the house or used elsewhere without destroying the nature, fitness and structural integrity of the house itself. If water from defective plumbing destroys the concrete slabs or columns in a home, would the "removable and separate identity" argument compel the Court to hold that those concrete products are "other property"? Hardly!

In short, petitioners' musings concerning the removable and self-identity nature of some house components neither supports the point nor coalesces with petitioners' UCC concerns to suggest that steel imbedded within the slabs of petitioners' homes is "other property" sufficient to sidestep the contractual expectation doctrine. The fact is, as judicially-recognized, that home buyers do not purchase severable, component products. Their bargain is an exchange of money for a completed house. The fact that some component products in a house (perhaps a light switch but certainly not the concrete or plumbing or electricity) can be removed from the structure without forever altering it, does not lead to the conclusion that an alleged defect in one component part of the structure should create a basis to recover the costs of repair either to another component or to the house itself. Continuity of component identity does not alter what has been purchased any more for a residential unit than it does for an identity-retained switch in a heat transfer unit. *See Aetna Life*, 511 So.2d at 993.

There are well-reasoned precedents from other jurisdictions which apply the economic loss rule to bar a suit in tort (both in negligence or strict liability) by the purchaser of an alleged defective home. *See Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992); *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982). In each of these decisions, the courts flatly rejected an "other property" exception where house components damaged property constituting the house proper. Petitioners have identified two contrary out-of-state cases as support for their proposition that damage to a building caused by a defective building material constitutes damage to "other property." *Adcor Realty Corp. v. Mellon Stuart Co.*, 450 F. Supp. 769 (N.D. Ohio 1978); *Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. Ct.), *affirmed on other grounds*, 336 A.2d 211 (Del. 1975). (Pet. brief at 19). Neither is very compelling.

The *Adcor* decision reflects Ohio law, which differs from Florida's. The Ohio Supreme Court has rejected the *Seely* and *East River* analysis which was accepted for Florida in *FP&L*. *See Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Ins. Co.*, 537 N.E.2d 624 (Ohio 1989). Any opinion from Ohio is of little value to the Court's assessment of a possible exception to the rule.

The *Cannon* decision by the Supreme Court of Delaware, on the very proposition which petitioners assert, has been superseded in *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992). There the court applied the economic loss rule to bar a homeowner's suit against a corporation engaged in selling home building kits and architectural design plans for houses. The homeowner had alleged that Acorn's design plan was defective, causing inadequate ventilation and allowing condensation to form within the walls of the house. Under petitioners' characterization of the "other property" exception to the economic loss

rule, the soggy walls in *Danforth* would be injuring other parts of the home. The Delaware Supreme Court did not accept that viewpoint. Rather, it reviewed at length and distinguished the *Cannon* decision as one involving physical injury to the owner's "other" property. The Delaware Supreme Court declined to make the leap, urged by the petitioners here, to find that one defective aspect of a house harms "other property" when it causes the house to become uninhabitable.

In *Danforth*, the court squarely applied the economic loss rationale found in *East River* and *Seely*, to the effect that contractual expectations do not implicate tort loss concerns with safety, but rather involve only commercial law concerns. Indeed, when the homeowner in *Danforth* complained that this dichotomy should not apply to "individual consumers, as distinguished from commercial buyers," as petitioners suggest here, the court specifically refused to carve a residential consumer exception to the rule based on the notion that there is inherently unequal bargaining power between individual consumers and commercial sellers. 608 A.2d at 1200-01.[32/]

Petitioners are cognizant of the fact that the economic loss rule has been applied *in* the majority of jurisdictions. They imply, however, that the "other property" exception to application of the rule has also been adopted by this majority, at least in the context of damage to houses caused by defective component products. Not so. Along with *Danforth*,

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32/ *Seely* itself had recognized that the rationale of strict liability cases "does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action." 403 P.2d at 151. Rather, the court held that while compensation for personal injuries should fall on the manufacturer of a defective product, the expense of which can be distributed based on price increases for the product,

> [t]hat rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his consumers.

Id.

decisions from other jurisdictions have refused to find damage to other property when injury resulting to a house is caused by a defective component elsewhere in the dwelling. Among these cases are *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982), and *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 374 S.E.2d 55 (Va. 1988).

Redarowicz involved alleged defects to a chimney and adjoining wall which created water leakage and consequent damage in the basement and roof of a dwelling. The homeowner did not escape the economic loss rule for his repairs. In *Sensenbrenner*, the defect was construction of a pool built on fill rather than natural soils. When the fill settled, it caused water pipes to break, which in turn caused the foundation of the house adjacent to the pool to suffer cracking. 374 S.E.2d at 56. The court declined to conclude that the spread of injury from the construction defect legitimized a tort cause of action.

The decisions in *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 782 F.2d 723 (7th Cir. 1986) (application of Illinois law), *Foxcroft Town Home Owners Ass'n v. Hoffman Rosner Corp.*, 449 N.E. 2d 125 (Ill. 1983), and *Colberg v. Rellinger*, 770 P.2d 346 (Ariz. App. 1988), involved similar damage to a dwelling caused by one, pinpointed defect in a product or construction practice. These courts, too, refused to conclude that "other property" was involved. Each decision focused on "duty" -- the absence of any responsibility to provide a guarantee outside of contract for financial loss stemming from a lack of quality in workmanship.

By and large, the core assessment in these cases was to preclude a tort cause of action where the remedy sought was for "recovery for deterioration alone, caused by latent structural defects . . . ." *See*, for example, *Chicago Heights*, 782 F.2d at 729. The fact that deterioration in an essential part of the structure caused damage to surrounding parts of the structure did not change the nature of the dispute from a mere failure of expectancy

interests (a breach of contract duty), or redesignate the injury as one to be remedied in tort. In terms reminiscent of this Court's *Conklin* decision, the point was made succinctly by the Virginia high court:

> The plaintiffs here alleged nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. The package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective -- one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure of the substandard parts to meet the bargained-for level of quality was to cause a diminution in the value of the whole, measured by the cost of repair. This is a purely economic loss, for which the law of contracts provides the sole remedy.

Sensenbrenner, 374 S.E.2d at 58. These courts recognize that the law of contracts provides protection of bargained-for expectations. The tort law duty of care, including that imposed by strict liability principles, comes into play only when physical injury has occurred, or when it can be said that damage has been sustained to property not linked to the contractual transaction.[33/]

There are other examples. The Minnesota Supreme Court recognized the fundamental failing in a component-by-component, "other property" argument, in *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.*, 354 N.W.2d 816, 820 (Minn. 1984), *overruled on other grounds* in *Hapka v. Paquin Farms*, 458 N.W. 2d 683 (Minn. 1990).[34/]

33/ Florida law, of course, already embraces tort recoveries in these circumstances. *See West v. Caterpillar, supra* and *Conklin v. Hurley, supra*.

34/ While the Westlaw service advises that *Hapka* overruled *Minneapolis Society* on other grounds, the Supreme Court of Minnesota apparently does not think so. Most recently, it noted both of these cases for precedential support in yet another economic loss rule case, without suggestion that *Minneapolis Society* was no longer good law. *See 80 South Eighth Street Limited Partnership v. Carey-Canada, Inc.*, 486 N.W.2d 393 (Minn. 1992).

> To hold that buildings constitute 'other property' would effectively overrule [Minnesota's economic loss rule] as to every seller of basic building materials such as concrete, brick or steel because the 'other property' exception [to the rule] would always apply. The UCC provisions as applicable to component suppliers would be totally emasculated.

See also Stuart v. Coldwell Banker Commercial Group, Inc., 745 P.2d 1284 (Wash. 1987) (en banc) (economic loss rule applied where condominium purchasers suffered damages to their decks and walkways through deterioration.)

Lest there by any doubt as to exactly what petitioners seek in these lawsuits, it is worth noting here that each of the petitioners primarily seeks recompense to repair or replace their homes, or to recoup lost value.[35/] These are classically "economic" losses, resulting from failed contractual expectations and embraced within the rule. *See East River*, 476 U.S. 858, 870 (1986); *Florida Power & Light Co. v. McGraw Edison*, 696 F. Supp. 617, 618, n. 3 (S.D. Fla. 1988), *aff'd without opin.*, 875 F.2d 873 (11th Cir. 1989); *Moorman Manufacturing Co. v. National Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982). That is, petitioners seek precisely the type of damages intended to be prohibited from a tort recovery -- damages which represent the "failure of the purchaser to receive the benefit of its bargain -- traditionally the core concern of contract law." *East River*, 476 U.S. at 870.

The "bargain," as noted earlier, is always a completed structure, whether a nuclear power plant incorporating component parts such as the turbines, or a home incorporating slab concrete. The rationale for focusing on the whole rather than fragmented parts was perhaps best captured in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 928-29 (5th Cir. 1987).

35/ *See* Toppino's Statement of the Case, *supra*. The other form of relief they seek is punitive damages, if given leave to pursue their claims in tort.

> In attempting to identify the product, our analysis leads us to ask what is the object of the contract or bargain that governs the rights of the parties? The completed vessels were obviously the objects of the contract. Shipco did not bargain separately for individual components of each vessel. We are persuaded that those same vessels that were the object of the contract must be considered 'the product' rather than the individual components that make up the vessels . . . . We see no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer. The buyer ordinarily has no interest in how or where the manufacturer obtains individual components. The buyer is usually interested in the quality of the finished product and is content to let the manufacturer decide whether to do all the work or delegate part of it to others.

The reasoning of *Shipco* was adopted by the First District in *American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 481 (Fla. 1st DCA 1991).

(e) The alleged hazardous propensity exception.

Petitioners urge the Court to adopt a new zone of tort recovery, freed from the restraints of the contractual expectation doctrine, in instances where a "risk" of personal injury exists. (Pet. brief at 21). For this proposition, petitioners invoke text from the *Seely* decision, several out-of-state decisions, and the Fourth District's pre-*FP&L* decision in *Drexel Properties*. They suggest that tort law should not be barred "prophylactically" in the absence of injury-in-fact, limited only to physical injuries which have already occurred. (Pet. brief at 22).

There are compelling reasons why the Court should not venture into the speculative world of inventing a tort duty by which material suppliers insure against wholly potential physical risks. Not the least of these reasons is that *Seely* does not in any way support petitioners' thesis.

Seely recognizes the line between actual physical injuries, which are compensable, in tort, and the mere prospect that physical injuries may occur at some future date, which are

deemed non-compensable. The relevant text of *Seely*, identified in the Court's opinion in *FP&L* and partially quoted by petitioners (Pet. brief at 21-22, n. 37), in no way suggests that anyone should have a cause of action in tort for possible prospective, but unrealized personal injuries, even against manufacturers subject to strict liability. *Seely's* discussion was a theory-based demarcation between products whose manufacture implicates safety considerations suitably satisfied in tort, and contractual arrangements made with product suppliers in which the bargain of the purchaser is eroded because the product fails to perform to the buyer's expectations.

A rejection of petitioners' position inheres pointedly in *East River*. There a risk of serious injury (or worse) would certainly have attended a breakdown of the vessel on the high seas. The high court surveyed the "intermediate positions" staked out by other courts on economic loss, and then had the following to say:

> The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage, Or it may be calamitous . . . But either way, since by definition no person or other property is damaged, the resulting loss is purely economic.

476 U.S. at 870 (emphasis added). By its express adoption of the rationale of *East River*, this Court too has rejected the "potential risk" of injury thesis. *FP&L*, 510 So.2d at 901-902. Taking its cue from *FP&L*, a Florida district court has adhered to the view that mere risk of injury does not suffice to establish a tort duty otherwise denied. *See American Universal Insurance Group v. General Motors Corp.*, 578 So.2d 451 (Fla. 1st DCA 1991) (defective oil pumps destroyed fishing vessel's engine while it was operating off the coast of Florida in the Atlantic Ocean).

The other decisions identified by petitioners to support their "potential injury" thesis provide even less authority. The federal district court decision which made an effort to predict Pennsylvania's strict liability law[36/] has been bluntly rejected by the Third Circuit. *See Aloe Coal Co. v. Clarke Equipment Co.*, 816 F.2d 110 (3d Cir. 1987). Later, Pennsylvania state court precedent itself rejected the risk of injury thesis. *REM Coal Co., Inc. v. Clarke Equipment Co.*, 563 A.2d 128 (Pa. Super. 1989).

The asbestos fire-proofing line of cases touched on by petitioners[37/] doesn't fit either. Asbestos litigation involves a product which in fact functions qualitatively quite well in the manner for which it was intended; that is, as a fire retardant material. *See 80 South Eighth Street Limited Partnership v. Carey-Canada, Inc.*, 486 N.W.2d 393 (Minn. 1992). The product, however, also creates an ongoing, present injury to humans who live and work in close proximity, based on the toxicity of asbestos. Expert analysis adopted by the courts consistently recognizes that present harm is occurring from asbestos contamination. *See Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 525-526 (Fla. 3d DCA 1985), *rev. denied*, 492 So.2d 1331 (Fla. 1986) (asbestosis is a disease caused by inhalation of asbestos fibers which become embedded in lungs).[38/]

36/ *Philadelphia Nat'l Bank v. Dow Chemical Co.*, 605 F. Supp. 60 (E.D. Pa. 1985).

37/ *City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986); *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987).

38/ Amicus Pulte reposes much reliance on a non-economic loss case arising in the insurance context for its risk of harm proposal. *Eljer Manufacturing, Inc. v. Liberty Mutual Ins. Co.*, 972 F.2d 805 (7th Cir. 1992) (Pulte's brief at 9-10, 15, 18). That case, however, simply construed a provision of an insurance policy with due regard for the purpose of such an agreement, which the court found encompassed coverage for the installation of a defective component into houses. 972 F.2d at 810. The court expressly distinguished the economic loss rule in the course of its analysis, thus effectively disclaiming any unintended use of its decision outside the insurance context. *Id.*

Another contention about insurance, on which petitioners and their friends place emphasis, is the fact that the mere possession of insurance by a materialman and manufacturer connotes coverage of any
(continued...)

Regarding *Drexel Properties*, two points are pertinent. First, it antedates the *FP&L* decision, and for the reasons noted earlier cannot be considered any longer as a viable precedent. Second, the rationale of *Drexel* is unsound. It focuses exclusively on a consumer-oriented remedial approach which is absolutely inconsistent with the long-standing doctrine that speculative damages are not recoverable either in contract or in tort. Many economic loss decisions express a sharp, analytical disagreement with *Drexel* and like decisions, because this minority view unreasonably discards well-founded rules of causation and injury that comprise the elements of a tort cause of action in favor of a zone of "speculative harm" theory for a special class of plaintiffs. The traditional elements of a tort cause of action are irreconcilable with a "risk" of injury theory of liability. "[I]t is not a tort to create risks; it is only a tort to cause damage." House and Bell, *The Economic Loss Rule: A Fair Balancing of Interests*, The Construction Lawyer, Vo. 11, No. 2 at 28, 31 (April 1991).

A major practical problem with the minority view is that it could well prove to be an exception which swallows the rule. The goal of a "risk" of injury exception is to encourage the repair of defects before injury results. If it works, though, the net effect is to award compensation simply for the repair and replacement of defective products. Thus, the intent of the economic loss rule -- not to import pure tort foreseeability into the traditional concerns of contract law -- becomes subsumed by a rule exception which carries with it an unmanageable, case-by-case judge or jury-made determination of whether a sufficient potential for injury was present in each given situation. This method of reaching the result

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38/(...continued)
particular risk of injury. It does not. Insurance companies can and do deny coverage based on the terms of their policies.

desired by petitioners is disruptive and unpredictable enough to commend against it. It becomes unthinkable when one considers the further complexity of relating the minority exception to Florida's embedded condemnation of damage awards based on speculation. *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918); *Douglas Fertilizers & Chemical Inc. v. McClung Landscaping, Inc.*, 459 So.2d 335, 336-37 (Fla. 5th DCA 1984).[39/]

Ultimately, the "risk" of injury position sought here is simply a recharacterized effort to recoup expenditures for repair, replacement and loss of product value, as the allegations of the complaints reveal. Any consumer safety underpinning from products liability law is absent. No bodily injury has been suffered, reinspection and restoration of the property has apparently taken place as a preventative to future injury,[40/] and there in fact exists no likelihood of future tort-compensable harm as a result of those repairs. That a building may have a shortened useful life, and may collapse fifty rather than one hundred years from now, hardly constitutes a present injury tort.

(f) The unequal bargaining power argument.

Petitioners' effort to avoid application of the contractual expectations doctrine next proceeds from a belief that the decision below has "expanded" the economic loss rule by applying it to homeowners outside the realm of a purely commercial transaction. (Pet. brief

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39/ The primary basis for an award of compensatory damages is compensation -- "That is, the objective is to make the injured party whole to the extent that it is possible to measure his injury in terms of money." *Fisher v. City of Miami*, 172 So.2d 455, 457 (Fla. 1965). The reasons for rejecting hypothesized possible damages include (1) the likelihood of inaccurate and highly speculative testimony, (2) the speculative nature of a prediction as to future damages, (3) the possibility of a "windfall" award for a particular plaintiff, (4) the likelihood of inequitable awards because future damages simply cannot be known in advance, and (5) the depletion of finite resources for truly injured persons deserving compensation. *Eagle-Picher*, 481 So.2d at 523-24 (Fla. 3d DCA 1985).

40/ The amicus briefs of Pulte and Babcock demonstrate this fact dramatically. Both have averted physical harm by correcting the very defects of which they complain.

at 26). This characterization of the Third District's decisions rests on petitioners' view that *FP&L* and its progeny were intended by the Court to be confined to considerations of unequal bargaining power. On top of this foundation, petitioners then construct a theory which incorporates (i) the assertion that Florida case law differentiates homeowners from other commercial interests, (ii) an absence of UCC warranties between homeowners and persons down the line who are not in privity, and (iii) an hypothesized absence of insurance by homeowners for these risks. Much of this construct is speculation, having no record support whatsoever. More importantly, though, there is a flaw in petitioners' formulation that, not unlike their charge against Toppino, causes it to sit on a defective foundation. That flaw is that neither *FP&L* nor the decisions to which it turned for analytical support display or imply an intent to limit the theory of contractual expectations solely to commercial transactions. The "intent" petitioners describe is theirs alone.

As a preliminary matter here, though, there is a doctrinal reason for the Court to forego the radical judicial step of imposing a distinctive division between contract and tort law based on the status of a class of plaintiffs as homeowners. That type of policy decision is routinely and properly a legislative task. The Florida Legislature has over the years provided effective statutory protections and remedies for at least one class of homeowners -- condominium unit owners. *See, e.g.*, § 718.203, Fla. Stat. (1991).[41/] Additionally, the state, counties and municipal governments have imposed minimum building codes to provide remedies against general contractors, subcontractors and design

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41/ The Casa Clara petitioners are in essence asking the Court to provide what the legislature could have but has never provided them. In particular, subsection 718.203(1)(e) provides an implied statutory warranty for 3 years on structural components for condominium owners. The other petitioners in essence ask the Court to do the legislature's job on their behalf. Amicus Polk County brashly described its need for Court intercession because of legislative limitations which they could appropriately alter or avoid through the legislative process.

professionals. *See* § 553.72, Fla. Stat. (1991). Petitioners are demanding a public policy ruling from the Court suitable for legislative enactment, despite the fact that such a ruling cannot be articulated with legitimate common law principles.

Then Chief Judge Grimes of the Second District recognized the inappropriateness of judicial law-making when facing the question of whether builders or developers should be held liable to remote purchasers for the diminished value of a home allegedly caused by defects in construction. *Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Development Corp.*, 369 So.2d 971 (Fla. 2d DCA), *cert denied*, 379 So.2d 210 (Fla. 1979). In *Strathmore*, the court was pushed by homeowners to extend the *Gable* rule to non-privity remote purchasers, based on an implied warranty cause of action. The court recognized this as an effort to apply the principle of strict liability in tort to diminished contractual expectations based on alleged latent defects in construction, and it turned away the attempt.

> Many unforeseen ramifications could arise should we opt for a rule holding builders or developers liable to remote purchasers for the diminished value of a home allegedly caused by defects in construction. If this step is to be taken, then we believe it should be accomplished by the legislature rather than by this court. We are unimpressed by appellant's argument that the uniqueness of condominium living requires a different rule than with respect to ordinary houses.

Strathmore, 369 So.2d at 973.

Passing the threshold, constitutional bar to the Court's treading on separation of power concerns when a legislative solution is totally accessible (if warranted), petitioners' advocacy position is flawed further because it ignores evolving common law. Petitioners endeavor to freeze judicial interpretation of the economic loss rule at an early point in its development. *FP&L* and *AFM* may not have involved homeowners, but decisions both before and after those cases, some of which have been previously cited in this brief, have

directly applied the economic loss rule to bar suits by homeowners in negligence and strict liability. *See Stuart v. Coldwell Banker, supra.; Foxcroft, supra; Redarowicz, supra; Sensenbrenner, supra; Chicago Heights, supra.*

In pursuing their theme in all directions, petitioners argue that homeowners need protection because they have unequal bargaining power. That argument relies heavily on common myth, and not fact or reason. There should be little doubt that a home purchaser can bargain with the general contractor, builder, developer or seller for warranty protection. Indeed, major developers often advertise the availability of express warranties for various periods of time, just as car or television manufacturers and retail outlets offer limited and enhanced express warranties.[42/]

Home purchasers are also free to enter into agreements with architects and design engineers to supervise and control the plans, specifications and actual construction of their homes, and thereby obtain commensurate responsibility. Homeowners also can, and do place structural and other inspection clauses in their contracts as "walk-away" clauses should inspections reveal problems or defects. They also can and do require protective bonds or purchase insurance.[43/]

The argument runs that homeowners or condominium dwellers are typically unsophisticated, and therefore are in need of special protection in their home purchases. This argument is naive and incorrect. For one thing, condominium units or homes cost significant sums of money, and for the very reason that they are "major" purchases in a

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42/ The availability of warranty protection may impose a higher sales price, but this is the very point of grounding contract law doctrines on bargained-for and allocated risks.

43/ Homeowner warranty insurance is available for precisely the risks that concern these petitioners. *See Harrow v. Remke Development, Inc.*, 573 So.2d 181 (Fla. 2d DCA 1991).

person's lifetime they command attention and responsibility co-extensive with their contractual expectations. Not to encourage all available forms of consumer protection, by eroding the economic loss rule, is to give sophisticated buyers an incentive not to act in their own self-interest. If created by the courts, contract-avoidance remedies can only establish disincentives to using available contract opportunities.

It should be remembered that home buyers also can and do engage attorneys. Those representatives certainly are well qualified to provide the legal sophistication that home purchasers allegedly lack, including information as to the availability and desirability of warranties, assignments of warranty rights, inspections and other protections.

There is another disturbing point of petitioners' position for which they offer no guidance. Where, if anywhere, would they have the Court draw a proper line among the varieties of home buyers? Should a new status-based cause of action in tort extend to all residential purchasers, including owners of major rental apartments, buyers of multi-million dollar condominium units, and corporate woodland retreats? Should it be tooled to apply only to home purchasers who can prove a lack of sophistication with warranty provisions, an inability to engage counsel, or a handicap that would prevent negotiation? If a remedy is created for home purchasers, should it not apply to other unsophisticated realty purchasers, such as newly-arrived immigrants who might buy a small building to operate a mom and pop-style restaurant or grocery?

The line-drawing concern here expressed is anything but remote. Various of the amici supporting petitioners seek the benefit of a new rule, but in no way fit petitioners' unsophisticated consumer paradigm. Babcock, Pulte Homes, ORIXgp and Polk County have all pled that they need court protection from themselves because they lack bargaining power. In the name of consumer protection principles, for example, the self-described

builder of "hundreds of thousands of homes in various areas of the United States" asks for judicial exclusion from contractual limitations. (See Pulte's brief at 1, 16-19). Whatever theory supports that request, surely equity, lack of sophistication or unequal bargaining power are not among its elements.

An abrogation of the economic loss rule, even for homeowners alone, would prompt more arbitrary line-drawing and engender more definitional arguments than those just mentioned. For example, the purchaser of a mobile home can not meaningfully inspect interior walls. If one of these residence dwellers suffered damage because the walls were improperly galvanized or affixed, and no other damage was caused, a Florida court might or might not hold that the home is a product for purposes of the Restatement (2nd) of Torts § 402A. But no recovery could be had for economic loss under any tort theory, unless the court were to decide that the mobile home is more like a permanent structure than a vehicle, or that wherever anyone lives is a "home." In that latter event, what is to be done with recreational vehicles and houseboats? Theoretically, an exception could be fashioned to apply only to primary residences, but on what principled basis could vacation homes be excluded?

The obverse of those hypotheticals is even worse. Suppose a new homeowner had hired an architect and general contractor during the building phase, and both had actually inspected construction of the house. The owner later complains, like the petitioners here, that reinforcing rods in the concrete walls rusted to cause structural weakness, a loss of value, and a risk of personal harm. Under petitioners' scheme, the owner would be entitled to recover for economic loss on a negligence theory even though the home was inspected, because the home would be deemed not to be a "product" and the homeowner would have

no § 402A claim. This further illustrates the unprincipled basis for creating a homeowner exception to the economic loss rule.[44/]

Contrary to the notion that homeowners as a class dwell in a distinctive cocoon of protection previously woven for them by the Florida judiciary, the position taken by petitioners would require the abrupt disavowal of many cases which have adhered to a privity requirement for the recovery of strictly contractual losses. When the New Hampshire Supreme Court recently took steps to create a policy-based implied warranty of habitability, it candidly conceded an absence of direct roots either in contract or tort duties. *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988). This Court should seriously question whether it is willing to throw out its duty-based precedents, in order to adopt a dubious legal distinction which has no foundation in either contract or tort.

Petitioners argue that the lack of a UCC warranty basis for recovery provides a reason to grant a negligence and a strict liability cause of action for homeowners. As noted earlier, in *Danforth* the Delaware Supreme Court has put this foolhardy reasoning to rest. As effectively summarized by one commentator, the imposition of tort liability on a remote material manufacturer such as Toppino "would effectively nullify several provisions of the Uniform Commercial Code intended to permit contracting parties to control their economic relations through the bargaining process." Barrett, *Economic Loss in Products Loss Liability Jurisprudence,* 66 Columbia Law Review 917, 958-59 (1966). This was a concern of this court in the *FP&L* decision.

44/ Navigating the borders of the exception that petitioners seek would require great dexterity. Massive uncertainty would be injected into the law governing these commercial transactions and losses. *See, e.g., Rardin v. T. & D. Machine Handling, Inc.*, 890 F.2d 24, 28 (7th Cir. 1989) ("contractual-type limitations on liability", such as the economic loss rule, are appropriate because they act as a brake against "for-want-of-a-nail-the-kingdom-was-lost liability").

> We note that the Uniform Commercial code contains statutory remedies for dealing with economic losses under warranty law, which, to a large extent, would have limited application if we adopted the minority view.

FP&L, 510 So.2d at 902.

If Toppino has allocated risks with a general contractor or other party, that allocation for product failures which cause mere economic losses should be respected. Otherwise, the fear prophesied in *East River*, that "contract law would drown in a sea of tort," 476 U.S. at 866, would be realized, as homeowners pick and choose whom to sue amongst contractors, sellers, design professionals and remote product manufacturers, regardless of whether and to what extent the owner has obtained agreements with any of those parties.[45/] Again, this concern is not conjecture. The record now before the court shows that, before suing Toppino, Johnson settled a suit against his owner/builder and pocketed an indeterminate sum.

The UCC deprivation argument made by petitioners also forgets that the Florida courts have already created an implied common law warranty of habitability based on contractual privity, and that the legislature has provided protections on behalf of some of their number -- the condominium unit owners. These statutory and common law causes of action are available to complement any express warranties which a prospective homeowner is free to negotiate.[46/]

45/ The risk that persons in privity, such as general contractors or developers, may not be in existence or available to sue is not a risk that suppliers and product manufacturers should be obliged to underwrite. Yet that is precisely what petitioners seek with their proposed expansion of risk foreseeability.

46/ Petitioners assert that "litigation efficiency" would be promoted by granting them a direct action against materialmen such as Toppino. *See* Pet. brief at 33, n. 55. One wonders why recovery efficiency should be considered at all. The so-called chain of warranties is the product of a bargained-for exchange of contractual duties by the parties, made available in elaborate ways through the UCC. Contractual allocations of rights and responsibilities enjoy constitutional protection that nowhere hinge on an "inefficient (continued...)

The least persuasive of petitioners' contentions is that insurance protection is not readily available to homeowners, but is readily available to Toppino for circumstances such as these. Nothing in this record indicates that suitable insurance for repair and loss of value is unavailable to home buyers. On the other side of the coin, however, the courts are legitimately concerned that a materials manufacturer or supplier would be compelled to insure against each and every conceivable use or misuse of its product, in every conceivable structure utilizing its product, no matter how great or small the use. *Compare FP&L*, 510 So.2d at 901.

Toppino suggests that insurance against latent defects to restore contractual expectation losses would in practice not be obtainable, at least not at a reasonable cost. Even if available, insurance for unlimited and undefined risks would greatly enhance the cost of products, to a point where they could not be used in less expensive housing. Thus, a materials manufacturer such as Toppino would not participate in less costly home building because it could never be certain of the nature of its liability, the length of time that liability would remain open, or the parties who might ultimately bring suit on a cause of action for defective concrete.

The lack of affordable insurance is a small facet of the problems, however, compared with the toppling of existing commercial relationships which the legislature has constructed. Faced with a prospective liability dilemma of the magnitude petitioners seek, Toppino could

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46/(...continued)
way to recover." *But see* Cheezem, *Economic Loss in the Construction Setting: Toward an Appropriate Definition of "Other Property"*, The Construction Lawyer, 21, 23 (April 1992).

In any event, one can hardly claim that the rule petitioners seek would foster litigation efficiency, even if that were a desirable goal. Direct action against a manufacturer or materialman would result in a cascade of indemnity and contribution claims back up the so-called chain of construction. The net effect, in terms of expenditure of judicial and party resources, would hardly be distinguishable from the present situation.

never count on expressed disclaimers of warranties with contractors or others with which it is in privity, since its ultimate responsibility (based on petitioners' new tort cause of action) would run to non-privity owners. Effectively, Toppino would be held to the same standard of supervisory responsibility for the use of its product that design engineers or architects assume in typical construction projects. One awkward effect of all this could be the concern noted in *Strathmore*, 369 So.2d at 973:

> It would be strange indeed if, when the original purchaser conveyed the property to another, that his vendee could resort to the builder for deficiencies in workmanship or materials which the original purchaser from the builder had accepted.

Finally on this point, it seems obvious that whatever policies suggest a change in the law, those policies cannot justify a result that puts a subsequent purchaser of a home in a better position than the original purchaser. *See Barrett, supra* at 921-22. Yet the rule petitioners seek would not invalidate the implied warranty of habitability given only to first purchasers in this state. Depending on how the Court frames any new tort remedy, subsequent purchasers might well find themselves better off with varietal tort claims than first purchasers more strictly confined. *See* Buening & Johnson, *The Economic Loss Rule, A Trial Lawyer's Guide to Protecting Contract Rights*, Florida Bar Journal at 38, 40 (April 1992).

The question recurs: should the Court give a tort remedy for contract damages to those who fail to bargain for a remedy in contract. *Id.* at 40; *Barrett, supra* at 932-33. The

answer must be no. The permutations and implications do not neatly lend themselves to judicial activism.[47/]

In the course of their discussion, petitioners make the additional observation that *caveat emptor* is no longer the law in home purchases in Florida. (Pet. brief at 30-31). This warrants only passing comment. The Court has rejected that doctrine in connection with the sale of new and used homes, by imposing on the seller a duty to disclose to the buyer all material facts effecting the value of the property which are unknown to the buyer and not readily observable. The rejection of *caveat emptor* is a contract-based conclusion by the Court that the former common law principle has no logical application to modern day home buying practices. *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985). The creation of a privity-based principle of contemporary jurisprudence does not recommend in favor of a rejection of the economic loss rule. To the contrary, the replacement of *caveat emptor* with a "seller's beware" credo operates first to reduce the need for home purchasers to be protected by any loophole in the economic loss rule, and second to reduce the class of home buyers which would require the Court's protection.

(g) The "no other remedy" rationale.

Petitioners argue that some remedy should be given homeowners who lack any contract options, because they are a deserving group. The lack of a contract remedy does not substantiate creating a cause of action in tort for economic losses against Toppino or material suppliers, however. *Latite Roofing Co., Inc. v. Urbanek*, 528 So.2d 1381 (Fla. 4th

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47/ Florida follows the "independent tort" rule. *E.g., Lewis v. Guthartz, supra.* If plaintiffs are permitted to seek punitive damages for "negligent infliction of economic loss," there would seem to be no rationale for continuing to inhibit those who allege contract breaches. To do so would make them worse off for having negotiated a contract.

DCA 1988), on which petitioners principally rely, is superficially appealing but far from convincing.

Petitioners advance *Latite* for the proposition that a plaintiff cannot be limited to a merely hypothetical cause of action in contract where the denial of a cause of action in tort would have the effect of leaving the plaintiff with no remedy against anyone for economic losses.[48/] Petitioners are in an odd position to make that assertion. In six of these seven consolidated cases, actual, viable contract claims have been brought against general contractors, architects, developers and banks. As a threshold or standing issue, consequently, this group of petitioners are hardly the ones to claim a *Latite*-form of relief.

But *Latite*-relief is not available to anyone in Florida. It had effectively been rejected by the *FP&L* decision, where the Court expressed the view that "the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting." 510 So.2d at 902. In making this statement, and in adopting the rationale of *East River*, the Court evidently concluded that the absence of a contract-based remedy does not alone open the door in any particular setting to a cause of action in tort. *East River* was a non-privity case where the absence of a tort cause of action against the defendant in fact left no viable cause of action against that

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48/ *Latite* is really ambiguous as to the existence of "no other" remedy, and not directly on point for these petitioners. It involved a suit against only one defendant, and it provides no insight as to whether a cause of action was available against some other defendant. The court observed in passing on another issue, that the plaintiff had a contract with a prior owner of the shopping mall which Latite Co. defectively roofed. Instead of addressing the plaintiff's inability to seek recompense against anyone, the court decided the case on the basis of plaintiff's lack of any contract remedy against this one defendant.

> [T]he complaint is cast in negligence, which appears to be [plaintiff's] sole theory upon which recovery can be had against Latite.

528 So.2d at 1383. This case is not authority for a broad-brush, "no remedy" exception to the contractual expectation doctrine, and it cannot be factually aligned in that regard with the cases in fact brought by these petitioners.

defendant or others. The Court's approval of *GAF Corp.* and *Cedars of Lebanon* also evidences an approbation of using the economic loss rule in the non-privity setting. Why these points did not command the Fourth District's attention in *Latite* is not so important as the recognition that the Court would be forced to recede from the integral parts of *FP&L*'s *ratio decidendi* should it now allow a tort cause of action to emerge solely from an absence of contract remedy.

Added to this history is the Court's express reliance in *FP&L* on the underlying importance of replacing a tort duty of care with "the freedom of bargaining and negotiation" available in contract. *FP&L*, 510 So.2d at 901. That doctrinal underpinning can only be read to embrace the conclusion that it is not the existence of actual contractual remedies which will control in any given circumstance, but rather the opportunity to reach contractual accord over product value and quality. The injection of *Latite*-relief into the economic loss rule would throw a serious monkey wrench into the policy rationale of encouraging and honoring negotiation and bargaining. Under *Latite* or any more extreme version of the same, it would behoove home purchasers to pay a lesser price, abjure warranty protection, and sit idly by with the knowledge that any latent defect which crops up can nonetheless be cured at a remote suppliers' expense. The low- or no-bargain approach becomes an inducement, because the courts will have stepped in to "fix" the problem.

In short, a "no alternative remedy" exception would replace negotiation and foster purchaser complacency. Petitioners' contention that a "no alternative remedy" exception

should be adopted is no more than an effort to exact from the Court a belated insurance policy for those purchasers who fail to contract for a remedy when they had the chance.[49/]

Nor can the Court ignore the critical distinguishing feature in *Latite* and in the *Moyer* decision.[50/] They are service cases, wholly distinct from Toppino's provision of a product for incorporation into structures under the control of others who provide services to the owner. *Moyer*, in fact, represents a situation 180 degrees different from Toppino -- liability of a supervisor, as opposed to the liability of a person who was supervised.

(h) No special circumstances should change the rule in the construction setting.

As a final point, petitioners make a serious effort to compare the construction context of Toppino's business to those cases which involve the rendition of professional services.[51/] The comparison rests on the premise that Toppino's manufacture of concrete for sale to builders is analogous to providing a professional service, in the vein of services provided by the accountant in *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So.2d 9 (Fla. 1990), or the abstractor in *First American Title*, 457 So.2d 467. A number of courts have recognized, however, that a contract for the manufacture and supply of concrete constitutes a UCC contract for the sale of goods. *S.J. Groves & Sons Co. v. Warner Co.*, 576

49/ *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla. 1973) is also cited as supporting the no remedy exception. There a general contractor was permitted a cause of action for the alleged negligent supervision over an architect. *Moyer* has been reconciled with application of the economic loss rule by recognizing that the supervisory architect in *Moyer* possessed absolute authority over the work of the contractor, such that he was essentially a guarantor of the contractor's performance. *See First American Title Insurance Co. v. First Title Service Co.*, 457 So.2d at 467; and see *Rardin*, 890 F.2d at 29, noting that cases like *Moyer* are distinct because the defendant's role is "precisely, to guarantee the performance of the other party to the plaintiff's contract, usually a seller. The guaranty would be worth little without a remedy, necessarily in tort . . . against the guarantor."

50/ See n. 49 above.

51/ The goal of this argument, interestingly, seems to be a foreswearing of the mere foreseeability test urged in earlier passages of petitioners' brief.

F.2d 524, 528 (3d Cir. 1978); *Bevard v. Howat Concrete Co.*, 433 F.2d 1202 (D.C. Cir. 1970); *Maryland Supreme Corp. v. Blake Co.*, 389 A.2d 1017 (Md. 1977); *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete*, 350 N.E.2d 321 (Ill. App. Ct. 1976).

In any event, the analogy to *Max Mitchell* and *First American Title* is a coarse one. In *Max Mitchell*, the Court adopted the rationale of Section 552, *Restatement (2nd) of Torts* (1976), to hold that an accountant is liable in negligence to a person with whom he may not have been in contractual privity but with whom he had direct, personal contact relating to the services he provided. In that case, an accountant utilized his expertise in direct negotiations with a bank for the purpose of obtaining a loan on behalf of the accountant's client.[52/] The accountant's opinion of the client's business fortitude was faulty, and the client's default on the loan followed in due course. The Court noted the heavy reliance upon audited financial statements in the contemporary financial world and concluded that, in circumstances where the accountant knows that particular persons intend to rely on his opinion, a negligence cause of action lies in their favor for the breach of a tort duty. On this basis, the Court determined that a privity restriction on liability was inappropriate. The Court also relied on its opinion in *First American Title*, which had upheld a non-privity tort cause of action against an abstractor who had known that third persons such as title insurers would rely on the abstractor's opinion. 558 So.2d at 14.

Significantly, the Court expressly stated in *First American Title* that it "found unpersuasive the asserted analogy to cases of products liability," and it "distinguished *A.R. Moyer, Inc.* on its facts." *Id.* Given the Court's differentiation of *Moyer* and its separation

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52/ The Court emphasized that the tort feasor accountant "actually negotiated the loan on behalf of his client . . . [by personal delivery] with the knowledge that [the bank] would rely upon [the financials] . . . [and] vouched for the integrity of the audits . . . ." 558 So.2d at 16.

in principle from the products liability doctrine, it is difficult to find any link between the service professional cases and the posture of a product manufacturer like Toppino.

Petitioners attempt to bridge this chasm first by arguing that Toppino is in a role of "mutual reliance or dependence" in the so-called "chain of construction" identified in *E.C. Goldman, Inc. v. A/R/C Associates, Inc.*, 543 So.2d 1268 (Fla. 5th DCA), *rev. denied*, 551 So.2d 461 (Fla. 1989). (Pet. brief at 38). The chain of construction mutual dependence theory argued by petitioners ignores entirely the concern that Toppino might be held liable to parties outside this chain, such as subsequent owners, as well as those in the chain, if a foreseeability test is applied. The ultimate, suing consumer is very likely to be unlinked from the original chain in this era when a house or condominium is often purchased and resold for investment, or simply sold as jobs are lost, moved, or upgraded.

More fundamentally, there is really no validity to petitioners' contention that Toppino was akin to a professional services provider in these transactions. This argument proceeds from an assertion that the concrete supplied was uniquely tailored by Toppino to each building, and that in doing so Toppino added "service" to the mix. This assertion fails analytically, for it ignores the realities of home construction.

Analytically, a concrete manufacturer no more adds a "service" to his mix than a truss manufacturer adds a service to create the specific size trusses to be in any particular building. Both of these products are tailored to the job. And just as Toppino mixed the water and sand and aggregate to the specifications of a supervising professional who ordered the cement, so too does the truss manufacturer tailor its product to the orders of those professionals. *Compare GAF Corp. v. Zack Co.*, 445 So.2d 350 (Fla. 3d DCA) *rev. denied*, 453 So.2d 45 (Fla. 1984), holding that no tort duty exists for roofing manufacturer

which pulls a manufactured product off the shelf to supply construction sites, based on the specific demands of general contractors or design professionals.

Following the design mix orders of others is hardly a basis on which to saddle Toppino with a tort duty grounded on alleged, reliance-inducing behavior. Unlike the accountant in *Max Mitchell*, the abstractor in *First American Title*, or the supervisory architect in *Moyer*, Toppino did not control or influence the conduct of any other participant in the transaction. Toppino was not in a practical position to question the mix-strengths ordered. The strained analogy between Toppino's role and the accountant's role in *Max Mitchell* underscores the lack of any reason to create a corresponding tort duty for Toppino.

2. Toppino did not Possess a Duty of Compliance with any Building Code.

Petitioners wrongly contend that Toppino violated section 553.84, Florida Statutes (1991) -- the Florida Building Codes Act ("Act"). They base their assertion on a double-derived incorporation from the Monroe County Building Code, the Standard Building Code, and so-called ACI standards. None of these impose a construction-related duty of compliance on material manufacturers such as Toppino, however, expressly or by reference.

By the plain words of the statute, product manufacturers such as Toppino are excluded from coverage under the state building code. Section 553.79(1) of the Act charges persons with a duty of code compliance if they "construct, erect, alter, repair or demolish any building." Petitioners' operative pleadings concededly allege only that Toppino "manufactured and supplied the concrete." (Pet. brief at 44). This allegation does not match the categories of persons covered by the Act. The doctrines of *expressio unius est exclusio alterius* and plain meaning operate to exclude from a precise legislative catalog

persons and groups who are not specifically included. *Thayer v. State*, 335 So.2d 815 (Fla. 1976).

Petitioners endeavor to overcome this omission of suppliers and product manufacturers by reference to the legislative statement of intent incorporated in the Act, and to the Third District decision in *Sierra v. Allied Stores Corp.*, 538 So.2d 943 (Fla. 3d DCA 1989), which they say extends the Act's coverage to all persons "committing" violations of the law. (Pet. brief at 44). When all provisions of the Act are considered together, however, and the Third District's decision is more acutely analyzed, petitioners' argument evaporates.

As regards the Act, the "intent" provision is amphorous and unavailing for petitioners. Section 553.72, Florida Statutes (1991), states that "[t]he purpose and intent of this Act is to provide a mechanism for the promulgation, adoption and enforcement of state minimum building codes to cover all phases of construction . . . ." There is a complete absence of other language which would apply the Act to manufacturers and suppliers of component products.

As regards *Sierra*, that court held only that a contractor and an owner may be found responsible for a code violation if the Act expressly applies to owners and contractors. No question arose in *Sierra* concerning the liability of a supplier or parts manufacturer -- a party not covered by this law -- for construction violations. Indeed, the court answered in the negative the question of whether an owner was responsible for code violations resulting from the work of an independent contractor not hired by the owner who was also sued under the Act. 538 So.2d at 943-44.[53/]

53/ It is noteworthy that there obviously was no thought by the Third District itself, in its *Casa Clara* decision, that the court was acting at odds with the court's earlier *Sierra* decision.

Since the state statute does not encompass Toppino, as the district court below expressly stated, petitioners move on to contend that Toppino violated the American Concrete Institute Building Code Requirements for Reinforced Concrete (ACI 318-77).[54/] (Pet. brief at 44). This ACI promulgation was incorporated by reference into the "Standard Building Code" which, in turn, was incorporated by reference into the Monroe County Building Code. The attempt to bring Toppino under the Monroe County Building Code by incorporation of the incorporation has several problems. The language of the Monroe County Building Code is the first. Section 6-55(12) of the Code states that it does not apply to

> any person who only furnishes materials or supplies without fabricating them into, or consuming them in performance of the work of the contractor.

Toppino furnished materials and supplies to particular locations, but it never acted in performance of the work of the contractor; that is, it never performed construction work. Express language of the Standard Building Code, incorporated by reference into the Monroe County Building Code, placed no compliance duties on Toppino. The applicable 1976 version of that code applied only to the "construction, alteration, repair, equipment, use and occupancy, location, removal and demolition, of every building or structure. . . ." § 101.3, 1976 Standard Building Code. Section 105.1 of that code identifies owners, their authorized agents, or contractors, as being subject to its requirements, but not product manufacturers.

Petitioners' argument devolves down to an assertion that Toppino had a duty to comply with ACI 318 by "incorporation," as part of the Monroe County Building Code. The

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54/ The codes and standards discussed in this section are found at *Ontario* R. 497-600.

fact is, ACI 318 was never validly incorporated into or became that code. The Standard Building Code does incorporate ACI 318 by reference (see section 1601 of the 1976 Standard Building Code), but section 6-16 of the Monroe County Building Code never specifically references nor adopts ACI 318 by name, or otherwise. It adopts only the "Standard Building Code."[55/]

Petitioners argument on this point boils down to this: the state statute provides a remedy for violation of local building codes; the Monroe County Code adopts by reference the Standard Building Code; the Standard Building code "picks up" ACI 318; and despite the limitations on scope of coverage of the Monroe County Code, the Standard Building Code and state law, Toppino should be covered as to ACI 318 because, without any express indication, it is silently weaved into the Monroe County Code. This syllogism cannot assign coverage under ACI 318 to Toppino for the fundamental reason that judicial doctrine in Florida requires more. The absence of a specific, clear incorporation of ACI 318 by name in the Monroe County Building Code renders this alleged embodiment invalid, and unenforceable. *See Goodman v. Kendall Gate Investco, Inc.*, 395 So.2d 240, 241 (Fla. 3rd DCA 1981), where the court held adopting statutes must identify a reference statute or other material "by specific and descriptive terminology."

The *Goodman* decision, which involved just the situation of code incorporation that exists here, holds that this descriptive mode of reference is particularly appropriate when an allegedly incorporated code or standard constitutes a derogation from common law principles. *Id.* In *Goodman*, the silent incorporation by reference stretched by reference

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55/ Section 6-16 of the Monroe County Building Code states: "The Standard Building Code, as presently adopted by the Southern Building Code Congress International, Inc., and all future revisions thereto, are hereby adopted as the county building code and shall be applicable to all buildings within the unincorporated areas of the county, unless expressly rejected or modified by the board of county commissioners by ordinance."

from the Metropolitan Dade County Code through the South Florida Building Code to OSHA Standards. *Id* at 241. That is just the circumstance here. Yet petitioners would have ACI's "silent" incorporation of ACI 318 into the Monroe County Building Code, through its adoption of the Standard Building Code, create a tort cause of action against Toppino in derogation of the common law doctrine which otherwise bars recovery in the absence of privity.

The *Goodman* bar to petitioners' thesis is only one facet of the problem that petitioners cannot overcome. ACI 318, by its terms, expressly does not apply to manufacturers. Section 1.1.1 of ACI 318-77 states that:

> This Code provides minimum requirements for design and construction of reinforced concrete structural elements. . . .

The authors of ACI 318 explained in their *Commentary on Building Code Requirements for Reinforced Concrete (ACI 318-77)*, that ACI 318 was intended to impose duties of compliance only on architects, engineers and contractors. The inspection of concrete construction is the responsibility of engineers or architects, and contractors are not relieved of their responsibility to judge whether the quality of the work is in compliance with contract documents, including the requirement "to see that concrete is of the correct quality, properly placed and cured; and to see that tests for quality control are being made as specified." § 1.3.1, p. 9. In short, ACI 318 does not purport to reach to manufacturers delivering concrete to a construction site. Its discussion of those parties responsible for concrete quality and fitness for intended use makes no mention of concrete manufacturers.

Case law, as well, supports the view that manufacturers like Toppino are not responsible parties under building codes. In *Mastrandrea v. J. Mann, Inc.*, 128 So.2d 146

(Fla. 3d DCA 1961), *cert. denied*, 133 So. 2d 320 (Fla. 1961), the court specifically held that a building code imposed no duty of compliance on a material supplier which delivered cement blocks to a job site, but stacked them in violation of an applicable building code. *Id.* at 147-48. The obligation for stacking in violation of the building code rested with the general contractor and masonry subcontractor, not the supplier.

In any event, ACI 318 is also not operative here because it does not impose restrictions on the amount of sodium chloride in aggregates or in concrete -- the problem which petitioners would lay at Toppino's feet. ACI 318 did not contain chloride content limitations in concrete until 1983, and the Standard Building Code did not contain any such limitations until 1985, long after these buildings were constructed.[56/]

For this host of reasons, the decisions of the Third District in *Casa Clara* and *Chapin* properly affirmed the trial court's dismissal with prejudice of the building code counts against Toppino. The district court correctly determined as a threshold matter that there was no building code which applied to Toppino in its role as manufacturer.

Recap of Arguments

Petitioners argue that homeowners should be given a tort remedy against materialmen and suppliers because they often do not have a remedy of any nature when repair, replacement and loss of value damages are suffered from latent defects. The argument is made that homeowners are unsophisticated consumers who cannot protect themselves through contract.

56/ The only restriction remotely related to petitioners' allegations is defined as "injurious amounts of salts in the water used in mixing" the concrete, not in the aggregates or total mix consisting of cement, aggregates and water which comprise the concrete. *See* § 3.4.1, ACI 318-71, 77. Since ACI 318 does not prohibit concrete or aggregates from containing injurious levels of salts, Toppino can only stand in violation of ACI 318 if its mixing water alone contained these injurious levels. Petitioners' complaints make no such allegation, however.

The argument made by petitioners is theoretical, of course, sprinkled with commonly-held notions of unsophisticated homeowners, fly-by-night general contractors, and debt-ridden, bankruptcy-prone developers. The Court should not resort to this speculation in analyzing the equities and policy considerations that will shape a rule of law in this area. There are facts aplenty, in even these very modest records, with which to test petitioners' hypotheses. Those facts, and not petitioners' fantasies, reveal quite a different picture than that which petitioners have portrayed.

Mr. Johnson, one of the seven petitioners, has already used existing and traditional non-tort means to recover and pocket money received from his owner/builder. As a home and lot owner in Monroe County, he fits the description of petitioners' hypothetical, hapless homeowner, yet he obviously was not so unsophisticated as to have lost the opportunity for a contract remedy.

The unit owners in the Casa Clara complex have contract claims pending not only against 15 partner-developers of their project, but three very substantial financial institutions they assert have stepped into the shoes of the developer when the partnership failed. These unit owners also have claims pending against an architect, two engineers and one general contractor for breach of implied statutory and common law warranty, among other things. However unsophisticated they may have been before they bought their condominium units, they now appear to have acquired considerable sophistication in pursuing recompense for their repairs. Others among the petitioners have shown similar ingenuity.

These examples from the record of this proceeding demonstrate that, even without the considerable protections given to condominium unit owners by state statutes -- a situation which takes the Casa Clara dwellers completely out of any category of unprotected buyers -- homeowners as a class cannot be portrayed as so helpless as to require their own,

new tort against materialmen and suppliers. The hypothetical foundation for petitioners' argument that homeowners as a group are remediless, and that traditional contract relief is not available, is belied by facts in these very proceedings. Petitioners would have these cases decided on the basis of: "do as I say, not as I do." That maxim provides poor guidance for children; it provides worse grounding for Supreme Court precedent.

Conclusion

Courts and commentators continue to struggle to define the boundary between tort and contract. The opinions of this Court and the United States Supreme Court, as well as the best reasoned writings of other courts and commentators, require focusing on the duty and interest sought to be protected, not exclusively on the damages suffered or the possibility that someone may be injured. Quality is best protected by contract; safety by tort.

To rule otherwise here would allow indeterminacy to become a rule which overwhelms the freedom of parties to contract. Law devolves into an *ad hoc* process, unpredictable and unworthy of respect, when such result-oriented rules hold sway. As one prescient commentator put it in 1966

> [i]t would indeed be ironic if the tort doctrine which was evolved to rescue the personal injury area from the 'intricacies of the law of sales' were to imprison the economic loss area with inapposite tort concepts.

See Note, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages - Tort or Contract?*, 114 U. Pa. L.Rev. 539, 549 (1966). Such imprisonment would surely result from the scheme that petitioners and their amici propose.

The court should affirm in their entirety the decisions of the Third District in *Casa Clara* and *Chapin*.

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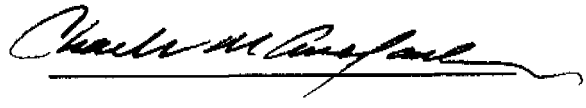

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