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## Florida's Economic Loss Rule: Will it Devour Fraud in the Inducement Claims When Only Economic Damages Are at Stake?

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## I. INTRODUCTION

The District Courts of Appeal in Florida have recently been confronted with the issue of whether the economic loss rule ("ELR") should bar recovery of economic losses suffered from independent fraud in the inducement claims. Every court which has faced this issue, other than the Second District Court of Appeal, has concluded that the ELR should not bar tort recovery for fraud in the inducement claims.<sup>1</sup> This article explores the conflicting application of the

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1. Following the writing of this article and immediately prior to publication, the Supreme Court of Florida decided this issue. Where possible, the author has incorporated the holding of this recent decision into the discussion of this article.

ELR in Florida courts to intentional, independent torts, such as fraud in the inducement, and the issues which ultimately led to the Supreme Court of Florida's decision that the ELR will not bar such claims.

Part II of this article briefly explores the history of the ELR. In order to provide a more thorough understanding of the ELR, Part II is broken down into subsections which discuss the elements of the ELR, exceptions to the ELR, and the reasons for the ELR's existence. Part III provides an overview of the independent, intentional tort exception to Florida's ELR by concentrating on the factors which define these torts and more specifically concentrates on the tort of fraud in the inducement. Part IV evaluates the ELR and fraud in the inducement as they have been applied in recent 1995 and 1996 cases. Finally, Part V concludes with an analysis of the reasons why the ELR has not been expanded to bar fraud in the inducement claims.

## II. BRIEF HISTORY OF FLORIDA'S ECONOMIC LOSS RULE

The question most often asked in discussions on Florida's ELR is, what does it do? Although the parameters of the ELR are hazy, stated simply, the ELR prohibits recovery in tort for economic damages arising under contracts for goods or services, unless there is personal injury or damage to other property.<sup>2</sup> Despite the specific language of the ELR, there is no clear answer that explains exactly how the ELR should be applied. As one commentator wrote, "it is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss [rule]."<sup>3</sup> In order to thoroughly understand the fundamentals of the ELR, an analysis of each element of the ELR is required.

### A. *Elements of the Rule*

The first part of the ELR prohibits tort recovery for contracted goods or services.<sup>4</sup> Tort recovery is an alternative form of recovery that a party to a contract may seek instead of relying upon a breach of contract form of recovery.<sup>5</sup> Florida courts have distinguished between unintentional torts, i.e.

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2. *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1245 (Fla. 1993).

3. Paul J. Schweip, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (Nov. 1995).

4. *Casa Clara*, 620 So. 2d at 1245 (citations omitted).

5. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla. 1987) (holding that parties to a contract can only seek tort damages if conduct occurs that establishes a tort that is distinguishable from or independent of the breach of contract). *See also* *Atkinson v.*

negligence, and intentional tort claims.<sup>6</sup> Until recently, negligence was the only tort claim barred by the ELR, when unaccompanied by damage to other property or bodily injury.<sup>7</sup> However, in the landmark case, *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*,<sup>8</sup> the Supreme Court of Florida strictly applied the ELR and refused to observe a previous exception, which had permitted negligence claims by those not in privity with the contracting parties, in the absence of any other remedy.<sup>9</sup> Presently, the ELR bars negligence claims and certain intertwined intentional tort claims for contracted goods or services, even by parties lacking privity.<sup>10</sup>

The second part of the ELR provides exceptions which allow tort recovery for contracted goods and services when there is personal injury and/or other property damage.<sup>11</sup> While personal injury is easily recognizable, "other property" has defied easy description.<sup>12</sup> The courts in *East River Steamship*

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Orkin Exterminating Co., 625 P.2d 505, 511 (Kan. Ct. App.), *aff'd*, 634 P.2d 1071 (Kan. 1981) (explaining that the difference between a tort and a contract action is that a breach of contract is a failure to perform a duty arising under or imposed by an agreement; whereas, a tort is a violation of a duty imposed by law).

6. See *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113, 1116 (M.D. Fla. 1990).

7. See *Casa Clara*, 620 So. 2d at 1246; see also *Sandarac Ass'n Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352 (Fla. 2d Dist. Ct. App. 1992). In *Sandarac*, the court explained that historically the courts have limited the interest protected in negligence to interests concerning the safety of one's person and property. *Id.* The court stated that to allow an exception to the ELR by allowing recovery for negligence claims would be to allow an actual expansion of negligence law to protect interests not traditionally protected in negligence law. *Id.*

8. *Casa Clara*, 620 So. 2d at 1244.

9. *Id.* at 1248 (overruling *Latite Roofing Co. v. Urbanek*, 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988)). In *Latite*, the defendant/appellant, Latite Roofing Co., was the roofing contractor on the construction of a shopping center. Latite constructed most of the roof area on the shopping center before being compelled to stop work. The plaintiffs/appellees, Urbanek and Kohl, purchased the center after work had been stopped and before Latite finished construction. Urbanek and Kohl sued Latite seeking damages for the negligent construction and installation of the roof. Relying on the Supreme Court of Florida's decision in *AFM*, the court held that use of the ELR to bar tort claims for only economic loss applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss. *Latite*, 528 So. 2d at 1383. The court explained that due to the fact that the parties lacked privity, no alternate theory of recovery existed and, therefore, the ELR could not bar recovery for the plaintiffs' pure economic loss. *Id.* at 1382-83.

10. See *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1199-200 (11th Cir. 1994).

11. *Casa Clara*, 620 So. 2d at 1245 (citations omitted).

12. *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 9 (Fla. 5th Dist. Ct. App. 1994). The court stated: "[w]hat constitutes damage to 'other property' is sometimes a puzzling circumstance to determine in resolution of economic loss cases." *Id.*

*Corp. v. Transamerica Delaval, Inc.*,<sup>13</sup> and *Casa Clara*<sup>14</sup> have attempted a practical definition.

In *East River*, the United States Supreme Court was asked to decide “whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss.”<sup>15</sup> In this case, a shipbuilder contracted with the respondent to design, manufacture, and supervise the installation of turbines in four supertankers. After the ships were built, the turbines on all supertankers malfunctioned due to design and manufacturing defects. The Supreme Court held since each turbine was supplied as an integrated package, regarded as a single unit, the product only damaged itself.<sup>16</sup>

Initially, damage to other property provided a narrow exception to the ELR.<sup>17</sup> In *Casa Clara*,<sup>18</sup> however, the Supreme Court of Florida strictly applied the ELR to bar recovery of economic losses to condominium owners whose condominiums were built with defective concrete.<sup>19</sup> The concrete supplied by the defendant, Toppino, contained a high content of salt that caused the reinforcing steel inserted in the concrete to rust, which, in turn caused the concrete to rust and break off.<sup>20</sup> The plaintiffs owned condominium units and single-family homes built with, and allegedly damaged by, the concrete.<sup>21</sup> The Supreme Court of Florida was confronted with the issue of “whether a homeowner [could] recover for purely economic losses from a concrete supplier under a negligence theory.”<sup>22</sup>

In its landmark decision, the Supreme Court of Florida held that because there were no personal injuries and no other property was damaged, the homeowners could not recover in tort.<sup>23</sup> The court explained the damage to

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13. 476 U.S. 858, 867 (1986). *East River* was a landmark case that involved an admiralty action concerning products liability and the ELR. *Id.* at 858.

14. *Casa Clara*, 620 So. 2d at 1244.

15. *East River*, 476 U.S. at 859.

16. *Id.* at 867. The Supreme Court stated “[s]ince all but the very simplest of machines have component parts, [a contrary] holding would require a finding of ‘property damage’ in virtually every case where a product damages itself.” *Id.*

17. *Casa Clara*, 620 So. 2d at 1244.

18. *Id.*

19. *Id.* at 1245.

20. *Id.*

21. *Id.*

22. *Casa Clara*, 620 So. 2d at 1245.

23. *Id.* at 1247. *Casa Clara* is a landmark case not only because the Supreme Court of Florida failed to apply the other property exception, but also because the homeowners were not in privity with the defendant and they lacked contractual remedies. *Id.*

other property exception by stating “[t]he character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant.”<sup>24</sup> The Supreme Court of Florida further explained that since the concrete was an essential part of the house, which the buyers had bargained for, the concrete did not injure “other” property; therefore, the other property exception did not apply.<sup>25</sup> As can be identified from the above descriptions, both of these cases have held that when pure economic loss is suffered due to one component of an integrated product injuring another component, the ELR will apply.

### B. *Rationale*

The ELR is based on both policy and practical considerations. The policy underlying the ELR is that parties have the power and should protect against the risk of economic loss, from breach of contract based on failure of the product or services to perform as expected, during contract negotiations through warranty provisions and price adjustments.<sup>26</sup> Then, in the event of a breach, the parties should recover based on the provisions which were bargained for, rather than attempting to recover under tort law after the breach.<sup>27</sup>

The practical basis for the ELR is judicial economy.<sup>28</sup> Some justices may view the ELR as a tool to clear their dockets because the ELR is a bright line rule and it can be applied as a matter of law, rather than when the courts become bogged down with the prima facie elements of torts.<sup>29</sup> Justices are reluctant to find an exception to the ELR for independent torts, such as fraud in the inducement, because cases can be expedited faster when causes of action are a matter of law.<sup>30</sup>

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24. *Id.* (citations omitted).

25. *Id.*

26. See *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987); *Casa Clara*, 620 So. 2d at 1246 (“The rule is ‘the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.’”) (citations omitted). See also *Strickland-Collins Constr. v. Barnett Bank*, 545 So. 2d 476, 477 (Fla. 2d Dist. Ct. App. 1989) (holding Florida will not create a tort duty allowing for economic loss recovery, “where the litigants have allocated the various risks of their bargain by contract.”).

27. *Id.*

28. Interview with Theresa Montalbano Bennett, Esquire, in Ft. Lauderdale, Fla. (June 6, 1996).

29. *Id.*

30. *Id.*

The cases that have invoked the ELR have consistently demonstrated the rationale that contract negotiations and warranty law are the appropriate vehicles to remedy breaches that result in purely economic loss. This rule is a fairly recent development of contract law, in that, the United States Supreme Court laid its foundation only ten years ago in *East River*.<sup>31</sup> Shortly after the United States Supreme Court articulated the rule in 1986, the Supreme Court of Florida added the rule to Florida common law in 1987 in the *Florida Power & Light v. Westinghouse Electric Corp.* decision.<sup>32</sup> However, in *Florida Power & Light*,<sup>33</sup> the Supreme Court of Florida acknowledged that the doctrine was “not a new principle of law in Florida,” but rather stemmed from the fundamental privity requirements of contract claims.<sup>34</sup>

In *Florida Power & Light*, the Supreme Court of Florida rejected the negligence claim of Florida Power & Light (“FPL”), which arose out of a contract between FPL and the defendant, Westinghouse Electric Corporation. (“Westinghouse”).<sup>35</sup> FPL brought suit claiming Westinghouse was liable for breach of express warranties in the contract and for negligence.<sup>36</sup> The Court dismissed FPL’s tort claim on the ground that Westinghouse had no duty under either a negligence or a strict products liability theory to prevent a product from causing economic loss only.<sup>37</sup>

The *Florida Power & Light* court looked to the seminal United States Supreme Court ELR case, *East River*, for guidance.<sup>38</sup> In *East River*,<sup>39</sup> the United States Supreme Court held that, “[d]amage to a product itself is most naturally understood as a warranty claim.”<sup>40</sup> The Supreme Court examined the policy grounds for the ELR and noted “we must determine whether injury to a

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31. *East River*, 476 U.S. at 858.

32. *Florida Power & Light*, 510 So. 2d at 902.

33. *Id.* at 899.

34. *Id.* at 902. See also *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739–40 (11th Cir. 1995) (explaining the court’s 1987 decision in *Florida Power & Light*). In *Florida Power & Light*, the court stated, “the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting.” *Florida Power & Light*, 510 So. 2d at 902.

35. *Florida Power & Light*, 510 So. 2d at 902. FPL and Westinghouse entered into a contract, whereby, FPL was to purchase six steam generators from Westinghouse. *Id.* at 900. FPL discovered leaks in the generators and brought suit. *Id.*

36. *Id.*

37. *Id.* at 901–02 (citing *East River*, 476 U.S. at 858).

38. *Florida Power & Light*, 510 So. 2d at 901.

39. *East River*, 476 U.S. at 858. The plaintiff purchased turbines which were found to be defective resulting in damage to only the turbines themselves. *Id.* at 860.

40. *Id.* at 872.

product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts.”<sup>41</sup> The Supreme Court determined that warranty law provides the purchaser with the benefit of his/her bargain and thus, sufficiently protects the public’s interests.<sup>42</sup> Based on this analysis, the *East River* court determined that when the only injury claimed is economic loss, whether stated in strict liability or negligence, there shall be no products liability claim.<sup>43</sup> The Supreme Court noted to hold otherwise would be to allow “contract law to drown in a sea of tort.”<sup>44</sup>

Since the *Florida Power & Light* decision, the ELR has been debated and expanded into a variety of contexts.<sup>45</sup> In *AFM Corp. v. Southern Bell*,<sup>46</sup> the Supreme Court of Florida framed the issue as: “Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?”<sup>47</sup> The Supreme Court of Florida, relying on the decisions of *Florida Power & Light* and *East River*, concluded that “without some conduct resulting in personal injury or other property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.”<sup>48</sup>

Following *AFM Corp.*, the Supreme Court of Florida made a landmark decision by a four to three vote in *Casa Clara*.<sup>49</sup> As one commentator of the ELR stated after the *Casa Clara* decision was handed down, the Supreme Court of Florida “[is] put[ting] its foot forcefully down on the rule’s accelerator pedal, ensuring its speedy romp through commercial torts.”<sup>50</sup>

41. *Id.* at 859.

42. *Id.* at 873.

43. *East River*, 476 U.S. at 876.

44. *Id.* at 866 (citations omitted).

45. See *Pulte*, 60 F.3d at 740 (citing *AFM Corp.*, 515 So. 2d at 180) (extending the ELR to contracts for services); *Sandarac Ass’n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1355 (Fla. 2d Dist. Ct. App. 1992) (holding that a condominium association could not sue the general contractor or architects in negligence for defects in the condominium’s common areas); *Strickland-Collins Constr. v. Barnett Bank of Naples*, 545 So. 2d 476, 477 (Fla. 2d Dist. Ct. App. 1989) (holding that the ELR bars a general contractor’s negligence claim against a bank for misapplication of funds from a construction loan).

46. *AFM Corp.*, 515 So. 2d at 180.

47. *Id.* *AFM Corp.* contracted with Southern Bell for advertising in the yellow pages. *Id.* When the yellow pages were distributed, AFM’s advertisement was printed incorrectly and, after some other compounded problems, AFM chose to sue solely on a tort theory and not on any contractual theories. *Id.* at 180-81.

48. *Id.* at 181-82.

49. *Casa Clara*, 620 So. 2d at 1244.

50. Schweip, *supra* note 3, at 38.



*Casa Clara* fueled the ELR in two distinct ways.<sup>51</sup> First, *Casa Clara* extinguished negligence claims for contracted goods and services, including claims by plaintiffs not in privity with the defendant.<sup>52</sup> This can be illustrated by the fact that the plaintiffs in *Casa Clara* had no contract with the defendant because they had bought their homes under contracts with various developers.<sup>53</sup> Nevertheless, the Supreme Court of Florida invoked the ELR, reiterating the already familiar rationale that contract principles are more appropriate than tort principles for recovering economic loss without an accompanying physical injury or damage to other property.<sup>54</sup>

Second, *Casa Clara* distinguished the “other property” exception to the ELR by eliminating components of a product.<sup>55</sup> For example, the court determined that because the plaintiffs had bargained for their condominiums and single family homes, and not the condo’s and home’s various components, the concrete, which made up the buildings, was “an integral part of the finished product . . . .”<sup>56</sup> As a result, the court held that the concrete only damaged itself.<sup>57</sup> “*Casa Clara* explained many cases that preceded it and tried to state, with some finality, the extent of the ELR.”<sup>58</sup> However, the courts continue to struggle for a consistent application of the ELR.<sup>59</sup>

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51. See *Casa Clara*, 620 So. 2d at 1246.

52. *Id.* at 1247.

53. *Id.* at 1245.

54. See *id.* The majority overlooked the fact that the parties lacked privity and, therefore, there existed no opportunity for the parties to engage in negotiations and bargaining. *Id.* The dissent stated “[t]he rationale of the economic loss rule is that parties who have bargained for the distribution of risk of loss should not be permitted to circumvent their bargain after loss occurs to the property that was the subject of the bargain.” *Casa Clara*, 620 So. 2d at 1248. (Shaw, J., dissenting). The dissent felt that the ELR could not and should not apply in this situation because the “key premise underlying the [ELR] is that parties in a business context have the ability to allocate economic risks and remedies as part of their contractual negotiations” and that premise did not exist in *Casa Clara*. *Id.* at 1248. (Barkett, C.J., dissenting). While Justice Shaw in the dissent agreed with the majority, that parties who have freely bargained and entered a contract pertaining to a particular subject matter should be held to the terms of that contract, including the distribution of losses, Justice Shaw stated “the theory is stretched when it is used to deny a cause of action to an innocent third party who the defendant knew or should have known would be injured by the tortious conduct.” *Id.* at 1249 (Shaw, J., dissenting).

55. *Id.* at 1247.

56. *Id.*

57. *Casa Clara*, 620 So. 2d at 1247.

58. Daniel M. Bachi and Bard D. Rockenbach, *The Practical Limitations of the Economic Loss Rule*, 69 FLA. B.J. 89, 89 (Nov. 1995) (citations omitted).

59. See *id.*

### C. *Exceptions to Florida's Economic Loss Rule*

Although the ELR provides two exceptions on its face, personal injury and other property damage, Florida courts have found additional exceptions in certain circumstances.<sup>60</sup> In *Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, the Second District Court of Appeal of Florida stated “[l]awyers and judges alike have found it difficult to determine when the rule applies and when an exception is appropriate.”<sup>61</sup> However, the *Sandarac* court recognized three exceptions to the general rules of negligence in order to permit recovery for economic loss that would otherwise be barred under the ELR.<sup>62</sup> The *Sandarac* court recognized recovery of economic damages arising from negligent actions by attorneys, abstractors, and accountants.<sup>63</sup>

These exceptions are recognized by other Florida courts as well. For example, in *First Florida Bank v. Max Mitchell & Co.*,<sup>64</sup> the Supreme Court of Florida indicated that it will not apply the ELR or require privity for a claim against an accountant.<sup>65</sup> Similarly, in *First American Title Insurance Co. v. First Title Service Co. of the Florida Keys*,<sup>66</sup> the court addressed a claim by a party not in privity with an abstract company for negligent preparation of an abstract.<sup>67</sup> The *First American* court found that the plaintiff was a third party beneficiary of the abstractor's employment contract and limited liability to parties to the abstract transaction and intended and known third party beneficiaries, rather than to all foreseeable injured parties.<sup>68</sup> The patterns of exceptions recognized in these cases suggest that concurrent breach of contract and

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60. *Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352 (Fla. 2d Dist. Ct. App. 1992) (citing *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *First Am. Title Ins. Co. v. First Title Serv. Co. of the Fla. Keys*, 457 So. 2d 467 (Fla. 1984)); *see also* *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 8 (Fla. 5th Dist. Ct. App. 1994) (explaining that an engineer, who knew the tractor would be damaged if he negligently performed, is liable in tort even though there is no contract between the parties).

61. *Sandarac Ass'n*, 609 So. 2d at 1352.

62. *Id.* at 1353.

63. *Id.* The court explained that “[u]nder restricted circumstances, attorneys, abstractors, and accountants may be liable to specific plaintiffs for economic damages arising from their negligent performance of professional services.” *Id.* (*See infra* note 69 for examples of cases which found these exceptions).

64. *First Florida Bank*, 558 So. 2d at 9.

65. *Id.* at 14.

66. *First Am. Title Ins. Co. v. First Title Serv. Co. of the Fla. Keys*, 457 So. 2d 467 (Fla. 1984).

67. *Id.* at 468.

68. *Id.* at 473.

negligence claims may be permitted where the breaching party has a higher degree of care and foreseeable third parties may be harmed by the breach.<sup>69</sup>

#### D. *The Independent Tort Exception to Florida's Economic Loss Rule*

When there is a breach of contract claim for goods and services, the initial question is whether the plaintiff put at issue an intentional tort claim.<sup>70</sup> Since the ELR bars all negligence claims for contracted goods and services, the only viable application for the independent tort exception occurs when an intentional tort is at issue.<sup>71</sup> To constitute a viable independent tort claim, the intentional tort must not be intertwined with the breach of contract.<sup>72</sup> An independent tort claim "must be based on 'some additional conduct' beyond the conduct constituting a breach of contract."<sup>73</sup> In other words, "[a] tort is independent of a breach of contract if the facts comprising the breach are not relied upon to establish the elements of the tort."<sup>74</sup>

Some of the intentional torts which have provided an additional exception to the ELR, and which have been considered independent of contractual duties, include: fraud; fraud in the inducement; intentional interference with an existing contract; civil theft; deceit; and other torts which require proof of intent.<sup>75</sup> In order to fully understand the relationship between the ELR and

69. The following cases discuss exceptions to the ELR where the cited parties had a higher degree of care: *Southland Constr.*, 642 So. 2d at 5 (engineer); *Angel, Cohen and Rogovin v. Overson Inv., N.V.*, 512 So. 2d 192 (Fla. 1987) (attorney); *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.*, 582 So. 2d 47, 49-50 (Fla. 2d Dist. Ct. App.), *cause dismissed*, *Arlington Elec., Inc. v. McElvy, Jennewein, Stefany, Howard, Inc.*, 587 So. 2d 1327 (1991) (architects); *Bay Garden Manor Condominium, Ass'n v. James D. Marks, Assocs.*, 576 So. 2d 744 (Fla. 3d Dist. Ct. App. 1991) (engineers); *First State Savings Bank v. Albright & Assocs. of Ocala*, 561 So. 2d 1326 (Fla. 5th Dist. Ct. App.), *review denied*, 576 So. 2d 284 (Fla. 1990) (real estate appraiser); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315 (Fla. 3d Dist. Ct. App. 1985) (attorney).

70. *SFC Valve Corp. v. Wright Mach. Corp.*, 883 F. Supp. 710, 716 (S.D. Fla. 1995) (citing *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3d Dist. Ct. App. 1993)). Throughout this article, when independent torts are discussed in the context of courts allowing an exception to the ELR, the author refers to intentional, independent torts.

71. *See Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1199 (11th Cir. 1994).

72. *See id.* at 1200 (citing *Serena v. Albertson's Inc.*, 744 F. Supp. 1113 (M.D. Fla. 1990)).

73. *Petitioner's Initial Brief* at 19; *Woodson v. Martin*, 677 So. 2d 842 (Fla.), *quashed*, No. 87,057, 1996 WL 600478 (Fla. Oct. 17, 1996) (citations omitted).

74. *SFC Valve Corp.*, 883 F. Supp. at 716.

75. *See McAbee v. Edwards*, 340 So. 2d 1167, 1169 (Fla. 4th Dist. Ct. App. 1976) (recognizing a malpractice claim for the economic damages of an intended beneficiary negligently omitted from the will); *see also Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 723 (Fla. 3d

fraud, an in-depth look at the elements used to determine independent torts is necessary.

### III. INDEPENDENT TORTS AND FLORIDA'S ECONOMIC LOSS RULE

The independent tort doctrine provides that in order to plead a tort claim in an action arising out of a contract, "there must be a tort 'distinguishable from or independent of [the] breach of contract.'"<sup>76</sup> One reason for this doctrine is that contract remedies were intentionally created to provide relief for breaches of contract.<sup>77</sup> Since breaches of contract create strict liability, there is no justification for fault or conduct based claims when either the duty or resulting damage arises from the contractual relationship.<sup>78</sup> Conversely, when the source of duty and/or damages falls outside the contract, then contract remedies do not make the non-breaching party whole and an independent tort exists.<sup>79</sup> When determining whether a cause of action arose out of contract or tort, the dividing line is not always clear. "[A] tort is ordinarily a violation of a duty imposed by law, independent of contract, though it may sometimes have relation to obligations growing out of, or coincident with, a contract."<sup>80</sup> This creates the recurring difficulty courts face in determining the existence of an independent tort.

#### A. *Factors Defining Independent Torts*

##### 1. Duty

One of the reasons why the application of the ELR is so confusing is because duties exist in both tort law and contract law.<sup>81</sup> As noted above, a tort

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Dist. Ct. App. 1972), *cert. denied*, 285 So. 2d 18 (Fla. 1973) (noting that deceit is an intentional tort recognized by the common law); *Brass v. NCR Corp.*, 826 F. Supp. 1427, 1428 (S.D. Fla. 1993) (finding that the ELR does not bar fraud in the inducement). *Contra Woodson v. Martin*, 663 So. 2d 1327, 1329 (Fla. 2d Dist. Ct. App. 1995) (holding that the ELR bars fraud in the inducement claims).

76. *AFM Corp.*, 515 So. 2d at 181 (citations omitted).

77. *See Florida Power & Light*, 510 So. 2d at 901.

78. *See id.*

79. *See Brass*, 826 F. Supp. at 1428 (citing *AFM Corp.*, 515 So. 2d at 180).

80. FLA. JUR. 2d *Torts* § 7 (1995).

81. *See Casa Clara*, 620 So. 2d at 1246. In *Casa Clara*, the court explained the difference between a duty in tort and a contractual duty by stating:

The purpose of a duty in tort is to protect society's interest in being free from harm, . . . and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in performance of promises. When only economic harm is involved, the question becomes

duty must be independent of the contract duty in order for an exception to the ELR to apply.<sup>82</sup> Factors which make a duty in tort independent of a duty in contract depend upon the nature of the underlying tort or contract.<sup>83</sup> The Fourth District Court of Appeal of Florida recently stated:

If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. . . . If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort.<sup>84</sup>

In certain cases, duties may merge, making it difficult to determine whether failure to perform the duty amounts to a breach of contract or an independent tort. For example, the duty of good faith and fair dealing exists both in the creation of the contract and in the performance of the contract.<sup>85</sup> If the duty of good faith and fair dealing was breached before the contract was entered into, then an independent tort has been found to exist.<sup>86</sup> On the other hand, if the duty is breached once the contract has been entered into, then a breach of contract has been committed.<sup>87</sup>

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‘whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.’

*Id.* at 1246–47 (citations omitted).

82. *AFM Corp.*, 515 So. 2d at 181.

83. *See Jarmco, Inc. v. Polygard, Inc.*, 668 So. 2d 300, 303 (Fla. 4th Dist. Ct. App. 1996).

84. *Terminix Int’l Co. v. Michaels*, 668 So. 2d 1013, 1014 (Fla. 4th Dist. Ct. App. 1996) (citations omitted).

85. *Cf. Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). *Johnson* involved an action for breach of contract and fraud regarding the purchase of a home which, the buyers learned after they purchased it, had a defective roof. One of the issues presented for review was whether the sellers, who were aware of the problems regarding the roof, had a duty to disclose the problems to the buyers. The *Johnson* court held that the sellers had a duty to disclose the defective roof because the doctrine of caveat emptor was not in tune with the times and did not conform with current notions of justice, equity, and fair dealing. *Id.* at 628. By eliminating the doctrine of caveat emptor, the court held that the seller had a duty of good faith and fair dealing to disclose material defects, which the seller had knowledge of, both before entering the contract and after entering the contract. *See id.*

86. *See id.* at 625.

87. *Id.*

Florida courts have long recognized that there are independent torts which impose tort duties on parties outside of their contractual duties.<sup>88</sup> One example of a tort which the Florida courts hold imposes duties independent of contractual duties is civil theft.<sup>89</sup> In *Burke v. Napieracz*,<sup>90</sup> the court declined to allow the ELR to bar the plaintiff's civil theft claim because the court refused to abolish a legislatively created tort designed to extend a civil remedy to those harmed by alleged criminal activity.<sup>91</sup> In sum, the ELR "means that in certain kinds of cases, . . . no tort duty is imposed on the defendant to avoid economic harm to the plaintiff."<sup>92</sup> Outside of those cases, the existence of tort duties, such as civil theft, remain independent of contractual duties.<sup>93</sup>

## 2. Damages

When a tort claim is based on damages, which cannot be recovered from a breach of contract claim, "an issue of fact remains as to whether the [p]laintiff suffered extra-contractual damages."<sup>94</sup> "Only two jurisdictions other than Florida . . . have used damages to define whether an independent tort exists."<sup>95</sup> For example, in *Grace Petroleum Corp. v. Williamson*,<sup>96</sup> the Twelfth District Court of Appeals of Texas reversed an exemplary damages award based on concurrent claims for breach of contract and fraudulent misrepresentation on the grounds that the fraudulent misrepresentation claim lacked damages distinct from those found under the breach of contract.<sup>97</sup> The court noted that in order to determine whether the plaintiff could recover on an asserted tort

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88. Brief of Amicus Curiae Florida Consumer Action Network in Support of Position of Respondents at 11, *HTP, Ltd. v. Lineas Areas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995) (No. 94-2779), *approved*, No. 86, 913, 1996 WL 600501 (Fla. Oct. 17, 1996) [hereinafter Brief of Amicus Curiae] (giving examples such as conversion, slander of title, defamation, and civil theft).

89. *Burke v. Napieracz*, 674 So. 2d 756 (Fla. 1st Dist. Ct. App. 1996).

90. *Id.*

91. *Id.* at 758.

92. *See* Brief of Amicus Curiae at 11, *HTP, Ltd.* (No. 94-2779).

93. *Id.*

94. Petitioner's Initial Brief at 29, *Woodson* (No. 87-057) (citing *Burton v. Linotype, Co.*, 556 So. 2d 1126 (Fla. 3d Dist. Ct. App. 1989)).

95. Theresa Montalbano Bennett, *Lies and Broken Promises: Fraud and the Economic Loss Rule After Woodson v. Martin*, 74 FLA. B.J. 46, 48 (1996) (citing *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991); *Jim Walters Homes, Inc. v. Reed*, 711 S.W. 2d 617, 618 (Tex. 1986)).

96. 906 S.W.2d 66 (Tex. Ct. App. 1995).

97. *Id.* at 68.

theory, it had to “examine the *nature* of the plaintiff’s *loss*, because the nature of the injury most often determines which duty has been breached.”<sup>98</sup>

The ELR does not always act to bar recovery of pure economic loss.<sup>99</sup> When an independent tort claim is alleged, outside a breach of contract, courts have held that if the damages sought are distinct from damages within the breach of contract, the plaintiff may recover regardless of whether the damages are purely economic.<sup>100</sup>

### 3. Time

The most obvious way to distinguish an independent tort from a breach of contract is by determining when the alleged independent tort took place.<sup>101</sup> Typically, causes of action which arise before entering into a contract constitute independent torts because no duty has yet been created under contract.<sup>102</sup> Therefore, the duty which has been breached lies in tort.<sup>103</sup> For example, fraud in the inducement occurs prior to entering a contract because it occurs prior to the formation of the contract. Therefore, no contractual duty is breached when fraud in the inducement occurs.

On the other hand, once a contract has been entered into, it becomes more difficult to distinguish between contractual duties and independent tort duties since there are duties under contracts which also arise under common law.<sup>104</sup> For example, fraud in the performance of a contract is not an independent tort because the duty owed arose out of the duties set forth in the contract.<sup>105</sup>

One case which clearly illustrates the time element is *Hoseline, Inc. v. U.S.A. Diversified*.<sup>106</sup> In *Hoseline*,<sup>107</sup> the appellee, Hoseline, entered into a contract with appellant, USA Diversified (“USA”), in which USA agreed to

98. *Id.* (citations omitted).

99. Brief of Amicus Curiae, at 11, *HTP Ltd.* (No. 94-2779).

100. *See id.* (citing *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

101. *See Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1237 (N.D. Fla. 1991).

102. *See Leisure Founders, Inc. v. CUC Int’l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993) (holding fraud in the inducement claims do not fall within the scope of the ELR because they involve precontractual conduct which is distinct from conduct constituting breach of contract).

103. *See id.*

104. *Id.*

105. *See Williams Elec. Co.*, 772 F. Supp. at 1237 (explaining that fraud in the performance is distinct from fraud in the inducement).

106. *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198 (11th Cir. 1994).

107. *Id.*

ship certain quantities of wire harness loom to Hoseline.<sup>108</sup> Hoseline discovered that USA had been undershipping the loom forty-five to fifty percent.<sup>109</sup> Hoseline demanded a refund, but USA refused.<sup>110</sup> Hoseline then filed suit alleging breach of contract and common law fraud and civil theft.<sup>111</sup> The Eleventh Circuit rejected Hoseline's civil theft and fraud claims based on the ELR and held that since both claims arose out of USA's breach of their contractual duties, Hoseline could not recover in tort.<sup>112</sup>

*Hoseline* demonstrates the importance of establishing a timeline. Timelines help to separate when a duty has been breached, since it may be more difficult to determine whether an independent tort exists once the contract has been formed. Additionally, courts typically hold that the ELR does not bar tort claims which occur prior to the formation of a contract.<sup>113</sup>

### B. *Fraud in the Inducement*

One of the essential elements of a contract is that parties to the contract enter into it freely and without assent obtained through fraud, mistake, duress, or undue influence.<sup>114</sup> One example of a tort which has been recognized as existing, independent of a breach of contract, is fraud in the inducement.<sup>115</sup> Fraud in the inducement has been recognized in Florida for decades specifically because it is a tort based on conduct which is independent of any breach of contract conduct.<sup>116</sup> Fraud in the inducement contains the elements consistent with the elements that constitute an independent tort. For example, fraud in the inducement of a contract occurs prior to the actual contract.<sup>117</sup> Likewise,

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108. *Id.* at 1199.

109. *Id.*

110. *Id.*

111. *Hoseline*, 40 F.3d at 1199. After Hoseline filed the lawsuit, USA filed for bankruptcy causing Hoseline to abandon the breach of contract claim. *Id.* at 1199.

112. *Id.* In making this determination, the Eleventh Circuit relied on *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113 (M.D. Fla. 1990). In *Serina*, the court held that a plaintiff could not bring a separate tort action where facts surrounding a breach of contract and the separate and distinct tort are intertwined. *Id.* at 1118.

113. *See Williams Elec. Co.*, 772 F. Supp. at 1237.

114. FLA. JUR. 2D *Contracts* § 35 (1995).

115. *See, e.g.*, *Burton v. Linotype Co.*, 556 So. 2d 1126, 1126 (Fla. 2d Dist. Ct. App. 1989); *Johnson v. Bokor*, 548 So. 2d 1185, 1186 (Fla. 2d Dist. Ct. App. 1989) (holding that a party fraudulently induced into a contract may sue for fraud in the inducement or for breach of contract).

116. Brief of Amicus Curiae at 5, *HTP, Ltd.* (No. 94-2779) (citing *Isom v. Equitable Life Assurance Soc'y*, 189 So. 253, 259 (Fla. 1939)).

117. *See Williams Elec. Co.*, 772 F. Supp. at 1238; *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993).



“[t]he tort of fraudulent inducement recognizes, as do all tort claims, a societal belief that individuals entering into agreements with one another owe each other a duty.”<sup>118</sup> The specific duty encompassed by fraud in the inducement claims is the duty of the parties entering into the contract to speak honestly as to elements which make up the contract.<sup>119</sup>

### C. Elements of Fraud in the Inducement

Fraud is a particularly difficult claim to prove because its elements include proof of the defrauder’s intent and proof of the defrauded party’s reasonable reliance on the misrepresentation.<sup>120</sup> However, in order to prove fraud in the inducement, the plaintiff has the burden of demonstrating all of the following elements of common law fraud: 1) misrepresentation of material fact; 2) the representor of the misrepresentation knew or should have known of the statement’s falsity; 3) intent by the representor that the representation will induce another to rely and act on it; and 4) resulting injury to the party acting in justifiable reliance on the representation.<sup>121</sup>

A claim of fraudulent inducement requires a full examination into the facts and circumstances surrounding the claim before the occurrence of fraud can be determined.<sup>122</sup> The first element of fraud in the inducement requires that there be a misrepresentation of material fact made by the defendant.<sup>123</sup> In *Cavic v. Grand Bahama Development Co.*,<sup>124</sup> the Eleventh Circuit held:

[T]o constitute actionable fraud, a false representation must relate to an existing or pre-existing-fact, an unspecific and false statement of opinion such as occurs in puffing generally cannot constitute fraud.

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118. Brief of Amicus Curiae at 13, *HTP, Ltd.* (No. 94-2779).

119. *Id.*

120. See *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir. 1984).

121. *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th Dist. Ct. App. 1990) (citations omitted).

122. *Burton*, 556 So. 2d at 1128 (citations omitted).

123. *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

124. 701 F.2d 879 (11th Cir. 1983). In *Cavic*, the appellees sued the appellant for common law fraud alleging that they were induced by fraudulent misrepresentations to enter into contracts to purchase land from the appellant. The appellees complained that the appellant made false representations regarding land appreciation, resale factors, and recovery of equity, which induced the appellees to enter the contracts. The jury found that the appellants made the representations with the knowledge of their falsity and with the intent to induce the appellees to act upon the representations. The Eleventh Circuit held that the jury was justified in its determination and confirmed that the appellant’s misrepresentations went beyond mere sales puffing. *Id.* at 885.

Also, a promise of future action or a prediction of future events cannot, standing alone, be a basis for fraud because it is not a representation, there is no right to rely on it, and it is not false when made.<sup>125</sup>

Likewise, in *Plantation Key Developers, Inc. v. Colonial Mortgage Co. of Indiana*,<sup>126</sup> the court held that "a mere broken promise does not constitute fraud."<sup>127</sup>

In a recent case concerning fraud in the inducement and the ELR, *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*,<sup>128</sup> the Eleventh Circuit held that the ELR does not bar a claim for damages when it is accompanied by an independent tort, such as fraud in the inducement.<sup>129</sup> In *Pulte*, the Eleventh Circuit held that the plaintiff, Pulte, had a valid claim for fraud in the inducement.<sup>130</sup> However, the court held that Pulte did not meet the burden of proof needed to support the claim because Pulte failed to show any misrepresentation by the defendant, Osmose, and Pulte failed to show that it relied on any alleged misrepresentations.<sup>131</sup> The Eleventh Circuit's finding offers evidence that a valid claim for fraud in the inducement can only succeed if the plaintiff meets his/her burden of proof.

The second element of fraud in the inducement requires the plaintiff to prove that the false misrepresentation made by the defendant was known, or should have been known, to be false at the time it was made.<sup>132</sup> Coinciding with the second element, the third element of fraud requires the plaintiff to prove that the defendant made the misrepresentation with the intent that it would induce the plaintiff to rely and act on it.<sup>133</sup> In a seminal case involving fraudulent misrepresentation, *Finney v. Frost*,<sup>134</sup> the court set aside a jury

125. *Cavic*, 701 F.2d at 883 (citations omitted).

126. 589 F.2d 164 (5th Cir. 1979).

127. *Id.* at 172 (citing *Brod v. Jernigan*, 188 So. 2d 575, 579 (Fla. 2d Dist. Ct. App. 1966)).

128. 60 F.3d 734 (11th Cir. 1995).

129. *Id.* at 742 (citing *AFM Corp.* 515 So. 2d at 181-82; *Burton*, 556 So. 2d at 1128).

130. *Pulte*, 60 F.3d at 742.

131. *Id.* Pulte alleged that Osmose had fraudulently induced it to buy a certain plywood because the plywood contained certifications that it complied with applicable building codes and standards, which Pulte alleged was false. *Id.* at 734. Additionally, Pulte asserted that Osmose's promotional literature misrepresented that the Osmose-treated plywood conformed to those building codes. *Id.* at 736. The court held that the record contained no showing that Pulte's allegations were true. *Id.* at 742.

132. *Poliakoff v. National Emblem Ins. Co.*, 249 So. 2d 477, 478 (Fla. 3d Dist. Ct. App. 1971). *Poliakoff* is often cited to for the essential elements of fraud.

133. *Id.*; see also *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

134. 228 So. 2d 617 (Fla. 4th Dist. Ct. App. 1969), *cert. dismissed*, 239 So. 2d 101 (Fla. 1970).

verdict in favor of the plaintiff because the court felt there was insufficient evidence to support the plaintiff's allegations that the defendant knowingly provided false information which was intended to induce the plaintiff to act.<sup>135</sup>

In *Finney*, the plaintiff purchased a yacht from the defendant with a bill of sale declaring the vessel to be free and clear of all liens, mortgages, taxes, and encumbrances.<sup>136</sup> The plaintiff sued the defendant because two months after the receipt of the yacht and bill of sale, the boat was attached and sold for unpaid bills.<sup>137</sup> The *Finney* court held that there was no evidence "to establish that the defendant knew the bills were not paid or that he told the plaintiff that the bills were paid to induce plaintiff to act."<sup>138</sup>

On the other hand, in *American Eagle Credit Corp. v. Select Holding, Inc.*,<sup>139</sup> the United States District Court for the Southern District of Florida held that the plaintiff, American Eagle, established the elements of fraud and, therefore, the court entered judgment against the defendant, Roffers.<sup>140</sup> In this case, American Eagle sued Dean Roffers, secretary/treasurer of Select Holdings and Select Restaurant Group, Inc., for fraud. Roffers made a false statement regarding equipment that American Eagle had contracted to purchase from a vendor. Roffers told another Select Holdings employee to tell American Eagle that the equipment had been manufactured, was inspected in the vendor's warehouse, and was found acceptable by the Select companies, therefore, American Eagle should go ahead and pay the vendor. Roffers did not deny that the statements were false, and the court held that Roffers knew the statements were false at the time he made them.<sup>141</sup> Additionally, the court held that Roffers made the false statement regarding the equipment in order to induce American Eagle to act.<sup>142</sup>

135. *Id.* at 618.

136. The bill of sale specifically stated:

The sellers further warrant that the said vessel is free and clear of all liens, mortgages, taxes, and encumbrances of any nature or kind and hereby agree to indemnify and save harmless, the purchaser against and from any and all claims arising by reason of anything happening or occurring prior to date hereof and all expense in connection therewith.

*Id.*

137. *Id.*

138. *Id.*

139. 865 F. Supp. 800 (S.D. Fla. 1994).

140. *Id.* at 813.

141. *Id.* at 812.

142. *Id.* The facts stated that American Eagle was not going to pay the vendor until they were assured that the equipment had been inspected and was acceptable. *Id.*

The final and most important element of fraud in the inducement requires the plaintiff to have justifiably relied upon a misrepresentation and, as a result thereof, suffered damages.<sup>143</sup> Justifiable reliance is the most significant element because it ensures that the defendant will not be liable in tort for representations the plaintiff could not have been expected to rely upon.<sup>144</sup> In the seminal case of *Besett v. Basnett*,<sup>145</sup> the Supreme Court of Florida held that a “recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”<sup>146</sup> However, the supreme court noted that a plaintiff is not precluded from recovery in tort just because he/she failed to make an independent investigation of the statement.<sup>147</sup> Moreover, the court held that “[a] person guilty of fraud should not be permitted to use the law as his shield.”<sup>148</sup>

In another monumental case, *Johnson v. Davis*,<sup>149</sup> the Supreme Court of Florida explained that, “[t]he doctrine of caveat emptor does not exempt a seller from responsibility for the statements and representations which he makes to induce the buyer to act, when under the circumstances these amount to fraud in the legal sense.”<sup>150</sup> The *Johnson* court held that a seller of residential property has a duty to disclose material facts affecting the value of property which are not readily observable to the buyer and which are not known to the buyer.<sup>151</sup> The significance of this element is that parties cannot proceed on

143. See *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

144. See Brief of Amicus Curiae at 14, *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995) (No. 94-2779).

145. 389 So. 2d 995 (Fla. 1980).

146. *Id.* at 997.

147. *Id.* In *Besett*, the plaintiffs, Mr. and Mrs. Basnett, filed a complaint against the Besetts and their real estate broker, the defendants, alleging that the defendants had made a fraudulent misrepresentation for the purpose of inducing the plaintiffs to buy a lodge and a particular piece of property. The plaintiffs alleged that the defendants had misrepresented the amount of business income the lodge had previously produced and the defendants had misrepresented the size of the lodge. The trial court dismissed the complaint for failing to state a cause of action; however, the district court reversed the trial court's decision. *Id.* at 996. The supreme court held that the plaintiffs were justified in relying upon the representations made by the defendants, even though they might have learned that the representations were false had they made an independent investigation. *Id.* at 998.

148. *Besett*, 389 So. 2d at 998.

149. 480 So. 2d 625 (Fla. 1985).

150. *Id.* at 627. Prior to the Supreme Court of Florida's decision, the doctrine of caveat emptor was applied to the sales of residential homes. *Id.* at 628. This doctrine, which stands for “let the buyer beware,” held that it was the buyer's responsibility to be informed and examine his purchase prior to entering the contract. See *id.*

151. *Id.*

a fraud in the inducement claim unless they are justified in relying on the representation.

Likewise, a party cannot be successful on a fraud in the inducement claim unless all of the elements of fraud are proven. This provides yet another reason why the economic loss rule should not bar fraud in the inducement claims. Fraud in the inducement, in and of itself, contains sufficient safeguards against meritless claims without applying the ELR to bar fraud claims prior to a factual determination of the elements.

#### IV. THE ECONOMIC LOSS RULE AND FRAUD IN THE INDUCEMENT IN RELATION TO RECENT 1995 AND 1996 CASES

Fraud in the inducement has been considered an independent tort which may be brought separately from a breach of contract claim by essentially every district in Florida, including the second district.<sup>152</sup> However, in a relatively recent decision, the Second District Court of Appeal held that the ELR bars fraud in the inducement claims.<sup>153</sup> In *Woodson v. Martin*,<sup>154</sup> the court was asked to determine the following question, which it then certified to the Supreme Court of Florida as a question of great public importance: "Is a buyer of residential property . . . prevented by the 'economic loss rule' from recovering damages for fraud in the inducement against [a] real estate agent and its individual agent . . . representing the sellers?"<sup>155</sup>

In making its decision, the second district explained that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories."<sup>156</sup> The court noted "if the damages sought are economic losses only, the party seeking recovery for those damages must proceed

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152. *Monco Enters., Inc. v. Ziebart Corp.*, 673 So. 2d 491, 492 (Fla. 1st Dist. Ct. App. 1996) (citing *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)); see also *TGI Dev. Corp. v. CV Reit*, 665 So. 2d 366 (Fla. 4th Dist. Ct. App. 1996); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995); *Burton*, 556 So. 2d at 1128; *Johnson v. Bokor*, 548 So. 2d 1185, 1186 (Fla. 2d Dist. Ct. App. 1989).

153. *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995), *quashed*, No. 87,057 1996 WL 600478 (Fla. Oct. 17, 1996). In *Woodson*, the appellant bought an expensive home which he alleged was represented to him by the appellees as almost new. *Id.* at 1327. The appellant claimed that the appellees were guilty of a variety of misrepresentations and that he relied on those misrepresentations in deciding to buy the house. *Id.* When the appellant and his wife moved into the house, they discovered numerous, serious defects which led them to sue the appellees on several theories, including fraud in the inducement. *Id.*

154. 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995).

155. *Id.* at 1327.

156. *Id.* at 1329.

on contract theories of liability.”<sup>157</sup> Based on this reasoning, the court found that because the only damages suffered by the appellant, Woodson, were damages to his house, the ELR barred recovery for the fraud in the inducement claim.<sup>158</sup> The second district relied on several decisions, including the Supreme Court of Florida’s holding in *Casa Clara*, despite the fact that only one of the decisions actually involved a fraud in the inducement claim.<sup>159</sup>

Prior to the second district’s decision in *Woodson*, the Third District Court of Appeal of Florida held, in *HTP, Ltd. v. Lineas Aereas Costarricenses*,<sup>160</sup> that fraud in the inducement claims were not barred by the ELR.<sup>161</sup> In *HTP*, the plaintiff, Lineas Aereas Costarricenses, filed a complaint against the defendant, HTP, alleging that the plaintiff had been fraudulently induced into entering into a settlement agreement. The defendant counterclaimed that the plaintiff was in breach of the settlement agreement. HTP subsequently sought the dismissal of Lineas Aereas Costarricenses’ fraudulent inducement claim on the ground that Florida’s ELR barred the claim. The third district rejected HTP’s breach of the settlement agreement claim and found that a “cause of action for fraud in the inducement [is] an independent tort that [is] not barred by the economic loss rule.”<sup>162</sup>

Although several Florida courts have addressed the issue of whether the ELR should bar fraud in the inducement claims,<sup>163</sup> the second district was the only court in Florida to apply the *Woodson* rationale in finding that the ELR should bar such claims. However, the Supreme Court of Florida’s recent

157. *Id.*

158. *Id.* The *Woodson* court referred to the Supreme Court of Florida’s decision in *Casa Clara*, which the *Woodson* court interpreted as barring all claims, regardless of whether they are independent, if the only damages suffered are economic. *Woodson*, 663 So. 2d at 1329.

159. *Id.* at 1328–29. The *Woodson* court relied on the following cases: *Pulte*, 60 F.3d at 744 (holding the ELR does not bar fraud in the inducement claims; the plaintiff just failed to prove the claim); *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1200 (11th Cir. 1994) (involving a fraud in the performance claim); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628, 631 (Fla. 1995) (applying the ELR to negligence claims); *Casa Clara Condominium Ass’n v. Charley Toppino & Sons*, 620 So. 2d 1244, 1248 (Fla. 1993) (applying the rule only to negligence claims and abolishing recovery when only economic damages are suffered).

160. 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1996).

161. *Id.* at 1222 (citing *Burton*, 556 So. 2d at 1128).

162. *Id.*

163. See *Linn-Well Dev. Corp. v. Preston & Farley, Inc.*, 666 So. 2d 558 (Fla. 2d Dist. Ct. App. 1995). In *Linn-Well*, the second district affirmed its decision in *Woodson*, and certified a similar question to the Supreme Court of Florida: “Is a buyer of *commercial* property prevented by the ‘economic loss rule’ from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers?” *Id.* at 559 (emphasis added).

decision in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,<sup>164</sup> ended the conflict by holding that the ELR does not bar fraud in the inducement claims. This decision is long overdue since, aside from the third district's decision in *HTP*, the Eleventh Circuit,<sup>165</sup> the First District Court of Appeal,<sup>166</sup> the Fourth District Court of Appeal,<sup>167</sup> the Fifth District Court of Appeal,<sup>168</sup> and every other appellate court in Florida has held that the ELR does not bar fraud in the inducement claims.<sup>169</sup> The second district's decision in *Woodson* caused several of these courts to certify conflict to the Supreme Court of Florida on this issue.<sup>170</sup> Furthermore, the second district's rationale offered no persuasive explanation for extending the ELR to bar fraud in the inducement claims.<sup>171</sup> As one commentator has stated: "if fraudulent inducement claims were no longer available in breach of contract claims, parties would be foreclosed from protecting themselves from fraud."<sup>172</sup>

## V. CONCLUSION

The alleged intent of the ELR was to separate negligence claims for personal injury damages from contract claims for economic damages. However, when the Second District Court of Appeal applied the ELR to bar fraud in the inducement claims, this expansion of the ELR went too far.

164. No. 86,913, 1996 WL 600501 (Fla. Oct. 17, 1996), *approving*, *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995).

165. *See, e.g., Pulte*, 60 F.3d at 742 (stating that "[a]lthough the economic loss rule bars recovery for tort claims arising from breach of contract, the doctrine does not preclude a claim for damages occasioned by an independent tort, including fraud in the inducement of a contract").

166. *See, e.g., Monco Enter.*, 673 So. 2d at 492 (explaining that fraud in the inducement is an independent tort which is not barred by the ELR).

167. *See, e.g., TGI Dev.*, 665 So. 2d at 366 (holding that "[f]raud in the inducement, even when only economic damages are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule"). *See also Jarmco*, 668 So. 2d at 301 (affirming *TGI Dev., Inc.*, and holding that the ELR does not bar a common law fraud in the inducement claim seeking to recover only economic losses).

168. *See, e.g., Lee v. Paxson*, 641 So. 2d 145, 145-46 (Fla. 5th Dist. Ct. App. 1994) (explaining the "argument that the economic loss rule bars [a] fraudulent inducement claim is specious; nevertheless, it is clear that, under Florida law, appellant has no enforceable claim.").

169. Respondents' Answer Brief at 21, *HTP, Ltd.* (No. 94-2779).

170. *See Jarmco*, 668 So. 2d at 300; *Monco Enter.*, 673 So. 2d at 491; *TGI Dev.*, 665 So. 2d at 366; *HTP, Ltd.*, 661 So. 2d at 1221.

171. Bennett, *supra* note 95, at 48.

172. *Id.*

Fraud in the inducement, whether based on an intentional act or a negligent act, is an independent tort claim which cannot be insured against and is discovered only after the formation of the contract. The context of this kind of tort claim makes limiting the recovery of damages to economic damages under contract law wholly inadequate.

In quashing the second district's decision to expand the ELR to bar fraud in the inducement claims, the Supreme Court of Florida supported the author's reasoning that sound public policy should require, rather than restrict, the levy of punishment against fraudulent actors and the reward of full compensation to victims of fraud. The removal of any kind of fraud claim from the menu of tort law claims available to injured parties, weakens the protections afforded by law. In essence, the Second District Court of Appeal's application of the ELR encouraged intentional and negligent acts of trickery and deceit<sup>173</sup> because of the limitation, if not the elimination, of a means of full recovery.

Although the Second District Court of Appeal's opinion in *Woodson v. Martin* sparked debate among lawyers and judges as to the proper application of the ELR, this debate did not cloud the real consequences of applying the ELR to bar fraud in the inducement claims. The Supreme Court of Florida's very recent decision has confirmed this author's opinions; thereby ending the conflict in Florida courts and permitting recovery to the victims who have entered into contracts obtained through trickery and deceit.

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173. See Respondents' Answer Brief at 16, *HTP, Ltd.* (No. 94-2779).

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