IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

Case No. 3D18-1834

2711 HOLLYWOOD BEACH
CONDOMINIUM ASSOCIATION, INC.,

Appellant,

vs.

NIBCO, INC.,

Appellee.

On Appeal from the Eleventh Judicial Circuit,
in and for Miami-Dade County, Florida
L.T. Case No. 13-35751

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLEE NIBCO, INC.

Daniel B. Rogers
SHOOK, HARDY & BACON L.L.P.
Citigroup Center, Suite 3200
201 S. Biscayne Boulevard, Suite 3200
Miami, Florida 33131
(305) 358-5171
drogers@shb.com

-- Of Counsel --
Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1800 K. Street, N.W., Suite 1000
Washington, DC 20006
(202) 783-8400
pgoldberg@shb.com

Counsel for Amicus Curiae the National Association of Manufacturers

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Statutes and Other Authorities

INTEREST OF AMICUS CURIAE

Amicus curiae the National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Members of the NAM include manufacturers of building components widely used in the construction industry, including condominium buildings. The NAM thus has a substantial interest in Florida's application of the economic loss rule to components used to construct buildings. That rule properly protects manufacturers from tort liability when their products do not meet the buyer's expectations, resulting in economic losses. Tort liability is appropriate only when a product defect causes personal injury or damage to other property. Foreclosing application of the economic loss rule in the construction defect context, as suggested in this appeal, would adversely impact manufacturers by subjecting them to outsized and unprincipled tort liability for economic losses, which are traditionally governed by

contracts between the homebuyers and the contractors (and, in turn, contracts between contractors and product suppliers, and suppliers and manufacturers).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal about who should pay, and under which legal theories, when a contractor assembles multiple components into a system installed in a building during its construction, the system fails to perform as expected, and the building purchaser incurs economic losses as a result. Here, the 2711 Hollywood Beach Condominium Association ("Association") alleges the fire sprinkler system integrated into the building it purchased is defective. It claims the antimicrobial coating in the system's steel pipes, which were made by one company, is allegedly incompatible with the system's CPVC pipes and fittings, which were made by and purchased from other companies. The Association asserts that this incompatibility damaged the CPVC pipes, ultimately resulting in water leaks.

Importantly, the Association does not assert the component parts themselves are individually defective. Yet, it filed products liability tort claims directly against the components' manufacturers, alleging they should have warned about the claimed incompatibility with the other manufacturers' products. The Association joined the tort claims it filed against the component manufacturers in the same complaint as its contract and warranty claims against the developer, contractor, and sprinkler subcontractor seeking the same damages for the same claimed incompatibility.

The trial court, based on long-established precedent in *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), properly concluded that the economic loss rule bars the Association's tort claims against the component part manufacturers. Florida—along with most jurisdictions, including the U.S. Supreme Court—adopted the economic loss rule to assure the separation between the law of torts and the law contracts. The rule prevents recovery in tort for economic losses arising from a product's failure to perform as expected, which are protected by contract and warranty law.

Here, the contracts and warranties the Association can enforce are against those who constructed the building it purchased. Those parties involved in the building's construction may, in turn, have contract and warranty claims, including for indemnification, against component product suppliers or manufacturers. Florida law governing defective construction components has long operated under this allocation of liability under contract and warranty law for economic losses. Allowing the Association to recover directly from the component manufacturers under a products liability theory "would result in 'contract law…drowning in a sea of tort'"[1] and cause manufacturers to absorb outsized liability for economic losses.

[1] *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 404 (Fla. 2013) (quoting *E. River S.S. Corp. v. Transam. Delaval, Inc.*, 476 U.S. 858, 866 (1986)).

The trial court thus properly applied *Casa Clara* in ruling that the Association could not recover in tort from the sprinkler component manufacturers for either (i) economic damages incurred when water leaking from the sprinkler pipes damaged other parts of the building or (ii) economic damages to be incurred to replace the pipes with an all-steel system. Instead, the Association may recover such economic losses under contract and warranty law from the entities that assembled the sprinkler system, integrated it into the building, and sold the building to the Association.

In an effort to circumvent this longstanding law, the Association contends the economic loss rule no longer applies in construction defect cases because *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013), purportedly receded *sub silencio* from *Casa Clara*'s application of the rule to construction defects. It did not. Aside from the fact that the Supreme Court does not overrule prior precedent *sub silencio*, *Tiara* held only that the economic loss rule is limited to the products liability context. The rule therefore continues to bar products liability tort claims for economic losses caused by defects in construction components.

The Court should decline the Association's plea to subject manufacturers to unlimited and unprincipled tort liability for economic losses in construction defect cases. Those losses are a matter of contract and warranty law. This Court should therefore affirm the trial court's application of *Casa Clara* to this case and reject the needless request to certify a question about *Casa Clara*'s continued validity.

ARGUMENT

I. *CASA CLARA*'S APPLICATION OF THE ECONOMIC LOSS RULE TO CONSTRUCTION DEFECT CLAIMS AND ITS "OBJECT-OF-THE-BARGAIN" TEST PROPERLY ALLOCATES RISK FOR ECONOMIC LOSSES AS A MATTER OF CONTRACT—NOT TORT—LAW.

In *Casa Clara*, the Florida Supreme Court made a policy choice that contract law, not tort law, governs liability for purely economic losses in construction defect cases. The Court aptly recognized that a tort duty to protect against economic losses in this context would allow remote purchasers of homes and commercial buildings to bring tort claims against building component manufacturers every time a component does not satisfy the owners' economic expectations. *See Casa Clara*, 620 So. 2d at 1247 (refusing to exempt homeowners from the economic loss rule because doing so would give them greater remedies in tort than in the contracts they agreed to in purchasing the building); *see also Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965) (explaining that the economic loss rule is necessary to prevent manufacturers from liability unknown and unlimited in scope).[2]

The Court was disturbed by the fact that, in order to pay for this new liability and guard against the economic risk posed by such an unrestricted tort duty, manufacturers would necessarily increase the prices of their products—a cost that would ultimately fall on the public in general. *See Casa Clara*, 620 So. 2d at 1247

[2] "The development of Florida's products liability economic loss rule can be traced to two cases: *Seely* [] and *East River Steamship* []." *Tiara*, 110 So. 3d at 403.

(holding that nothing would justify requiring the consuming public to pay more for building components so that the manufacturers could insure against the possibility that the components will not meet the expectations of some owners). The Nevada Supreme Court reached the same conclusion, similarly explaining that:

> permitting tort recovery for economic losses from construction defects would create a general, societally imposed duty on the part of builders and developers to avoid such losses. These losses are not properly addressed by tort law, which has as its underlying policy the promotion of safety. Instead, such harm is paradigmatically addressed by the policies underlying contract law -- to enforce standards of quality as defined by the parties' contractual relationships.

Calloway v. City of Reno, 993 P.2d 1259, 1266 n.3 (Nev. 2000), *superseded by statute on other grounds as stated in Olson v. Richard*, 89 P.3d 31 (Nev. 2004).

Indeed, Florida public policy has been, since at least the formal adoption of the economic loss rule, that all Floridians should not have to pay more for products because some individuals suffer economic losses they had the power to avoid. *See Florida Power & Light Co. v. Westinghouse Elec. Corp*., 510 So. 2d 899, 902 (Fla. 1987) ("We agree and find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public."); *accord Seely*, 403 P.2d at 151; Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 902 (1989) ("[T]he benefit of protecting individuals by shifting the burden of economic loss to manufacturers through tort law is insufficient to justify the economic impact such

cost-shifting would have on society. Manufacturers' prices would rise as they sought to insure against the possibility that some of their products would not meet the needs of some of their customers."). There is no basis to create an exception to this rule for manufacturers of building components in construction defect cases.

A. Florida's Products Liability Economic Loss Rule Applies To Products Liability Tort Claims Concerning Defective Building Components.

The Association contends *Tiara*'s limitation of the economic loss rule to products liability cases impliedly overruled *Casa Clara*'s application of the rule to products liability claims for defective building components. As an initial matter, the Florida Supreme Court does not overrule prior decisions impliedly; unless overruled expressly, *Casa Clara*'s holdings remain binding. *See Mercury Cas. Co. v. Flores*, 905 So. 2d 179, 180 (Fla. 3d DCA 2005) ("The Florida Supreme Court has made clear that it does not intentionally overrule its earlier cases without saying so."). Regardless, *Tiara* did not overrule *Casa Clara*. *Casa Clara*'s application of the economic loss rule to products liability claims for defective building components is entirely consistent with *Tiara*'s limitation of the rule to the products context.

First, the Association incorrectly characterizes their negligence/strict liability claims against the fire sprinkler component manufacturers as "real estate" claims in order to shoehorn them into cases holding that strict liability does not apply to improvements to real property. The cases cited by the Association, however, held only that contractors are not subject to strict products liability claims for the services

they provide in making structural improvements to real property; no case has held that manufacturers of building components are immune from products liability claims if a defect in their product causes personal injury or damage to other property. *See, e.g.*, *Jackson v. L.A.W. Contracting Corp.*, 481 So. 2d 1290, 1292 (Fla. 5th DCA 1986) (holding strict liability does not apply to contractor's faulty improvement to real property, but would apply to manufacturer whose defective product caused injury); *Plaza v. Fisher Dev., Inc.*, 971 So. 2d 918, 920-24 (Fla. 3d DCA 2007) (same); *see also Easterday v. Masiello*, 518 So. 2d 260, 261 (Fla. 1988) (holding "strict products liability does not apply to structural improvements to real estate," but not holding that it would not apply to a defective building component). To the contrary, Florida courts apply products liability concepts, including the economic loss rule, to construction defect cases that, like here, involve allegations that a product integrated into a building is defective. *See, e.g.*, *Matthews v. Whitewater W. Indus., Ltd.*, No. 11-24424-CIV, 2012 WL 12865243, at *4 (S.D. Fla. Aug. 28, 2012) (recognizing that a manufacturer of a product incorporated into a building is still responsible for making a non-defective product under product liability law).

Second, *Casa Clara*'s application of the economic loss rule to products liability claims for building components furthers *Tiara*'s confirmation of the underlying purpose of the rule. It establishes 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." *Tiara*, 110 So. 3d at 401 (quoting *Casa Clara*, 620 So. 2d at 1246). This division between tort and contract has been long embedded in Florida law:

> Tort law imposes upon manufacturers a duty to exercise reasonable care so that the products they place in the marketplace will not harm persons or property. However, tort law does not impose any duty to manufacture only such products as will meet the economic expectations of purchasers. Such a duty does, of course, exist where the manufacturer assumes the duty as part of his bargain with the purchaser, or where implied by law, but the duty arises under the law of contract, and not under tort law.

Westinghouse, 510 So. 2d at 901; *see also Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 58 (Va. 1988) (holding that to recover in tort based on a claimed defect in a home, homebuyer must show "a breach of a duty to take care for the safety of a person or property of another"). Given this congruence between *Casa Clara* and *Tiara*, no tension exists between the cases for this Court or the Florida Supreme Court to resolve.

Numerous jurisdictions that recognize the economic loss rule apply it to claims alleging defective construction components. These courts have endorsed the sentiment in *Casa Clara* that building purchasers must be limited to their contract and warranty remedies for economic losses caused by products integrated into those buildings. See, for example:

- *Sensenbrenner*, 374 S.E.2d at 58 ("Although sales of real estate are not controlled by product-liability concepts in other respects, the rule limiting recovery for economic losses to the law of contracts does apply to sales of real property alleged to be qualitatively defective.");

- *Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc*., 651 N.W.2d 738, 746 (Wis. Ct. App. 2002) (adopting the reasoning of *Casa Clara* and holding that "the economic loss doctrine applies to building construction defects when, as here, the defective product is a component part of an integrated structure or finished product"); *Linden v. Cascade Stone Co.*, 699 N.W.2d 189, 199 (Wis. 2005) (approving lower court adoption of *Casa Clara*);

- *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84 (Tex. App. 2007) (applying the economic loss doctrine to bar homeowners' negligence claim against a supplier of building components);

- *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 P.3d 664, 670-71 (Ariz. 2010) ("[I]n the context of construction defects, we adopt a version of the economic loss doctrine and hold that a plaintiff who contracts for construction cannot recover in tort for purely economic loss, unless the contract otherwise provides.");

- *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 244 (Utah 2009) (citing *Casa Clara* for the position that the economic loss rule bars homeowners' tort claims for damages to a building by an integrated component of the building where "each purchased a finished product, which included the integral components"; to contend that these integral components somehow retain a separate character apart from the final product of the building goes too far).

These cases across the nation reaffirm that "tort law historically has refused to impose a duty to prevent economic loss in construction defect cases." Barrett, *supra*, at 894. Creating a categorical exception to applying the economic loss rule in all real property contexts—or creating an exception just for condominiums—as the Association requests, runs afoul of these longstanding and widely accepted legal

principles. The law simply does not impose upon building component product manufacturers an unlimited tort duty—not agreed to in any contract or warranty—to manufacture products that will always meet an association's or other homebuyers' expectations. This not only results in the flood of open-ended tort lawsuits the Florida Supreme Court sought to prevent in applying the economic loss rule, it also improperly elevates building material manufacturers to guarantors that their products will not cause economic loss to building purchasers/homebuyers—including subsequent purchasers—in violation of well-established Florida law. *See Perez v. Nat'l Presto Indus., Inc.*, 431 So. 2d 667, 669 (Fla. 3d DCA 1983) ("a manufacturer is not an insurer of its product").

Because no principled basis exists to foreclose application of the economic loss rule in construction defect cases, the Court should not create that exception here.

B. *Casa Clara* Properly Applied the "Object-of-the-Bargain" Rule.

The trial court ruled that any damage the fire sprinkler system caused to other parts of the building in which it was integrated amounted to a product damaging itself rather than damaging "other property." This ruling follows *Casa Clara*'s holding that the parts of the building damaged by the defective component are part of the integrated product the purchaser bargained for and purchased and thus are not "other property" for purposes of the economic loss rule. In *Casa Clara*, the buyers argued a defective component "damaged 'other property' because the individual

components and items of building material, not the homes themselves, are the products purchased." 620 So. 2d at 1247. The Supreme Court disagreed, stating:

> The character of a loss determines the appropriate remedies, and, to determine the character of the loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant. Generally, house buyers have little or no interest in how or where the individual components of a house are obtained. They are content to let the builder produce the finished product, i.e., a house. These homeowners bought finished products--dwellings--not the individual components of those dwellings. They bargained for the finished products, not their various components. The [defective component] became an integral part of the finished product and, thus, did not injure "other" property.

Id. (citation omitted).

The Association urges the Court not to follow the "object-of-the-bargain" approach in *Casa Clara* and, instead, look to "the product sold by the defendant" to determine whether it causes damage to "other property." Not only is using the Association's suggested approach inconsistent with controlling law in *Casa Clara*, it would be inconsistent with the policies underlying the economic loss rule that liability for economic losses is defined by contract, not tort, duties. The plaintiff bargained for and purchased a building, not its individual components, and thus the failure of the purchase to meet economic expectations is governed by the duties prescribed by the purchase contract and any included warranty. Because the plaintiff did not bargain for and purchase the individual components, no contractual duties have been imposed on the component manufacturer to satisfy the purchaser's

economic expectations. The analysis thus properly focuses on the object-of-the-bargain purchased by the plaintiff, not the product sold by the defendant.

The Association wrongly contends that the U.S. Supreme Court rejected the object-of-the-bargain approach in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997). Federal courts, though, have concluded just the opposite, explaining that "*Saratoga Fishing* took an 'object-of-the-bargain' approach." *Albers v. Deere & Co*., 599 F. Supp. 2d 1142, 1155 (D. N.D. 2008); *accord Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 91 (D. Mass. 1998). In fact, since *Saratoga Fishing*, courts nationwide have continued to apply the object-of-the-bargain approach—in connection with both the federal and state versions of the economic loss rule—to distinguish the product from "other property":

- *Golden Spread Coop., Inc. v. Emerson Process Mgmt. Power & Water Sols., Inc.*, 360 F. Supp. 3d 494, 521 (N.D. Tex. 2019) ("Texas courts have consistently viewed the component part and product as a whole and applied the ELR, thereby precluding a finding of damage to 'other property.'"); *see also id.* at 523 (stating Texas applies "an 'object of the bargain' test to define what constitutes 'other property' for the purpose of the ELR");

- *Albers*, 599 F. Supp. 2d at 1155 (applying the object-of-the-bargain approach and noting that "[m]ost of the courts that apply the 'product/other property' dichotomy define the product by focusing upon what was the 'object-of-the-bargain' consistent with limiting tort remedies when the parties have had the opportunity to contractually address the scope of liability");

- *Hutton v. Deere & Co.*, 2000 WL 350260, 210 F.3d 389 (10th Cir. 2000) (applying the object-of-the-bargain approach);

- *Sea-Land Serv., Inc. v. Gen. Elec. Co.*, 134 F.3d 149, 153 (3d Cir. 1998) (recognizing the "object of the bargain" test as the test applied in that circuit);

- *OneBeacon Ins. Co. v. Deere & Co.*, 778 F. Supp. 2d 1005, 1009 (E.D. Mo. 2011) (recognizing the "object-of-the-bargain" approach to determine "other property");

- *U.S. Specialty Ins. Co. v. Daimler Trucks N. Am., LLC*, No. 16-cv-3210, 2017 WL 3118009, at *3 (S.D. July 21, Ind. 2017) ("Indiana law continue[s] to focus on the product *purchased by the plaintiff* in the 'other property' analysis.");

- *Ins. Co. of N. Am. v. Man Engines & Components, Inc.*, No. 05-60699-CIV, 2006 WL 8432178, at *3-4 (S.D. Fla. June 27, 2006) (holding that "[t]he object of the parties' contract constitutes the 'product' under *East River*.").

These courts universally recognize that the object-of-the-bargain approach remains the best means to further the policies underlying the economic loss rule since it comports with the proper contractual allocation of risk for economic losses.

This premise rings particularly true here because the component parts were not alleged to be defective by themselves, but only when combined into an integrated system with other components. Construction professionals often determine which building components to purchase, whether to combine them with others' products, and how they should be installed for a particular project. Component manufacturers are generally not involved in these decisions, which vary based on the particulars of each unique project. As a result, the law imposes no duty on manufacturers to ensure their products will perform as expected or agreed to by those downstream parties. *See Seely*, 403 P.2d at 150-51 (explaining that a manufacturer should not be liable for the level of performance of its product for uses elected by others and for which the manufacturer did not agree); *E. River S.S.*, 476 U.S. at 874 ("Permitting recovery

for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product.").

Instead, parties entering into contracts with construction professionals for the purchase of a building must rely on those contracts to protect their respective bargains. Accordingly, to preserve the purpose of the economic loss rule, one must look to the building or other product which the plaintiff contracted to purchase (*i.e.*, the object of the bargain) in determining the character of the plaintiff's loss and the attendant duties breached. *See Fishman v. Boldt*, 666 So. 2d 273, 274 (Fla. 4th DCA 1996); *Sensenbrenner*, 374 S.E.2d at 58. The Court should reject the Association's request to depart from the well-grounded object-of-the-bargain approach.

II. FLORIDA CONSTRUCTION-LAW STATUTES SUPPORT APPLYING THE ECONOMIC LOSS RULE IN CONSTRUCTION DEFECT CASES.

The Court should also reject the Association's suggestion that the Court not apply the economic loss rule without the Legislature's explicit direction. (IB at 9-10.) The economic loss rule is a widely-accepted doctrine that limits common-law tort claims and does not need legislative authorization. Regardless, the rule is fully consistent with how the Florida Condominium Act ("FCA") allocates liability. Specifically, section 718.203 of the FCA imposes upon parties closely involved with a condominium project—contractors, subcontractors, developers, and suppliers—statutory warranties protecting purchasers from economic losses caused by defective

building components. The FCA does not extend these statutory warranties to component product manufacturers. The Legislature purposefully decided against making manufacturers liable when their products are integrated into buildings that do not meet the purchaser's expectations. *See Harbor Landing Condo. Owners Ass'n, Inc. v. Harbor Landing, L.L.C.*, 78 So. 3d 120, 121 (Fla. 1st DCA 2012).

Section 718.203 refers to manufacturers twice in subsection (1), but does not list them as parties providing statutory warranties to condominium purchasers in subsection (2). *See id.* (explaining that, as a matter of statutory construction, the court must presume the Legislature's reference to "manufacturers" in one subsection and its omission from another was intentional); *see also Moonlit Waters Apartments v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (applying principle *expressio unius est exclusio alterius*). The FCA makes a manufacturer liable for a building component's failure to perform as expected only if the manufacturer was also a "supplier" with a direct connection to the project. *See Port Marina Condo. Ass'n, Inc. v. Roof Services, Inc.*, 119 So. 3d 1288, 1291 (Fla. 4th DCA 2013) (noting statute does not impose liability upon a manufacturer that "had no knowledge of the condominium project" and did not directly "supply anything for the condominium project").

The Legislature's policy judgment is entirely consistent with *Casa Clara* and the trial court's application of the economic loss rule in this case. The Legislature could have easily rejected the outcome ordained by *Casa Clara* since 1993 by simply

amending section 718.203 to make manufacturers liable in warranty for economic losses resulting from any and all remote use of their building components. But, in the quarter century since *Casa Clara*, the Legislature has never chosen to do.

The Legislature has amended the FCA, including section 718.203, many times and never made the policy choice that manufacturers should be liable for economic losses. In 1990, for example, the Legislature created the Condominium Study Commission, which held public hearings around the State to hear issues of concern with condominiums and recommendations for needed changes in the law. *See* Senate Staff Analysis & Economic Impact Statement on SB 1408 at p. 1. Based on the Commission's recommendations, the Legislature amended the FCA, including amendments making additional parties (design professionals, architects, and engineers) liable for the statutory warranty in section 718.203(2). *See* Ch. 91-103, § 11, Laws of Fla. Apparently recognizing the problems caused by expanding the liable parties, the Legislature subsequently amended the statute to remove those newly-added professionals and limit the parties statutorily liable to contractors, subcontractors, developers, and suppliers. *See* Ch. 92-49, § 8, Laws of Fla.

Despite the Condominium Study Commission's extensive work and findings and despite multiple amendments to the list of parties responsible for a statutory warranty, the Legislature has never chosen to place such liability for economic losses on manufacturers. Rather, section 718.203 reflects the Legislature's attentive and

purposeful intent to place such liability on others involved directly with the construction project. Notwithstanding the Association's assertions to the contrary, this is the law of Florida. The Court should not allow the Association to circumvent that sound policy judgment by suing manufacturers in tort for economic losses.

III. APPLYING THE ECONOMIC LOSS RULE TO CONSTRUCTION COMPONENT PRODUCT DEFECT CLAIMS DOES NOT LEAVE PURCHASERS OF HOMES AND COMMERCIAL BUILDINGS UNPROTECTED OR WITHOUT RELIEF.

Florida law provides the Association with a remedy for its claimed economic losses against parties involved in the construction process that typically secure ample insurance to cover such potential losses. Nevertheless, the Association here wants to also sue manufacturers in tort for these losses. It contends manufacturers should not be "immunized." Florida law, though, provides homebuyers with adequate protections for their economic losses and subjects manufacturers to liability in appropriate circumstances.

First, in addition to statutory warranties, homebuyers have ample protections available against economic losses, including the general warranty of habitability, a seller's duty to disclose defects, and a homebuyer's corresponding ability to inspect for defects. *See Casa Clara*, 620 So. 2d at 1247; *e.g.*, *W. Fla. Cmty. Builders, Inc. v. Mitchell*, 528 So. 2d 979 (Fla. 2d DCA 1988) (homeowner's lawsuit for breach of implied warranty against builder/seller based on crack in the house). The parties liable for economic losses typically purchase insurance to guard against such

exposure, as do homebuyers. *See Westinghouse*, 510 So. 2d at 902 (noting that parties can obtain further protection through insurance). *Casa Clara* correctly recognized that these protections are sufficient when compared with the significant adverse consequences that would be caused by allowing contractual parties to recover economic losses from manufacturers in tort. *See* 620 So. 2d at 1247.

Second, contrary to the Association's contention, purchasers of residential and commercial buildings enjoy realistic bargaining power and other options to protect against economic losses. *See Casa Clara*, 620 So. 2d at 1247.

> The construction industry is not characterized by the unequal bargaining positions of a typical retail consumer and manufacturer. While an individual has no realistic chance of negotiating with soft drink or automobile manufacturers over the nature of the products' design, manufacture, or warranty, such is not the case in construction. …It is completely unlike the "take it or leave it" contract imposed by mass-marketers that prompted the courts to open new avenues of relief for the consumer….[T]he homeowner is in a position to negotiate a warranty or reduction in price to reflect the risk of hidden defects. Unlike most consumer goods, price and warranty are almost always negotiable in the sale of realty.

Barrett, *supra*, at 934.[3]

---

[3] *See also Linden*, 699 N.W.2d at 199 ("[H]omeowners retain contractual remedies against the general contractors, who in turn have their own remedies against the subcontractors."); *Mitchem v. Johnson*, 218 N.E.2d 594, 598 (Ohio 1966) ("[R]eal estate buyers generally experience little difficulty in securing express warranties or guarantees if they are insistent....[T]he purchase of real estate is invariably preceded by a lengthy period of inspection, consideration and negotiation. One does not purchase land under conditions in any way similar to the purchase of home permanents, cooking appliances, soap or electric blankets.").

Finally, the economic loss rule does not bar tort claims against manufacturers if defects in their products cause personal injuries or damage to other property. *See Tiara*, 110 So. 3d at 405. As noted above, building component manufacturers may also be liable under statutory warranty law if they were directly involved in the decisions that led to the losses. *See Port Marina*, 119 So. 3d at 1291. In addition, those parties from which purchasers may directly recover for economic losses, such as contractors, typically have a right to contractual or common-law indemnification from manufacturers. Indeed, numerous cross-claims for indemnification were asserted against the manufacturers in this case, including by the sprinkler subcontractor Rodel.[4] Even if those downstream indemnification claims have merit, they still do not create direct causes of action for the Association to assert against the component part manufacturers. For each of these reasons, manufacturers remain responsible for lawfully producing non-defective products. The economic loss rule does not immunize them.

CONCLUSION

The Court should affirm the summary judgment based on the economic loss rule and decline the request to certify a question about *Casa Clara*.

[4] It makes no difference that the trial court denied economic loss rule motions directed at Rodel's cross-claims. Regardless of how styled, those claims are, at bottom, indemnification claims and therefore subject to a different analysis than the Association's products liability claims against the manufacturers.

Respectfully submitted,

By: /s/ *Daniel B. Rogers*

Daniel B. Rogers
Florida Bar No. 195634
SHOOK, HARDY & BACON L.L.P.
201 S. Biscayne Boulevard, Suite 3200
Miami, Florida 33131
Telephone: (305) 358-5171
Facsimile: (305) 358-7470
Email: drogers@shb.com

-- Of Counsel --
Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
1800 K. Street, N.W., Suite 1000
Washington, DC 20006
Telephone: (202) 783-8400
Facsimile: (202) 783-4211
Email: pgoldberg@shb.com

Counsel for Amicus Curiae the National Association of Manufacturers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email this 7th day of June, 2019, upon the following parties:

Stuart Sobel
ssobel@srhl-law.com
Steven M. Siegfried
ssiegfried@srhl-law.com
SIEGFRIED, RIVERA, HYMAN, LERNER DE LA TORRE, MARS & SOBEL, P.A.
201 Alhambra Circle, 11th Floor
Coral Gables, Florida 33134
Telephone: (305) 442-3334
Facsimile: (305) 443-3292

Patrick S. Montoya
patrick@colson.com
Wm. Allen Bonner
abonner@colson.com
COLSON HICKS EIDSON, P.A.
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444

Counsel for Appellant 2711 Hollywood Beach Condominium Association, Inc.

Wendy F. Lumish
wendy.lumish@bowmanandbrooke.com
Donald A. Blackwell
don.blackwell@bowmanandbrooke.com
Alina Alonso Rodriguez
alina.rodriguez@bowmanandbrooke.com
BOWMAN AND BROOKE LLP
Two Alhambra Plaza, Suite 800
Coral Gables, Florida 33134
Telephone: (305) 995-5600
Facsimile: (305) 995-6100

Counsel for Appellee NIBCO, Inc.

By: /s/ *Daniel B. Rogers*
DANIEL B. ROGERS

CERTIFICATE REGARDING FONT STYLE AND SIZE

Counsel for Amicus Curiae certifies that the size and style of type used in this brief is Times New Roman 14-point font.

By: /s/ *Daniel B. Rogers*
DANIEL B. ROGERS