IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE-COUNTY, FLORIDA

CASE NO.: 2021-015089-CA-01
SECTION: CA43
JUDGE: Michael Hanzman

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION

_____/

ECONOMIC LOSS VICTIMS' RESPONSE IN STRONG SUPPORT OF THE PROPOSED $83 MILLION DOLLAR SETTLEMENT AND OPPOSITION TO ANY FURTHER REDUCTION FOR COLLATERAL SOURCES

Undersigned was honored to serve as the Court appointed Counsel for all Economic Loss Victims in the Allocation Mediation. While no mediation ever satisfies every concern from every participant, a successful mediation is one in which most of the important concerns of each side are addressed and the best possible compromise is attained, given the significant risks if a compromise is not reached. The **$83 Million Allocation Settlement** is a good result of that difficult process.

In accordance with the Court's Order dated March 9, 2022, setting out a process for written comments, we respectfully recommend that the $83 million Allocation Settlement be accepted by the Court -- which was reached only after many months of extensive negotiation. We respectfully suggest that this mediated amount not be further reduced by any ***last-minute*** Collateral Source arguments, that are clearly not contemplated under the Condominium Declaration or Chapter 718 and, consequently, not a matter either mediated or agreed to, but came after the compromise was reached.[1]

[1] The Court directly addressed this issue in the March 6th Order, where the Court stated that it may (or may not) reduce economic claims by the amount of any insurance that was paid. *See P*age 7 of the Order. Similarly, the Court further stated that it may consider deducting from the $83 million

Before mediation, this reduction issue was something that this Court already said was **"not going to happen"** when it was first raised by the Receiver on October 20, 2021, and the Receiver agreed. The relevant colloquy between the Receiver and the Court went as follows:

> **MR. GOLDBERG:** .... Finally, Your Honor, there's an important issue that needs to be brought up, regarding what's called contents and dwelling insurance. It's been brought to my attention, Your Honor, that a bunch of unit owners had a separate insurance policy that covered their quote, dwelling. And it was separately procured by them, and the policy has been described to me as dwelling coverage, covering. And I want to quote, alterations, appliances, fixtures and improvements, which are part of the building, but contained within the specific unit, the premises as defined in the policy. As well as, any real property, which pertains exclusively to the residence premises. I did a little research to found out what that real property, that could be affiliated with the specific unit. It's like a storage unit that may have been assigned. Things like that. But it's not the underlying -- specifically, excluded the underlying real property. The question has arisen that some of these insurers have paid out dwelling coverage to the individual unit owner, but the unit owners are a little bit nervous about depositing those checks, because they're not sure whether or not it would have an effect on the ultimate amount of their claim.
>
> Your Honor, my personal research indicates, again, that this was intended to ensure the act -- not the structure, but the inside fixtures and light of a particular unit. And it was procured by unit owners who happened to be a little bit more risk adverse, or fortunate to procure such additional insurance. And, I personally don't think they should be penalized, nor do they, nor do their lawyers, for the fact that they were fortunate enough or wise enough to have obtained such extra dwelling coverage.
>
> **THE COURT**: I'm sorry. Mr. Goldberg, I don't understand the issue. People loss their condominiums. <u>They have a claim for value of their condominiums. The suggestion being made, that they are concerned, and if they negotiate an insurance payment for contents, or this so-called attachment, type of insurance. They will be jeopardizing their claim for the value of their unit?</u>
>
> **MR. GOLDBERG:** <u>Yes</u>, Your Honor, that was the concern I was asked to raise with Your Honor, to get, quote -- ·

<u>Allocation Settlement</u>, costs and fees expended to date by counsel to benefit this economic loss subclass. While undersigned is very appreciative that the Court reiterated that it reserves the right to consider the payment of "Common Benefit" fees and expenses *(see* footnote 3 of the Order) at the conclusion of this litigation, undersigned respectfully requests that the $83 million Allocation Settlement should not be reduced in any manner and such decisions would be better made by the Court, at the conclusion of this litigation.

> **THE COURT:** Okay, **I'm not concerned about that. And that's not going to happen.** If people had contents insurance, or individual policies, that insured things other than the value of their condominium, and they are paid for that, that is not going to impair their ability, to make a claim, in the estate or litigation, for the value of their condominium. They are two separate things.
>
> **MR. GOLDBERG**: I agree, Your Honor. And I was asked to bring it up. Thank you for denying it.
>
> **THE COURT:** Well, if people had contents insurance or insurance that indemnified them against loss of fixtures, and things in the unit, they should not be concerned about negotiating payment for that loss.
>
> **MR. GOLDBERG**: Perfect. Thanks, Your Honor. With that, I am done with my presentation.

See October 20, 2021 Hearing Transcript at pages 33:24-37:4. (emphasis added) (attached hereto as Exhibit A).

Months of negotiations followed before Mr. Greer, and then, as this Court may recall, the Economic Victims and Wrongful Death Victims, all met for a full-day in person mediation at Fairchild Gardens, and reached an agreement for the $83 million Allocation in consideration for the Economic Victims' claims to exit those claimants from the case. At the time of the mediation, and even the days following, all counsel (for ***both*** the wrongful death victims and the economic loss victims) all vehemently agreed, there was no justification to reduce any of the victims by any Collateral Sources.

However, once the Agreement was finally presented to Court, only then did one counsel for Wrongful Death Victims first try to change the Agreement, by asserting that non-owner economic **"contents" claims** should be paid out of the $83 million settlement to reduce the settlement amount due to the Economic Loss Property Owner Victims. This was not accurate, and the first attempt to change the Allocation Agreement was defeated. Further, after it became clear that the non-owner economic/content claims would not be taken out of the $83 million settlement

recovery, then, and only then, did the Wrongful Death Victims change course and suddenly assert that the Allocation Agreement should be further reduced for Collateral Sources, consisting of payments made to mortgagees from the insurance benefits paid out of homeowner's insurance that unit owner secured and paid for, solely to insure its unit per requirement of the lender/mortgagee or otherwise.

All victims agree that Collateral Source Recovery reductions were always rejected by all counsel, and the Economic Loss Property Owner Victims were presented with the best and final compromised amount of $83 million. Moreover, Chapter 718 of Florida Statutes expressly prohibits a deduction in the allocation of proceeds from statutory termination of a Condominium or assessment under section.

Therefore, unable to resolve this "last minute" new issue without declaring an impasse on Friday night, all Counsel agreed to leave this issue up to the Court.[2] The Allocation Agreement that was entered by the Receiver, had an extra paragraph included, which was originally entitled ***"Collateral Source Recoveries",*** but changed to a benign ***"Insurance Recoveries"*** as follows:

> **g.** ***Insurance Recoveries:*** By separate motion, the Court shall adjudicate whether a Participating Unit Owner's Individual Percentage Share of the Common Fund should be reduced, if at all, by the amount of insurance proceeds received by any Participating Unit Owner related to or on account of the Collapse. All Parties irrevocably agree to be bound by the Court's decision with respect to this issue and agree that the Court's decision shall be binding and non-appealable. If the Court decides that such insurance amounts should be deducted from their share of the Common Fund, participating Unit Owners will have to sign, under penalty of perjury, a declaration disclosing all sources of insurance on its respective Unit (but excluding insurance on personal property).

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[2] At the same time, Counsel for the Economic Victims contended that the Court should similarly reserve ruling to later decide, if any future claims are brought by the Receiver, as a result of the egregiously low amount of insurance on the building (possibly by the insurance agent and/or appraise), those claims should go solely to increase (and benefit the Economic Loss Victims) the **$83 million Allocation Settlement.** Counsel for the Wrongful Death Victims, and the Receiver, informed undersigned counsel to make these arguments at the March 30th hearing.

The issue of whether any Collateral Sources of recovery should be deducted from both the Wrongful Death Victims and Economic Loss Property Owner Victims, was discussed and debated for many months (first at a hearing on October 20, 2021 as described above). ***All Counsel*** opposed deducting any Collateral Sources of any recoveries, such as liability/life insurance proceeds, charity donations, etc. from any victim's compensation, because the law on Collateral Source recoveries in Florida is very clear.

Unless the source is expressly identified in Fla. Stat. 768.76, such recoveries are not permitted to be deducted. Undersigned all agreed and were thus extremely surprised, when Wrongful Death Victims suggested, after an agreement had been reached and at the very last minute, that the agreed $83 million dollar Allocation Settlement, should be further reduced, by Collateral Source recoveries particularly in cases where the insurance payments were made to satisfy the mortgage on a unit to satisfy an encumbrance that would benefit the sale of the land. The parties only agreed to the $83 million dollar payout without reduction to settle the claims of the Economic Loss Property Owner Victims only, *after* extensive analysis of many internal and confidential factors, over a period of months. The parties settled on a fixed settlement amount of $83 million, not "maybe" $83 million or that amount minus other reductions to compromise on an unknown amount to be determined in the future for some of the unit owners.

Not only should these amounts not be deducted, but as a direct result of similar insurance policies, some Wrongful Death Victims ***have already collected millions of dollars*** in direct recovery from liability insurance maintained by the owner of the victim's specific unit. These Wrongful Death Victims have benefited directly from the additional insurance policies that were fortunately purchased, and all premiums paid, by these same Economic Loss Property Owner Victims. Moreover, there can be no dispute that any insurance proceeds collected by any CTS

Victim, is not admissible and/or relevant to the $83 million dollar Allocation Settlement. Ironically, all counsel agreed that any insurance policies regarding coverage for personal property should, and will not, be deducted from any recovery.

A. The Collateral Source Rule and Made Whole Doctrine Preclude Reductions.

The Collateral Source Rule has both an evidentiary and damages component. The evidentiary component is that evidence of collateral sources may not be introduced at trial because it risks prejudicing a plaintiff by having the jury think that the damages are already covered. The damages component allows a plaintiff to recover the full amount of their damages from a tortfeasor, regardless of whether there are any sources of insurance available to pay for the damages. The policy behind the rule is that a tortfeasor should not be exonerated for the plaintiff's foresight in obtaining their own insurance. *See Gormley v. GTE Prods.*, 587 So. 2d 455 (Fla. 1991). Section 768.76, Florida Statutes, contains a limited exception to the Collateral Source Rule, but that statute does not apply in this case for two reasons.

First, section 786.76 only authorizes the court to reduce a plaintiff's damages award by a few specific "collateral sources." If the source of the payment does not meet the statutory definition of a collateral source, then it is not deductible from a damages award. See § 768.76(2)(a), Fla. Stat. The Economic Loss Claimants' property or renter's insurance policies are not a deductible collateral source because they are not included in the statute. *Id.* This is the same reason why life insurance (for a Wrongful Death Claim) does not apply, as it is also expressly excluded. Instructive is *Hurtado v. Desouza, 166* So. 3d 831 (Fla. 4th DCA 2015), which held that an injured motorist's unemployment compensation benefits were not a collateral source that could be set off against the damages awarded in his automobile negligence action. As explained in *Hall v. Sargeant:*

> While the Florida legislature has abrogated that rule by statute in certain specifically-enumerated circumstances—such as disability benefits and insurance payments for

> medical expenses, *see id. (citing* Fla. Stat. § 768.76)—the common-law rule continues to apply when, as here, a plaintiff receives compensation from a source not listed in the statute. *Id.* at 838 ("[B]ecause unemployment compensation benefits are not specifically listed in section 786.76 and cannot be interpreted as a collateral source under any of its provisions, the trial court erred in setting off those benefits from the final judgment.").

Id., 18-80748-CIV, 2020 WL 1536435, at *22 (S.D. Fla. Mar. 30, 2020) (emphasis added).

Second, even if the victims' insurance policies could be considered collateral sources, if there is a right of subrogation in the collateral source, then no reduction under the collateral source statute can be made. See § 768.76(1), Fla. Stat. ("however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists"). Most property insurance policies have subrogation provisions for this reason. Universal Property and Casualty Insurance Company ("UPCIC") has already filed a motion to intervene and interplead funds from their policies in our case, and the court granted that motion without waiver of any rights UPCIC had under the policies. Whether the subrogation claim will ultimately succeed is not the issue. The fact it is in the policy is the determinative factor.

It is axiomatic that a setoff for collateral source payments is precluded by the existence of [not success] a right of subrogation, and not by the exercise of that right. *Bruner v. Caterpillar, Inc.*, 627 So. 2d 46 (Fla. 1st DCA 1993); *Sutton v. Ashcraft*, 671 So. 2d 301 (Fla. 5th DCA 1996). Moreover, under the Limited Fund circumstances of this case, the "made whole" doctrine may likely apply, which would mean that these insurance companies might not be able to assert any subrogation rights, unless and until the plaintiffs first recover the full amount of damages they have sustained, which will never happen here. Thus, no insurance proceeds paid by either the Association or the CTS Unit Owners' contents insurers would apply to set-off any damages they are able to seek and recover from the Third-Party Defendants.

B. Equally Important, the Same Canon of Statutory Interpretation that This Honorable Court Analyzed in its Order of Preliminary Approval Dated March 6,

2022, Make it Inappropriate to Reduce Certain Economic Loss Victims' Recoveries.

The Economic Loss Victims maintain that any reductions for Collateral Sources would violate the Condominium Declaration and Fla Stat. §718.119, and such a result would also inequitably place blame on certain owners over others. The core analysis advanced by WDC was strictly a statutory analysis under section 718.119 to advance the risk of an assessment that fueled the compromise.

First, the Condo Declaration (which every Owner, Renter, and Visitor agreed to) provides for a split of the proceeds by specific percentages (*see* Exhibit B to the Allocation Settlement Agreement) and nowhere in the Declaration does it provide that the split of any amounts can account for Collateral Sources an Owner receives. The Declaration provides specific amounts for each Owner's ownership percentage in the property. The Declaration is a contract that controls and runs with the land. Reducing allocations for Collateral Sources would in effect change those percentages, and alter the Condominium Declaration, a contract that every Owner, Renter and Visitor agreed to abide by, and thereby impair contractual rights.

Similarly, Fla Stat. § 718.119(2) states that the Condo Association can levy an assessment against an owner but "only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit." This statute does not allow for an increase or decrease of the assessment against a particular owner because they had insurance coverage. If the allocation amounts for a particular owner that had insurance was reduced by any insurance proceeds recovery, this would, in effect, increase the assessment to that owner and violate Fla Stat. § 718.119(2). All owners must be treated consistently under the law. The existence or non-existence

of individual insurance is not part of the statutory framework to consider in an assessment or allocation under the circumstances of termination or otherwise.

Aside from the legal impediments to reducing certain owners' recoveries by Collateral Sources, it would also be inequitable to do so. This Court should not punish Economic Loss Property Owner Victims who wisely obtained more insurance coverage paid more for the coverage in substantially higher premiums. It would be inequitable to reduce recovery to the owners who were more prudent. Currently, there is no plan to return any of these higher premium payments to owners, and many Wrongful Death Victims who were renters or visitors of a particular owner have benefitted or will benefit directly from the greater insurance many owners maintained. Further, the Economic Loss Property Owner Victims obtained this greater coverage to cover improvements they made to their properties. The current Allocation distribution does not account for the vast amounts Economic Loss Property Owner Victims paid to improve their units, with many taking out mortgages or equity lines for those improvements. Economic Loss Property Owner Victims are releasing all third-party claims for damages to recover these amounts. These insurance policies are a way of accounting for the improvements and the additional damages these owners would have had in this matter. As Receiver Goldberg stated, "I personally don't think they should be penalized, nor do they, nor do their lawyers, for the fact that they were fortunate enough or wise enough to have obtained such extra dwelling coverage." *See* Exhibit A at 35:12-35:17.

In addition, reducing payments to certain Economic Loss Property Owner Victims who purchased dwelling insurance is in effect blaming one owner over another. For example, assume there is an owner who purchased their Unit only months before the collapse and paid the repair assessment requested by the building in full. If that owner also purchased dwelling coverage, they would receive a reduction on their allocation amount over another owner who purchased a unit 20

years ago and never paid the assessment. This would be inequitable and highly prejudicial to those whose mortgages were satisfied from these proceeds. Reducing allocation amounts based upon Collateral Sources inequitably picks winners and losers in this Allocation process instead of treating everyone the same as required by the Condominium Declaration and law.

As this Court stated, "[i]f people had contents insurance, or individual policies, that insured things other than the value of their condominium, and they are paid for that, that is not going to impair their ability, to make a claim, in the estate or litigation, for the value of their condominium. They are two separate things." *See* Exhibit A at 36:21-37:1.

Accordingly, Undersigned respectfully requests, that the Court not alter, amend and/or change, the final agreed **$83 million dollar Allocation Settlement,** as a result of any possible Collateral Source recoveries or any other adjustment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 18, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court via the Florida Courts eFiling Portal, which will serve it via electronic mail to counsel of record.

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-015089

MANUEL DREZNER,

Plaintiff,

vs.

CHAMPLAIN TOWERS SOUTH
CONDOMINIUM ASSOCIATION, INC.,

Defendants.

ZOOM HEARING BEFORE THE
HONORABLE MICHAEL HANZMAN

Pages: 1-115

October 20th, 2021
9:00 a.m. - 11:05 a.m.

Remote Deposition
Miami, Florida 33130

Stenographically Reported By:
STACY A. BOFFMAN

view and claim it. And there's a whole process set forth. That process has started. Your Honor, the cash that was found, the County is working out the details and logistics with the treasury, and we expect that, that will get done shortly, and the cash will be transported up to Washington. With respect to the safes, Your Honor, I expect that I will be there at the police with a Locksmith, a videographer, and we will be accessing the safes. Again, as discussed in previous hearings, to the extent the owner can be identified, we will take the contents of the safe, put it in a clear evidence bag, leave the contents with the police. And I'll file a motion with this Court, approving the turnover to the party, if they can be identified. If they can't be identified, we will probably take photos, and put it up and follow the same protocol previously entered with respect to the hard items we found, and the remnants.

Finally, Your Honor, there's an important issue that needs to be brought

up, regarding what's called contents and dwelling insurance. It's been brought to my attention, Your Honor, that a bunch of unit owners had a separate insurance policy that covered their quote, dwelling. And it was separately procured by them, and the policy has been described to me as dwelling coverage, covering. And I want to quote, alterations, appliances, fixtures and improvements, which are part of the building, but contained within the specific unit, the premises as defined in the policy. As well as, any real property, which pertains exclusively to the residence premises. I did a little research to found out what that real property, that could be affiliated with the specific unit. It's like a storage unit that may have been assigned. Things like that. But it's not the underlying -- specifically, excluded the underlying real property. The question has arisen that some of these insurers have paid out dwelling coverage to the individual unit owner, but the unit owners are a little

bit nervous about depositing those checks, because they're not sure whether or not it would have an affect on the ultimate amount of their claim.

Your Honor, my personal research indicates, again, that this was intended to ensure the act -- not the structure, but the inside fixtures and light of a particular unit. And it was procured by unit owners who happened to be a little bit more risk adverse, or fortunate to procure such additional insurance. And, I personally don't think they should be penalized, nor do they, nor do their lawyers, for the fact that they were fortunate enough or wise enough to have obtained such extra dwelling coverage.

THE COURT: I'm sorry. Mr. Goldberg, I don't understand the issue. People loss their condominiums. They have a claim for value of their condominiums. The suggestion being made, that they are concerned, and if they negotiate an insurance payment for contents, or this so called attachment,

type of insurance. They will be jeopardizing their claim for the value of their unit?

MR. GOLDBERG: Yes, Your Honor, that was the concern I was asked to raise with Your Honor, to get, quote --

THE COURT: Okay, I'm not concerned about that. And that's not going to happen. If people had contents insurance, or individual policies, that insured things other than the value of their condominium, and they are paid for that, that is not going to impair their ability, to make a claim, in the estate or litigation, for the value of their condominium. They are two separate things.

MR. GOLDBERG: I agree, Your Honor. And I was asked to bring it up. Thank you for denying it.

THE COURT: Well, if people had contents insurance or insurance that indemnified them against loss of fixtures, and things in the unit, they should not be concerned about negotiating payment for

that loss.

MR. GOLDBERG: Perfect. Thanks, Your Honor. With that, I am done with my presentation.

Mr. Fay, I know wants to update you on the status of the real estate, unless the Court has any other questions?

THE COURT: No. Let me hear from Mr. Fay.

MR. FAY: Good morning, Your Honor, How are you?

I wanted to give you a couple of important updates.

First, the stalking horse continues to work diligently with their architects and plan engineers, and pre-planning what they would like to build, subject to, again, getting on site, and doing their regular inspections, as Receiver Goldberg mentioned earlier.

Number two, we continued to market the property heavily, and we have entrance from Mexico, United Kingdom, Canada, Newark, and a lot of other major, national and local group s have continued to call