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Building Blocks

The Newsletter of the Product Liability Building Products SLG

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Leadership Notes

Chair's Welcome

by Bill Hubbard

As we triage year-end issues, I hope you take the time to review this edition of *Building Blocks*. The first article provides an update on the spray foam litigation from Jaret Fuente following up on a piece from a prior newsletter. That litigation highlights an increasing trend in building product litigation: the allegation of health effects from exposure to various chemicals and substances in building products. We expect to see that trend continue in 2014. The second article summarizes another trend we are witnessing, the filing of consumer class actions involving wood composite decking. Mark Shifton and Heather McCoy provide a good synopsis of that litigation.

Now that the winter months are upon us here in the Midwest, it is easy to look forward to the 2014 Products Liability Conference that will be held April 9th through 11th at the Biltmore in Phoenix, Arizona. The Building Products SLG break-out session is scheduled for the morning of Friday the 11th. We have a great lineup of topics, including a panel discussion on the best practices for successful building product inspections, a presentation on the liability of product manufacturers complying with performance specifications in design/build projects, and an update on building product class actions post *Dukes* and *Comcast*.

As you are planning for 2014, please hold those dates and plan to attend the Product Liability Conference in April. Until then, we are always looking for authors and ideas for the Building Blocks newsletter, so please contact myself or our editors, Jaret and Mark, with any articles or article ideas. Wishing you Happy Holidays and a prosperous new year.

Featured Articles

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In This Issue

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Spray Polyurethane Foam Insulation Products Liability Litigation – An Update

by Jaret J. Fuente

Earlier this year, it seemed like Spray Polyurethane Foam Insulation ("SPF") might generate the type of attention that Chinese drywall did. Between April 2012 and May 2013 homeowners in various parts of the country, including Connecticut, Florida, Maryland, Michigan, New Jersey, New York, Pennsylvania, and Wisconsin, had filed at least thirteen separate lawsuits alleging property damages and physical injuries arising from SPF.

Florida plaintiff, Lucille Renzi, sought to transfer all SPF lawsuits to the Southern District of Florida, where her lawsuit was pending, for coordinated and consolidated pre-trial proceedings. Renzi argued there were other "substantially similar putative class action[s] involving the same allegedly tortious manufacture, distribution, marketing, labeling, installation, and inspection of SPF" that "all involve identical conduct on the part of the defendants" and "common questions of law and fact," and that centralization in the Southern District of Florida would save the plaintiffs and defendants the burden of litigating overlapping lawsuits in multiple jurisdictions across the country, and would be more convenient and conserve resources. *See In Re Spray Polyurethane Foam Insulation Prods. Liab. Litig.*, MDL No. 2444 (Dkt. No. 1, ¶¶ 2-9, 11). It seemed as though SPF was heating up.

On May 30, 2013, however, the Judicial Panel on Multi-District Litigation ("JPML") heard argument on Renzi's motion, including opposition of the various defendant manufacturers, distributors, installers, and a home builder, and promptly denied Renzi's motion. In its June 6, 2013, Order Denying Transfer, the JPML reasoned:

> On the basis of the papers filed and the hearing session held, we will deny plaintiff's motion. Although these actions share factual questions arising out of allegations that SPF insulation products emit [volatile organic compounds] VOCs as a result of one or more defects associated with the product, the Panel is not persuaded that Section 1407 centralization is necessary either to assure the convenience of the parties and witnesses or for the just and efficient conduct of this litigation. On the present record, it appears that individualized facts concerning the chemical composition of the different products, the training and practices of each installer, and the circumstances of installation at each residence will predominate over the common factual issues alleged by plaintiffs. Additionally, placing direct competitor manufacturer defendants into the same litigation would require protecting trade secret and confidential information from disclosure to all

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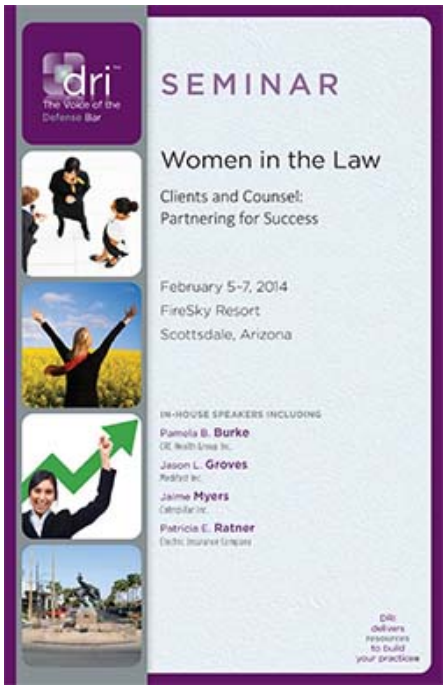

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parties and complicate case management.

In Re Spray Polyurethane Foam Insulation Prods. Liab. Litig., MDL No. 2444 (Dkt. No. 119).

Notably, the panel specifically relied on "individualized facts" related not only to the chemical composition of the various SPF products (there are multiple SPF manufacturers, some of which make various products themselves), but also related to the installers and the circumstances of the installations (the manufacturers have strict, specific requirements for mixing and installing the SPF). The panel stated that "[u]nder the present circumstances, voluntary coordination among the parties (many of whom are represented by the same counsel) and the involved judges is a preferable alternative to centralization. We encourage the parties to employ various alternatives to transfer which may minimize the potential for duplicative discovery and/or inconsistent pretrial rulings." *Id.* (citing *In re Yellow Brass Plumbing Component Prods. Liab. Litig.*, 844 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012); *Manual for Complex Litigation, Fourth*, § 20.14 (2004)).

Several interesting developments have followed. In June 2013, the Southern District of Florida, in *Renzi v. Demilec (USA) LLC, et al.*, No. 9:12-cv-80516-KAM (Dkt. 94) and *Steinhardt v. Demilec (USA) LLC, et al.*, No. 9:13-cv-80354-DMM (Dkt. 24), *sua sponte* ordered the parties to submit their positions regarding consolidation of those two cases. The plaintiffs favored consolidation for all purposes. The manufacturer opposed consolidation. And the distributor favored coordination only for discovery and certain pre-trial matters, but noted in its submission that the plaintiffs in both cases had advised that they intended to withdraw their class allegations. The Southern District eventually decided not to consolidate the cases because, although they had indicated they intended to do so, the plaintiffs in those two cases had not moved to amend their complaints to make the cases identical. *See Renzi* (Dkt. 112) and *Steinhardt* (Dkt. 35).

In August 2013, the plaintiffs in a Wisconsin class action voluntarily dismissed their action without prejudice, *Hecker v. Demilec (USA) LLC, et al.*, No. 3:12-cv-00682-WMC (Dkt. 43), and the plaintiff in an individual Connecticut state court action filed a "withdrawal of action," *Commorato v. Spray Foam Nation Company*, FST-CV13-6018331-S. And the *Steinhardt* plaintiffs, who once favored consolidation with *Renzi*, subsequently voluntarily dismissed their Florida action without prejudice as well. *Steinhardt* (Dkt. 37-38).

In October 2013, the Eastern District of Pennsylvania dismissed, with prejudice, the medical monitoring claim in a class action there. *Slemmer v. McLaughlin Spray Foam Insulation, Inc.*, No. 2:12-cv-06542-JD (Dkt. 30). And, in November 2013, the plaintiffs in a Michigan class withdrew their medical monitoring claim. *Stegink v. Demilec (USA) LLC, et al.*, No. 1:12-cv-01243-JTN (Dkt. 47).

In December 2013, the Southern District in *Renzi* granted the manufacturer's motion for partial summary judgment on Renzi's claim for "violation of consumer protection acts." *See*

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Renzi (Dkt. 113). Renzi sought relief on behalf of a nationwide class under not only the consumer protection act of Florida, her state of residence, but also the consumer protection acts of Alabama, Georgia, Louisiana, North Carolina, Texas, and Virginia. The Southern District ruled that Renzi lacked standing to bring claims under the consumer protection acts of states other than Florida. *Id.*

Despite what appears to be a drawdown of the SPF litigation since the JPML's decision in June, at least one additional SPF action was filed since then. On October 28, 2013, pro se individual homeowners in Connecticut filed suit with allegations similar to those in the existing actions. *See Beyer v. Anchor Insulation Co., et al.*, No. 3:13-cv-01576-JBA (Dkt. 1). Of course, other state court actions, which are not as easily tracked as federal actions, may be pending as well. Whether it's cooling down or heating up, at least for now, it appears that the SPF litigation may linger for a while.

Jaret J. Fuente *is a Shareholder in the Tampa, Florida office of Carlton Fields. He represents builders, developers, and manufacturers in breach of contract, construction defect, mold, and building product-related claims, including product liability and class action litigation. He has a particular interest in the recent trend in building product-related litigation.*

Composite Decking Litigation: After the Trex Settlement, Who's Next to the Party?

by Mark D. Shifton and Heather L. McCoy

Over the last decade, the plaintiff's bar has turned its attention to composite decking manufacturers, filing a stream of class action and direct actions against several big-name manufacturers, and – with two recent high profile class action settlements – the efforts appear to be paying off. While some complaints have either been dismissed or voluntarily withdrawn, several actions have resulted in significant settlements, as well as more modest settlements for private claimants. Accordingly, composite decking manufacturers present a clear target to the plaintiffs' bar, and the question being asked has gone from "do these claims have merit?" to "which manufacturer is the next target?"

Since its introduction in the 1990s, "composite" decking, generally comprised of sawdust, plastic and a binder, continues to grow in popularity, boasting annual sales of more than $1 billion. Composite decking manufacturers such as Trex, Fiberon, TimberTech, Azek, CertainTeed, Crawford, EverGrain, GeoDeck, DuraLife, and Rhino Deck – to name

only a few – advertise their products as low-maintenance, eco-friendly alternatives to traditional wood decks. Indeed, composite decks are good for the environment; the average composite is 80-90% recycled material, and consumers recognize and appreciate the ease of construction and maintenance presented by these products.

With increasing regularity since the early 2000s, however, several class actions and direct lawsuits have been filed against composite decking manufacturers. Many complaints allege that composite decking materials – despite being advertised as "low maintenance" – have been plagued by mold and mildew. Complaints often allege causes of action for breach of express and implied warranties, violations of federal and state consumer protection statutes, as well as claims of common-law fraud, deceptive practices, and misrepresentation. The breach of express and implied warranties claims usually involve allegations attacking the composite decking's guarantees, design, or disclaimers, and alleging that the products were not fit for their ordinary or intended purposes.

There have been several class action settlements – including two in the last four months – affecting broad classes of consumers. In August 2004, a New Jersey court approved a class action settlement in *Kanefsky v. Trex Co., Inc.* As part of the settlement terms, which applied to all persons nationwide who purchased certain Trex products from 1992 through July 31, 2004 (including subsequent owners), Trex agreed to pay the full cost of replacement of the product, including labor costs.

Six years later, in *Ross v. Trex Co., Inc.*, the United States District Court for the District of Northern California approved a class action settlement against the same manufacturer. Plaintiffs alleged that their Trex composite decks experienced surface flaking, and were thus defective. Although Trex denied the allegation, plaintiffs alleged a manufacturing problem at the Trex facility in Fernley, Nevada, a facility which manufactured the product to be distributed to sixteen states in the Midwest. In the settlement, Trex agreed to replace the product, and pay limited labor costs, for all products affected by surface flaking that were manufactured in that specific facility. The settlement class constituted all persons in the United States who owned a structure composed of a Trex product manufactured at Trex's Fenley plant from January 1, 2002 through December 31, 2007.

Similar actions have been filed against other composite decking manufacturers, with mixed results. In *Conway v. CPG Int'l, Inc., et al.*, a purported class action filed in the United States District Court for the Northern District of New York, was voluntarily dismissed by the named plaintiff on February 1, 2013, and has not been refiled. Another federal action, against a different manufacturer, was dismissed without prejudice upon the manufacturer's motion to dismiss pursuant to Rule 12(b)(6). In *Prue v. Fiber Composites, LLC*, an individual action against a composite decking manufacturer, plaintiff alleged that the defendant's manufactured decking materials were defective, and asserted three causes of action: (1) negligence; (2) violations of New

York's consumer protection statute; and (3) breach of the implied and express warranties. The United States District Court for the Eastern District of New York, however, granted the manufacturer's motion to dismiss the complaint in its entirety.

Another case against the same manufacturer, however, yielded different results. In *Fleisher v. Fiber Composites, LLC*, a class action filed in the United States District Court for the Eastern District of Pennsylvania, plaintiffs alleged that Fiber Composites' product Portico was defective in that it was prone to mold, mildew, and fungal growth, resulting in discoloration of the deck surface. The plaintiff asserted nine causes of action, seven of which survived a motion to dismiss, including, (1) violation of the Magnuson-Moss Consumer Products Warranties Act; (2) breach of the implied warranty of merchantability; (3) violations of three states' consumer protection statutes; (4) declaratory relief; and (5) unjust enrichment. Two weeks ago, the Eastern District of Pennsylvania preliminarily approved a proposed settlement which will provide compensation to residential or commercial owners who purchased composite decking, railing or fencing materials under various Fiber Composites brand names purchased and installed after March 14, 2008. Plaintiff's counsel estimated a nationwide class of 150,000 to 200,000 potential members.

Most recently, in *Mahan v. Trex Co., Inc.*, the United States District Court for the District of Northern California granted preliminary approval to a settlement agreement for a nationwide class action alleging misrepresentations and defects in Trex's first-generation composite products relating to mold growth and color variations. The proposed settlement, which has been capped at $8.25 million, provides compensation to class members who own decking, railing, or fencing built with certain Trex products purchased between August 1, 2004 and August 27, 2013. The class opt-out period expired October 28, 2013, and, as of the date this article went to print, the final approval hearing is scheduled for December 13, 2013.

Judging from the recent press regarding "victories" achieved in the *Fleisher* and *Mahan* class action settlements, the plaintiffs' bar appears poised to capitalize on the successes of these actions and target additional composite decking manufacturers for litigation. A recent internet search revealed numerous websites produced by plaintiffs' firms advertising the active "investigations" of claims of defective composite decking, including a firm in Minneapolis currently investigating four possible class action lawsuits against four separate composite decking manufacturers. In an apparent effort to rouse the masses in the crusade against composite decking manufacturers, there are even discussion forums aimed at recruiting potential class members. Given the publicity behind the recent settlements, and the alleged widespread nature of the problems, future filings can likely be anticipated. Litigators representing building products manufacturers, especially manufacturers of products incorporating composites, must be vigilant in tracking these developments, and preparing their clients for further litigation.

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News & Announcements

Building Products SLG – Golf Outing

by Alan Levy

As you know, DRI's next Products Liability Conference is being hosted at the Biltmore, Arizona, which is the home to some of the country's finest golf courses. Hence, the Building Products SLG is organizing a Golf Outing during the week of the conference. We are currently looking at tee times either Tuesday, April 8, 2014, before the conference or the afternoon of Friday, April 11, 2014 immediately following the event. The selected tee times will depend upon the preference of the participants who respond early. Those interested in participating in the Golf Outing should contact me at alevy@buckleylawgroup.com.

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