dri™
The Voice of the Defense Bar

Building Blocks
The Newsletter of the Product Liability Building Products SLG

May 24, 2013 Volume 4 Issue 1

DRI Resources

Leadership Notes

Note from the Chair

by Bill Hubbard

It was great seeing everyone at the Product Liability Committee conference in Washington, DC in April, and I think we all thoroughly enjoyed the presentations. Harris Feldman gave us a lot of insight and practice pointers in applying the integrated product doctrine defense. Mark Raffman provided a great summary of building product class action litigation post-*Dukes* and Karyn Schmidt provided a lot of new information on green building rating systems, codes, and standards and potential litigation relevant to building products and sustainability issues.

I think you will find the articles in this edition of *Building Blocks* just as interesting. Mark Shifton and Shrina Faldu provide a great analysis of a recent decision in which the Florida Supreme Court limited the use of the economic loss rule, and Jaret Fuente provides a summary of spray polyurethane foam insulation litigation. We are always looking for submissions for our next edition of *Building Blocks*, so please do not hesitate to email me at bill.hubbard@thompsonhine.com if you have any ideas or articles. I hope everyone has a great Spring.

Bill Hubbard *practices in Thompson Hine LLP's Product Liability Litigation and Construction practice groups. He regularly counsels clients on mass tort and class action litigation and focuses his practice on risk avoidance, litigation, and dispute resolution concerning commercial, consumer, and building products, injuries to persons and property, and claims involving owners, contractors, architects, engineers, construction managers, and other construction professionals.*

Note from the Editors

by Jaret J. Fuente and Mark D. Shifton

The DRI Product Liability Committee Building Products SLG is pleased to publish Volume 4, Issue 1, of its newsletter, *Building Blocks*.

We are always looking for authors for future issues, and welcome submissions from the membership. The readership of *Building Blocks* is composed of defense attorneys, in-house counsel, and insurance adjusters, and is interested in timely, practical advice from their colleagues. This is a great opportunity to share your wisdom, experience, and get your name out in front of the DRI community!

An article can be an analysis of recent case law or legislation, advice to inexperienced (or even experienced) practitioners, strategies you are seeing by the plaintiffs' bar, war stories, or

Join the DRI Community

In This Issue

Note from the Chair

Note from the Editors

Spray Polyurethane Foam Insulation Products Liability Litigation – *Cooling Down or Heating Up?*

Florida Supreme Court Limits Expansion of Economic Loss Rule

Increase Your DRI Membership Value

Recommend Your Colleagues

Committee Leadership

Committee Chair
William J. Hubbard
Thompson Hine LLP
(216) 566-5644
bill.hubbard@thompsonhine.com

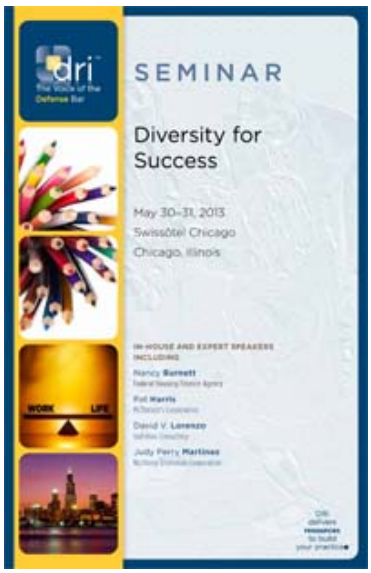
Committee Vice Chair
Alan R. Levy
Buckley, Zinober & Curtis
(212) 514-7400
alevy@bzclegal.com

Publications Co-Chairs
Mark D. Shifton
Seiger Gfeller Laurie LLP
(609) 375-2653
mshifton@sgllawgroup.com

Jaret J. Fuente
Carlton Fields
(813) 229-4362
jfuente@carltonfields.com

Click to view entire Leadership

Seminars



any other information that may be of interest to the SLG. Articles should be 1,000 – 1,500 words (or approximately five double-spaced pages), and include a short bio and contact information. Articles which are shorter or longer are always welcome for consideration.

If you have any questions, or wish to discuss a potential article topic, please contact either Jaret or Mark.

Jaret J. Fuente – jfuente@carltonfields.com

Mark D. Shifton – mshifton@sgllawgroup.com

Featured Articles

Spray Polyurethane Foam Insulation Products Liability Litigation – *Cooling Down or Heating Up?*

by Jaret J. Fuente

As consumers grow more sophisticated and interested in "Green Building" and energy efficiency, building product manufacturers continue to develop technologies and products to meet changing consumer demands. Low-e double pane windows, radiant barriers, and advanced insulation products are common in residential and commercial construction today. Spray polyurethane foam (SPF) insulation, in particular, is popular, in part, because it is designed to decrease moisture intrusion and energy loss and thereby increase overall energy efficiency, which can result in lower utility bills. It is also used sometimes as a sound barrier between walls and between floors in multi-level homes and buildings.

There are numerous manufacturers with varying SPF insulation products. In general, SPF insulation is installed by spraying the foam onto substrate surfaces in accordance with manufacturer specifications. The foam expands, fills gaps, and then cures to create a layer of insulation. SPF insulation is commonly installed between framing studs on wood-framed walls instead of traditional batt insulation. It also is commonly installed in attics by spraying it onto the underside of the roof decking, which may eliminate the need for traditional batt or blown insulation on the attic floor, creating a semi-conditioned attic space and insulating the HVAC ducts from excessive attic temperatures.

Despite its benefits and popularity, however, SPF insulation is the subject of numerous relatively recent product liability lawsuits. Since early 2012, at least thirteen lawsuits, most of which are class actions, have been filed, including at least two as recently as April 2013. Most of the lawsuits were filed in Florida and Connecticut, but others were filed in Michigan, New Jersey, New York, Pennsylvania, and Wisconsin.

The plaintiffs in the lawsuits are homeowners. So far, the defendants named include three different SPF insulation manufacturers, various distributors, installers and general contractors, and one home builder. The plaintiffs generally allege that the SPF insulation is toxic because of its design, or because the manufacturers' exacting installation specifications make it difficult to properly install, and that it off-gasses and causes headaches, neurological issues, eye, nose, and throat irritations, and respiratory issues. *See, e.g., Markey v. LaPolla Indus., Inc., et al.*, No. 2:12-cv-04622-JS-ETB (Dkt. No. 1, ¶¶ 11, 15) (E.D.N.Y. Sep. 14, 2012); *Slemmer v. NCFI Polyurethanes, et al.*, No. 2:12-cv-06542-JD (Dkt. No. 1, ¶¶ 11, 16) (E.D. Pa. Nov. 20, 2012); *Steinhardt v. Demilec (USA) LLC, et al.*, No. 9:13-cv-80354-DMM (Dkt. No. 1, ¶¶ 12, 17) (S.D. Fla. Apr. 12, 2013).

The causes of action are very similar to those alleged in the Chinese drywall litigation, including negligence, negligent supervision, strict liability, breach of warranties, unjust enrichment, violation of consumer protection and unfair trade practices laws, injunctive relief, and medical monitoring. The plaintiffs allege damages for the costs of inspection, the costs

Diversity for Success

May 30-31, 2013
Chicago, Illinois

DRI Publications

Product Liability: Warnings, Instructions, and Recalls

Print to PDF

to remedy the effects of the SPF, as well as to remove and replace it and other property impacted by it, the loss of use and enjoyment of their homes, including costs and expenses associated with the need for other temporary housing, and damages associated with non-specific personal injuries or increased risk of injuries, including medical monitoring. *See, e.g., Markey* (Dkt. No. 1, ¶¶ 28-29); *Slemmer* (Dkt. No. 1, ¶¶ 27-28); *Steinhardt* (Dkt. No. 1, ¶¶ 29-30).

On February 27, 2013, the plaintiff in one of the Florida actions, Lucille Renzi, filed a motion pursuant to the Rules of Procedure on Multi-District Litigation to transfer all of the SPF insulation lawsuits to the Southern District of Florida, where her lawsuit was pending, for coordinated and consolidated pre-trial proceedings. Renzi asserted that seven other "substantially similar putative class action[s] involving the same allegedly tortious manufacture, distribution, marketing, labeling, installation, and inspection of SPF" existed at the time of her motion that "all involve identical conduct on the part of the defendants" and "common questions of law and fact." *See IN RE: Spray Polyurethane Foam Insulation Prods. Liab. Litig.*, MDL No. 2444 (Dkt. No. 1, ¶¶ 2-9, 11). She argued that centralization in the Southern District of Florida will save the plaintiffs and defendants the burden of litigating overlapping lawsuits in multiple jurisdictions across the country, and will be more convenient and conserve resources. *See id.*

Defendants filed numerous responses in opposition. One manufacturer argued that the "cases offered for consolidation are essentially identical complaints strategically filed solely to manufacture the appearance that a MDL is necessary" and that the complaints have little in common and instead turn on individualized issues including claims stemming from " *different* products, purchased and installed at *different* times, in *different* geographical locations, by *different* contractors, each dependent on *different* and *distinct* ventilation designs, and allege *different* injuries." *See id.* (Dkt. 62). The lone builder defendant argued that it is a defendant in only one of the cases, it is the only builder defendant in any of the cases, eleven of the other defendants are defendants in only one of the eight cases, no single defendant is common to all of the cases, and that the cases involve five different types of SPF insulation manufactured by three different defendants and distributed by seven different defendants. *See id.* (Dkt. 66).

The briefing period is closed, and a hearing before the Judicial Panel on Multi-District Litigation is set for May 30, 2013. Until then, the cases are likely to move slowly. Regardless of the JPML's decision on centralization, however, these cases will likely involve many of the same legal issues we saw in the Chinese drywall litigation, if perhaps on a different scope, if they survive. Stay tuned.

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

Florida Supreme Court Limits Expansion of Economic Loss Rule

by Mark D. Shifton and Shrina B. Faldu

The economic loss rule, which has at times been described as one of "the most confusing doctrines in tort law," generally provides that purely economic losses are not recoverable in negligence and strict liability tort actions in the absence of personal injury or damage to property other than the product itself. The rationale behind the economic loss rule maintains that contract law is specifically designed to deal with economic expectations and losses. While the rule is simple in theory, courts have struggled over its application since its inception, resulting in great diversity as to its application among the many jurisdictions. Despite the seemingly straightforward application of a simple rule, courts

have created many exceptions to the doctrine that have allowed duplicative claims sounding in tort to survive. Recently, however, the Florida Supreme Court, called upon to decide the applicability of a relatively small exception to Florida's economic loss rule, acted in decisive fashion and issued a sweeping ruling, eliminating a significant exception to the rule and limiting the application of the economic loss rule to products liability cases. *Tiara Condo. Assoc. v. Marsh & McLennan Cos., Inc.*, 2013 WL 828003, ___ So.3d ___ (Fla. 2013).

At first blush, the Florida Supreme Court's decision seems to have the potential to cause headaches among building products manufacturers, who are often subject to lawsuits asserting multiple claims sounding in both contract and tort. Savvy defense counsel, however, will remain careful to structure their arguments and explain the intricacies of the economic loss rule to courts and adversaries, so that their clients do not face exposure from duplicative tort claims.

History of the Economic Loss Rule

The economic loss rule is a judicially-created doctrine prohibiting recovery for economic loss in tort in the absence of personal injury or property damage, where the loss is also compensable by a breach of contract claim. Put another way, under the economic loss rule, a party aggrieved by a breach of contract may only recover damages for economic harm based upon the terms of the contract, and not under an independent tort theory. Generally, "economic loss" has been defined as losses other than those resulting from an injury to the plaintiff's person or other property. Typically this includes damages for inadequate value, cost of repair and replacement of the defective product, or consequent loss of profits without any claim of personal injury or damage to other property.

The purpose of the economic loss rule is to draw a "line in the sand" between the law of contracts and tort. Justice Harry Blackmun, in writing the United States Supreme Court's majority opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, recognized that without the economic loss rule, "contract law would drown in a sea of tort." In addition to maintaining the distinction between tort law and contract law, the rule also preserves the freedom of contract between parties to allocate economic risk during the negotiation of the contract.

The California Supreme Court, in *Seely v. White Motor Co.*, was the first court to articulate the economic loss doctrine. In *Seely*, the plaintiff purchased an allegedly defective truck. After the truck was repossessed for non-payment, the plaintiff sued the manufacturer and the dealer, seeking damages for repair of the truck, money paid on the purchase price, and for lost profits. The California Court found that the doctrine of strict liability in tort had not supplanted a cause of action for breach of express warranty, and that the doctrine of strict liability was not intended to undermine the warranty provisions of sales or contract law, but rather to govern the wholly separate and distinct issue of physical injuries caused by defective products. The *Seely* Court held that "in the absence of personal injury or physical injury to property other than the product, the buyer's sole remedy was in warranty and not in strict liability or negligence." In 1986, in *East River Steamship Corp. v. Transamerica Delaval Inc.*, the United States Supreme Court first considered the economic loss rule. 476 U.S. 858 (1986). In *East River*, the Supreme Court adopted the California Supreme Court's reasoning *Seely* and found that "the distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary" and is necessary to "keep products liability and contract law in separate spheres."

Many courts adopted the economic loss rule following the United States Supreme Court's decision in *East River*, and it continues to be the majority rule with regard to the application of the doctrine. Jurisdictions have varied greatly, however, on their application of the economic loss rule, specifically with regard to whether the economic loss rule applies outside of the products liability context. Additionally, many jurisdictions have recognized several exceptions to the economic loss rule, including exceptions where the parties are in privity of contract. As jurisdictions continue to define the outer

boundary of the economic loss rule, some have reverted in their interpretation of the rule back to its origins, and have limited the application of the economic loss doctrine to products liability cases. On March 7, 2013, the Florida Supreme Court, in *Tiara Condo. Assoc. v. Marsh & McLennan Cos., Inc.*, was the most recent jurisdiction to do so, issuing a broad, sweeping ruling limiting the application of the economic loss rule to products liability cases.

Florida and the Economic Loss Rule

Tiara Condominium Association retained Marsh & McLennan to procure insurance coverage. Several years later a hurricane caused significant damage, and the Association began reconstruction. Upon its broker's assurances that the limits of its insurance coverage were $100 million, the Association began extensive repairs. Ultimately, its insurer denied coverage for much of the repairs, as the limits of its coverage were actually $50 million. The Association filed suit in federal court against its broker, alleging claims sounding in both contract and tort. The broker was granted summary judgment, and the Association appealed to the Eleventh Circuit, which reversed the grant of summary judgment on the negligence claims and certified the question to the Florida Supreme Court as to whether the economic loss rule would preclude the Association's tort claims.

Florida's economic loss rule includes a "professional services" exception; if the contract allegedly breached was for professional services, the economic loss rule's bar on tort claims would not apply. The question certified to the Florida Supreme Court was limited to whether an insurance broker's services fell within the professional services exception of the economic loss rule, which would thus allow a tort claim against the broker to survive summary judgment. In answering the certified question, the Florida Supreme Court engaged in lengthy review of the economic loss rule, and ultimately restated the question in broad fashion, questioning not only the professional services exception, but the application of the entire contractual privity branch of the economic loss rule.

In reviewing Florida precedent, the Court noted that despite having its roots in the products liability arena, the economic loss rule had often been applied to circumstances where the parties were in contractual privity and one party sought to recover damages in tort for matters arising from the contract. In cases where the parties are in privity, the economic loss rule had been used as a prohibition against the parties from circumventing the allocation of losses in the contract by bringing an action for purely economic losses in tort. The rationale for such rule is that when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or should have, addressed through their contractual agreement. Although Florida courts had generally prohibited recovery in tort for economic damages for parties in privity of contract, various exceptions have become recognized over time, such as the "professional services" exception at issue in *Tiara*, as well as in cases of alleged torts committed independently of the contract breach, such as fraud in the inducement of the contract.

In *Tiara*, the Florida Supreme Court noted that although courts had over time extended the economic loss rule to matters where the parties were in contractual privity, the roots of the rule were in the products liability context and the development of Florida's economic loss rule could be traced back to *Seely*, and it asserted that any subsequent expansion of the doctrine "expanded the rule beyond its principled origins and well beyond the court's original intent." The *Tiara* Court acknowledged that prior Florida decisions "did not go far enough" in limiting the scope of the economic loss rule, and had left intact a number of exceptions to the doctrine. In an effort to return to the intended purpose of the economic loss rule, the *Tiara* Court disavowed recent precedent, and held that the economic loss rule applied only in the products liability context, noting that "expansion of the rule beyond its origins was unwise and unworkable in practice." A strong dissent followed, with one Justice noting that "Florida contract law is seriously undermined by this decision," and another noting that "we face the prospect of every breach of contract claim being accompanied by a tort claim."

Analysis

The economic loss rule is well-established in many jurisdictions, and the defenses it affords should be included in the arsenals of most building products litigators. As demonstrated recently by the Florida Supreme Court, however, some courts have taken issue with the unbridled expansion of the economic loss rule, and may be amenable to limiting its application.

It remains to be seen whether courts in other states will follow Florida's lead in *Tiara* and limit the expansion of the economic loss rule to products liability cases. On its face, the decision certainly appears to provide an incentive for the plaintiffs' bar to "dress up" contractual claims as tort claims. How can counsel defending building products manufacturers help their clients avoid exposure to tort claims while already defending against claims of breach of contract? The answer is found in a close reading of *Tiara* itself. Aside from the broad holding that the economic loss rule no longer bars claims when the parties are in privity, the Florida Supreme Court's analysis is not especially groundbreaking. As noted in a concurring opinion of three Justices:

> Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and … our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.
> . . .
>
> While the contractual privity form of the economic loss rule has provided a simple way to dismiss tort claims interconnected with breach of contract claims, it is neither a necessary nor a principled mechanism for doing so. Rather, these claims should be considered and dismissed as appropriate based on basic contractual principles … The majority's decision does not change this statement of law, but merely explains that it is common law principles of contract, rather than the economic loss rule, that produce this result.

Standing alone, *Tiara* (and its progeny, should other courts follow Florida's lead and begin limiting the application of the economic loss rule) should not have significant impact on building products manufacturers. Claims of products liability will continue to enjoy the protections afforded by the economic loss rule, and claims made by parties in privity of contract will be subject to basic common-law principles; there can be no recovery for negligence when the alleged tort is not independent of the alleged contractual breach. Defense counsel must take care to educate courts and adversaries of the effect of the economic loss rule and the common-law theories underpinning it, rather than simply citing to the doctrine and expecting tort claims to fall with ease.

Mark D. Shifton *is a Partner in the Princeton, New Jersey and New York City offices of Seiger Gfeller Laurie LLP. Mark represents manufacturers, distributors, and retailers of a wide variety of industrial, consumer, and recreational products, including green building products, in both individual and class actions. Mark currently serves as the publications co-chair of the Building Products SLG, and can be reached at mshifton@sgllawgroup.com.*

Shrina B. Faldu *is a law clerk in the West Hartford, Connecticut office of Seiger Gfeller Laurie LLP. She is currently a third-year law student at University of Connecticut School of Law. Shrina can be reached at sfaldu@sgllawgroup.com.*

MyDRI

Increase Your DRI Membership Value

Did you know every DRI member has a listing on the Membership Directory? DRI has populated the member profiles on the DRI website for each member with their name, firm name, firm address, firm phone number, and member e-mail address, as well as a list of committees in which the member belongs.

Once you log onto the DRI website using your username and password, you can find your member profile by clicking the 'Dashboard' link at the top of the screen. Complete your profile (known as MyDRI profile) by including your member photo, practice areas, member bio, and firm location.

Furthering the completion of your MyDRI profile, members are encouraged to add more to his or her own profile by including more personal information – areas of professional interest, educational information, professional organizational activities and positions, starting with DRI, authorships and outside interests. Why? This information is beneficial to other members who find your profile by using the "Find a Lawyer" search engine, which will provide a better understanding of you and your practice.

The MyDRI profile will allow members to view a dashboard of activity (including Defense Wins, event rosters, course materials, leadership roles, renewing dues, authored articles, etc). The Dashboard on the MyDRI profile demonstrates your DRI membership value.

Log onto the DRI website and update your MyDRI profile today.

Did You Know…?

Recommend Your Colleagues

DRI is pleased to announce a new feature added to the **DRI Membership Directory**. This enhancement enables DRI members to recommend colleagues, acknowledging their experience and accomplishments. Recommendations will be highlighted on your member profile with a link to the profile of the person who recommended you. You will receive a notification via email when you have been recommended by a colleague. It is now more important than ever for you to make sure your member profile is up-to-date and complete. Visit the **Membership Directory** and start recommending! Note: You must be a DRI member and logged in to the website to utilize this feature.