

Spray Polyurethane Foam Insulation Products Liability Litigation – An Update

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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 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 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. *Originally published in DRI's Building Blocks, The Newsletter of the Product Liability Committee's Building Products SLG (December 19, 2013).* Read the previous article, "[Spray Polyurethane Foam Insulation Products Liability Litigation – Cooling Down or Heating Up?](#)"

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