

As Goes Md., So Goes The Nation On Steel Tubing

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In recent years, manufacturers, suppliers and installers of corrugated stainless steel tubing ("CSST") have, unfortunately, been a trendy target of the plaintiffs' class action bar. CSST is used for running natural gas and propane in buildings. The tubing material largely replaced iron pipe as a cheaper, easier-to-use alternative. It is manufactured by approximately 10 companies, and has been installed in more than 5 million homes.[1]

The allegations plaintiffs launch against CSST defendants in increasing numbers is that the tubing is subject to perforation due to electrical charges, which can result in disastrous building fires. The product's prevalence and alleged potential to inflict costly harm to people and property has spawned high-stakes litigation in numerous jurisdictions. Recently, however, the CSST industry scored an impressive and powerful victory in Maryland.



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In *Hasley v. Ward Mfg. LLC* (D. Md. Jul. 8, 2014), the named plaintiffs sought certification for a class of thousands of similarly situated Maryland residents or entities that either purchased Wardflex, a brand of CSST, or purchased a building in which Wardflex was installed, and asserted counts for strict liability, negligent design and negligent failure to warn. In their complaint against the tubing manufacturer, the plaintiffs alleged that Wardflex was dangerous because its thin walls are susceptible to perforation by an electric arc generated by a lightning strike, which can result in fire damage, personal injury and death. *Id.* at *1. The plaintiffs noted that CSST had been installed in more than 5 million homes and that 141 fires have been alleged to have occurred due to the perforation issue. *Id.*

The U.S. District Court for the District of Maryland, however, dismissed the case on the pleadings. Judge Richard D. Bennett first considered the manufacturer's argument that the plaintiffs failed to allege a sufficient injury-in-fact and, as a result, lacked standing. The court agreed that the injury alleged by the plaintiffs was not imminent and was too speculative to confer standing. The court reasoned that:

[F]or Plaintiffs' alleged injury to occur, lightning must first strike near the Plaintiffs' property and it must cause a small puncture in the tubing wall of the Wardflex installed in their homes. Then this puncture must ignite the natural gas inside the tubing, and then the surrounding materials must ignite

and create an extensive fire. Only then would Plaintiffs' alleged threatened injury arise. Id. at *3 (internal citations omitted).

The court was particularly convinced of the unlikelihood of an injury occurring to the plaintiffs by their own allegation that only 141 fires had been reported from lightning strikes on any CSST tubing, while admitting that more than 5 million homes contain Wardflex. Id.

The Hasley Court also dismissed the putative class action based on Maryland's economic loss rule. In Maryland, a products liability plaintiff that merely alleges harm in the form of "'intangible economic loss resulting from the inferior quality or unfitness of the product to serve adequately for the purpose for which it was purchased'" is barred from recovery. Id. at *4 (quoting *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330, 1332 (Md. 1994)). This rule flows from the historical practice of limiting a purchaser of a product suffering only economic harm to causes of action for breach of warranty and fraud, and precluding such a plaintiff from asserting negligence or strict liability claims. See *A.J. Decoster Co.*, 634 A.2d at 1332. The economic loss rule is in force "[i]n all but a few states." DOBBS' LAW OF TORTS § 449.

Judge Bennett observed that the plaintiffs had merely alleged that Wardflex was defective, and that they would be required to pay the cost of replacing the product. Hasley at *4. Lacking was any allegation of damage to the plaintiffs' persons or property. Id. As a result, the court determined that the plaintiffs' claims were not cognizable under Maryland law. Id.

In so holding, the court rejected the plaintiffs' argument that their claims should proceed under the public safety exception to the economic loss rule. In Maryland, a claim that is otherwise barred under the economic loss rule may proceed if the nature of the threatened damage and probability of damage occurring "'exhibit a clear, serious, and unreasonable risk of death or personal injury.'" Id. (quoting *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631-32 (Md. 1995)). The court found that, in the case of CSST, "the probability of damage occurring is extremely remote" because the risk of fire only arises from lightning strikes. Id. This, the court explained, did not present a substantial risk of harm, and therefore precluded the application of the public safety exception. Id.

The legal principles that defeated the plaintiffs' claims in Hasley — standing and the economic loss rule — are powerful weapons in the arsenal of CSST defendants that should be raised early and often in class action litigation not only in Maryland, but throughout the country. Indeed, the winning arguments in Hasley have already found success outside of Maryland. See *Kerin v. Titeflex Corp.*, No. 14-1130 at *6 (1st Cir. Nov. 4, 2014) (dismissing a CSST class action because "the alleged risk of harm is too speculative to give rise to a case or controversy"); *Mariani v. Titeflex Corp.*, No. 13-01720 at *4 (D. Colo. Jul. 10, 2014) (dismissing a CSST class action because "the chain of events necessary for injury to occur is simply too attenuated").

As these cases demonstrate, putative CSST class representatives are often unable to allege facts sufficient to show that they have suffered or imminently will suffer an injury, or that they have suffered the type of injury that is cognizable under strict liability or negligence theories. Given the uniform allegations that tend to be asserted in CSST class action complaints, these principles should serve to thwart, if not finally put an end to, attempts at certifying classes of CSST claimants around the country.

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[1] See John D. Oravec, 2 class-action lawsuits filed in Pa. against manufacturers of corrugated stainless steel tubing, TRIBLIVE, June 6, 2013, <http://triblive.com/business/headlines/4139270-74/tubing-stainless-lawsuits#axzz3loqlpKv2>.

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