

## CONTRACTOR ALERT

Contractor Alert is a publication by Richard M. Sissman, Esquire, 1485 Chain Bridge Road, McLean, VA 22101 This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esq. We welcome and appreciate your suggestions for future article topics. You can contact us at email: [Rsissmanesq@his.com](mailto:Rsissmanesq@his.com) or website [www.contractoralert.com](http://www.contractoralert.com)

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Maryland Rules on Economic Damages in Tort

Some manufacturers of fire-resistant roofing plywood dodged a bullet last month when the Maryland Court of Appeals decided by the narrowest of margins that they could not be held liable in tort for so-called economic damages caused by deterioration of the wood after its installation in townhomes. But the high court's pronouncements on the issue will affect contractor and manufacturer tort liability across the board. In its opinion, the court affirmed, and possibly strengthened, contractor protection from liability in suits requesting economic damages, defined as the cost of replacing or repairing the defective product or condition. *Patty Morris, et al v. Osmose Wood Preserving, et al.*, Md. No. 63, September Term, 1994, filed November 14, 1995.

The opinion tackled head-on the doctrine of economic damages when they may be recovered in tort, a concept first fully discussed in the landmark case of *Counsel of Co-Owners, Atlantis Condominiums Co.*, 308 Md. 18 (1986). And whether it simply affirms *Whiting-Turner* or unintentionally narrows the exception that permits a tort suit, as argued by the dissent, the bottom line is clear - those responsible for creating dangerous conditions or putting defective products in the marketplace are not responsible in tort for the costs of replacement or repair unless the defect creates an extreme danger of death or serious physical harm.

The question is one that the high court came close to addressing just this summer in *Chambo, A Division of Chamberlain Waterproofing and Roofing, Inc. v. Urban Masonry Corp.*, 338 Md 417 (1995), But the court remanded that case without reaching the main issue when it found a problem with the lower courts' choice-of-law analysis. In *Morris*, however, the high court discussed the issue directly, and found no reason to change Maryland's general economic-loss rules.

The discussion implicates the conceptual differences between tort and contract claims. Where, for example, a defective product causes personal injury or does damage to property, a Plaintiff may recover in tort. But when the same defect causes only a deficiency in the product itself, a Plaintiff is generally limited to recovery under warranty or contract theories. The costs incident to replacement or repair are not generally recoverable in tort. "The distinction rests...on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He can not be held liable for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands."

In *Whiting-Turner*, the Maryland high court altered that rule a bit, holding that where the defect creates a risk of death or personal injury, the entity responsible for that risk may be held liable in tort for the cost of repair or replacement. And such costs can be enormous; cases addressing the issue have included alleged

architect malpractice in a 21-story condominium development and a decision to install asbestos insulation in several of Baltimore City's public buildings.

In *Morris*, the alleged defect was contained in fire-retardant plywood in the roofs of residential townhouses. The homeowners alleged that the fire retardant caused the wood to deteriorate, creating a dangerous condition. Not only could someone on the roof fall through, the Plaintiff's claimed, but the structural integrity of the wood was so compromised that the entire structures were in danger of collapse.

The Plaintiffs sued the roofing manufacturers in tort, and alleged breach of U.C.C. warranties and violation of the Maryland Consumer Protection Act. Both the Montgomery County Circuit Court and the Court of Appeals ruled that no cause of action was stated in tort because of a failure of the Plaintiffs to show that the alleged defect involved a risk of death or physical injury. And while the Circuit Court dismissed the rest of the action as well, the Court of Special Appeals remanded the U.C.C. warranty claims for trial. But before the case could be retried, the high court granted certiorari and, by a vote of 4-4, essentially affirmed the circuit court's decision to dismiss the case entirely.

The Plaintiffs argued that under *Whiting-Turner* they were entitled to the cost of replacement. "The roof, Plaintiff's argue, cannot support weight and therefore create a risk of physical injury to anyone who goes on them (homeowners, repairmen, or firefighters) and to anyone who may be under them if they collapse under the weight of heavy snowfall or a strong wind gust." The court noted that the *Whiting-Turner* analysis depends on a sliding double scale of how high the risk of harm is and how serious the harm would be. Thus, "we examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious and unreasonable risk of death or personal injury. Thus, if the possible injury is extraordinarily severe, i.e., multiple deaths, we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe, (i.e., a broken leg or damage to property..." and vice versa. And the court justified this two-sided analytical model by looking to industry itself. Imposing tort liability for economic damages has, at least as one purpose, the goal of modifying business behavior. If the economic-loss rule were abandoned entirely, the court reasoned, industry would not be able to predict which of its activities were potentially subject to tort suits. The law as it stands, however, "does not cause major disruptions in [the two areas in which manufacturers's exposure to tort liability requires them to modify their business behavior]. The first area is the actual manufacturing and marketing of the product, in which manufacturers, regardless of the extent of tort liability, should always attempt to mitigate risks of death or personal injury. The second area is the allocations of funds to cover potential tort liability. In this area, our rule, because of the extreme nature of the risk required to trigger it, predominantly those situations in which either liability would inevitably be created by actual physical injury or the manufacturer's exposure to liability is so great that it cannot be ignored." The potential injuries alleged by the Plaintiff's failed to "meet the required legal threshold of pleading the existence of a clear and extreme danger of death or serious personal injury, as required by *Whiting-Turner* and its progeny. There is no allegation that any injury has ever occurred since the roofs were installed on the Plaintiffs' townhouses, or on the roofs of the members of the class, or that any of the roofs have collapsed...To lower the threshold to encompass mere "possibilities" of injury, as presented in this case,...is to "cheapen" the legitimacy of the exception to the economic loss rule and thereby invite an avalanche of such tort claims in future cases."

The members of the high court apparently agreed unanimously, however, that the plaintiffs' U.C.C. warranty claims could not succeed. The U.C.C. only applies to sales of goods, and while the plywood was a "good" when it was sold by the supplier to the builder, it was immediately installed in buildings. What the plaintiff\consumers purchased was real estate, not goods. And under the Maryland version of the U.C.C., the

plaintiffs could not sue the suppliers for breach of their contracts between the suppliers and the builders. As such, the Court of Special Appeals erred in remanding the case on the warranty counts and the high court offered the entire case dismissed.

If you should have any questions concerning this matter or any other construction issue, contact Richard M. Sissman, Esq, at (301) 762-0400 or in Virginia at (703) 903-9646.