Subrogation Whitepaper

CHINESE DRYWALL LITIGATION

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INTRODUCTION

In a prior *Alert*, *Defective Drywall: The Not-So-Great Wall of China*[1], we discussed the reported problems with Chinese-manufactured drywall ("Chinese drywall"). This whitepaper provides an overview of pending litigation arising out of the issues associated with Chinese drywall.

CHINESE DRYWALL - BACKGROUND

From 2004 through 2006, the housing boom and rebuilding efforts necessitated by various hurricanes led to a shortage of construction materials. As a result, U.S. builders and suppliers imported significant amounts of Chinese drywall, estimated to be enough to construct approximately 100,000 homes.

THE MAKING OF DRYWALL

Drywall is a widely used construction material that is also known as gypsum board, wallboard, plasterboard, sheetrock, and gyproc. A drywall panel is composed of a layer of hardened gypsum plaster sandwiched between two layers of paper liner. The gypsum used to make drywall can be created both naturally and synthetically. Gypsum is a hydrated calcium sulfate, composed of two molecules of water (H_2O) and one of calcium sulfate ($CaSO_4$).

Synthetic gypsum, which is chemically identical to mineral gypsum, is produced as a byproduct of coal combustion power plants. In most coal combustion power plants, the burning of coal produces undesirable sulfur emissions. Through the industrial process known as flue gas desulfurization (FGD), synthetic gypsum is created. FGD is a chemical process that utilizes various scrubber systems to remove sulfur oxides from the flue gas of power plants burning fossil fuels. The capture and removal of the sulfur gases is accomplished by combining the sulfur gases with calcium containing sorbents, generally lime (CaO) or limestone ($CaCO_3$). The chemical reaction between the calcium containing sorbents and the sulfur dioxide produces calcium sulfate, or gypsum.

When gypsum is crushed and heated to remove approximately seventy-five percent (75%) of its water content, it becomes a fine white powder, known as "Plaster of Paris." When water is added, it results in a paste-like material or slurry. Certain additives are blended with the paste or slurry to form the core of the drywall. Fabrication of the drywall consists of placing this gypsum core material between two sheets of manufactured paper. The core is set, dried, and cut into appropriate sizes.

While both synthetic and natural gypsum have the same basic chemical makeup, $CaSO_4$ and $2H_2O$, the amount and types of trace materials and unreacted sorbents found in the source material can vary among power plants and among mines.

INVESTIGATION OF CHINESE DRYWALL

An environmental consulting firm, Environ International Corp. ("Environ"), hired by a Miami-based builder, reportedly conducted tests on some of the allegedly defective Chinese drywall. In testing the air of the affected homes, Environ is said to have concluded the level of sulfur compounds, carbon disulfide, carbonyl sulfide, and dimethyl sulfide, were within health and safety limits. However, the tests reportedly confirmed that certain Chinese drywall was emitting sulfur gases capable of corroding copper air conditioning coils contained in homes.

A laboratory located in New Jersey, EMSL Analytical, Inc. ("EMSL"), also reportedly performed independent testing on Chinese drywall. EMSL is stated to have begun its investigation in 2006 following complaints of "rotten egg" odors being emitted from drywall. EMSL ultimately linked the odor problem to impurities in the Chinese drywall. Although still studying the problem, EMSL reported that a potential microbiological component in the Chinese drywall may be causing calcium sulfate to degrade into hydrogen sulfide.

[1] See: http://www.cozen.com/cozendocs/Outgoing/alerts/2009/subro040109.pdf

Knauf Plasterboard (Tianjin) Co. Ltd., a manufacturer of drywall in China, is reported to have hired the Center for Toxicology and Environmental Health, LLC ("CTEH") to conduct air quality investigations in Florida homes. CTEH detected levels of carbonyl sulfide and carbon disulfide. Knauf Plasterboard (Tianjin) has stated that the levels of the sulfur-containing compounds in the homes are no greater than that found in the air outside homes or in soil, marshes, or the ocean.

On March 20, 2009, the Florida Department of Health ("DOH") released results of analytical testing it commissioned of Chinese drywall samples, performed by Unified Engineering, Inc. ("Unified"). Unified found strontium sulfide at trace levels in the Chinese drywall. Unified further found the Chinese drywall samples gave off a "distinct sulfur odor" when heated during testing. Unified detected three volatile sulfur compounds, hydrogen sulfide, carbonyl sulfide, and carbon disulfide, being emitted from the Chinese drywall that had been exposed to a humid environment similar to that expected in Florida. Unified stated it could not reach a reliable conclusion on the source of the sulfur and indicated further analysis was required. Dr. David Krause, a toxicologist with the Florida Department of Health, stated that because the test only detected small quantities of strontium sulfide, further tests were necessary to determine whether the compound is the cause of the odors and corrosive gases.

On May 7, 2009, the U.S. Environmental Protection Agency's Environmental Response Team published a drywall analysis comparing a limited number of Chinese drywall samples from Florida homes to U.S. made drywall samples purchased from a Home Depot in New Jersey. The EPA found significant differences between the Chinese drywall and the U.S. made drywall. Sulfur was detected in the Chinese drywall but not in the U.S. drywall. Strontium in the Chinese drywall was anywhere from twice to ten times the amount found in the U.S. made drywall. Iron concentrations in the Chinese drywall were also significantly higher. Notably, there was no evidence of fly ash found in the Chinese drywall samples or the U.S. samples.

At the present time, none of the organizations investigating Chinese drywall have determined what is causing the problems associated with it. However, their testing and analysis continues.

THE CHINESE DRYWALL LAWSUITS

Putative class action complaints have been filed, which generally allege that the problem with the Chinese drywall, which was composed of both naturally mined gypsum and synthetic gypsum manufactured from coal combustion byproducts, is that it contains excessive levels of sulfur. The complaints allege that as a result of these excessive sulfur levels, when the Chinese drywall is subjected to certain environmental conditions, the product emits hydrogen sulfide gas and other gases. This "off-gassing" allegedly creates a noxious "rotten egg-like" odor reported in many homes and causes damage and corrosion to home structural and mechanical systems such as air conditioner and refrigerator coils, copper tubing, faucets, metal surfaces, and electrical wiring. Additionally, the "off-gassing" allegedly causes health problems in individuals, including allergic reactions, coughing, respiratory problems, sinus problems, throat infection, eye irritation, and nosebleeds.

ENTITIES INVOLVED IN THE LAWSUITS

MANUFACTURERS

KNAUF GIPS KG - Germany

Knauf Gips is a leading manufacturer of drywall and other building materials. It has more than 130 production plants in over 40 countries and has annual sales of approximately $7.1 billion.

It is alleged that in 1997, 2000, and 2001, Knauf Gips established three plasterboard plants in China located in Wuhu, Tianjin, and Dongguan, respectively. It is further alleged that Knauf Gips supervised, operated, and controlled the operations at the three plasterboard plants and participated in manufacturing, marketing, distributing, and selling the Chinese drywall directly and indirectly to various suppliers.

KNAUF PLASTERBOARD (WUHU) CO., LTD. - China

It is alleged that Knauf Plasterboard (Wuhu), as an agent of Knauf Gips, manufactured and placed the Chinese drywall into the stream of commerce by shipping approximately 28.6 million pounds of Chinese drywall to the United States in 2006. Knauf Plasterboard (Wuhu) has annual sales of approximately $30.7 million.

KNAUF PLASTERBOARD (TIANJIN) CO., LTD. - China
It is alleged that Knauf Plasterboard (Tianjin), as an agent of Knauf Gips, manufactured and placed the Chinese drywall into the stream of commerce by shipping approximately 16 million pounds of Chinese drywall to more than two dozen ports throughout the United States, including seven in Florida in 2006. Another 39 million pounds of Chinese drywall were transported to New Orleans, Louisiana. Knauf Plasterboard (Tianjin) has annual sales of approximately $18.4 million.

KNAUF PLASTERBOARD (DONGGUAN) CO., LTD. - China
It is alleged that Knauf Plasterboard (Dongguan), as an agent of Knauf Gips, manufactured and placed Chinese drywall into the stream of commerce by shipping 11 million pounds of Chinese drywall to Port Canaveral in 2006.

TAISHAN GYPSUM CO., LTD. - China
It is alleged that Taishan Gypsum manufactured and/or distributed Chinese drywall and placed it into the stream of commerce. Taishan Gypsum has annual sales of $2.9 million.

ROTHCHILT INTERNATIONAL, LTD. - China
It is alleged that Rothchilt manufactured and/or distributed the Chinese drywall and placed it into the stream of commerce.

DISTRIBUTORS AND SUPPLIERS

USG CORPORATION – Delaware
USG is the United States' largest distributor of drywall and related building products. Currently, Berkshire Hathaway owns 17% of USG and Knauf affiliate Gebr Knauf Verwaltungsgesellschaft owns 15%. In 2008, USG had total sales of approximately $4.6 billion and U.S. sales in excess of $1.9 billion.

The company, through its subsidiaries, manufactures and distributes building materials for use in residential and nonresidential construction. USG's operating segments include North American Gypsum and L&W Supply Corporation. Among its other subsidiaries are: CGC Inc. (Canada) and USG Mexico SA (Mexico).

North American Gypsum operates 46 plants throughout the United States, Canada, and Mexico. Their major brands are Sheetrock and Levelrock. North American Gypsum accounts for more than half of USG's sales.

In 2007, L&W Supply purchased the inventory of California Wholesale Material Supply (CALPLY), which sells building products in seven western states and Mexico.

It is alleged that USG distributed, marketed, and sold the Chinese drywall in the United States by importing four shipments of Chinese drywall from Knauf Plasterboard (Wuhu) and (Dongguan) aboard the *Yong An Cheng* in 2006.

L&W SUPPLY CORPORATION D/B/A SEACOAST SUPPLY - Delaware
As discussed above, L&W Supply is a subsidiary of USG. L&W Supply distributes building products made by USG and other manufacturers through nearly 200 locations in about 35 states, including Florida. Wallboard accounts for approximately 30% of L&W Supply's sales. L&W Supply has annual sales of approximately $457 million. The company's customers are primarily builders and contractors.

It is alleged that L&W Supply distributed and sold the Chinese drywall.

BANNER SUPPLY COMPANY - Florida
It is alleged that Banner Supply imported, distributed, marketed, and sold the Chinese drywall. Banner Supply distributes building products throughout the United States and has annual sales of approximately $20 million.

INTERIOR & EXTERIOR BUILDING SUPPLY, L.P. - Louisiana
It is alleged that Interior & Exterior supplied Chinese drywall in the State of Florida. Interior & Exterior is a building supply company with offices in four states and has annual sales of approximately $21.6 million.

RIGHTWAY DRYWALL - Georgia
Rightway is alleged to have supplied Chinese drywall in the State of Florida. Rightway is a building supply company with annual sales of approximately $800,000.00.

LA SUPREMA TRADING, INC./LA SUPREMA ENTERPRISES, INC. – Florida
La Suprema Trading and La Suprema Enterprises are two separate building supply companies which are alleged to have distributed and sold Chinese drywall in the State of Florida.

BLACK BEAR GYPSUM SUPPLY, INC. - Florida
Black Bear is alleged to have distributed and sold Chinese drywall in the State of Florida. Black Bear is a building supply company with annual sales of $2 million.

BUILDERS

TAYLOR MORRISON, INC. F/K/A TAYLOR WOODROW, INC. - Florida
It is alleged that Taylor Woodrow's limited liability corporations that built communities throughout Florida installed the Chinese drywall in homes it built and sold.

SOUTH KENDALL CONSTRUCTION, CORP. - Florida
It is alleged that South Kendall Construction installed the Chinese drywall in homes it built and sold.

WCI COMMUNITIES, INC. - Delaware
It is alleged that WCI installed the Chinese drywall in homes it built and sold.

LENNAR CORP./LENNAR HOMES, L.L.C. F/K/A LENNAR HOMES, INC./U.S. HOME CORP. - Delaware
It is alleged that Lennar installed the Chinese drywall in homes Lennar Homes and U.S. Home built and sold.

U.S. Home Corporation and Lennar Homes, LLC are affiliates and subsidiaries of Lennar Corporation and have combined sales of $4.5 billion. CEO Stuart Miller controls 47% of the companies, which primarily build single-family homes in 16 states under brand names including Lennar, Cambridge, NuHome, and Greystone.

ALLEGED CAUSES OF ACTION

The plaintiffs in the Chinese drywall class actions have alleged causes of action that include product liability claims based on negligence, strict liability, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the Florida Deceptive and Unfair Trade Practices Act. The causes of action as construed under Florida law are discussed below.

NEGLIGENCE

In negligence cases, the defendant's conduct is a primary focus of the inquiry to determine whether a defendant is liable for a product defect. In order to prevail in any negligence action, the plaintiff must allege and prove: (a) the defendant owed a legal duty, (b) the defendant breached the duty, and (c) the breach proximately caused plaintiff's injury. *Sussman v. First Fin. Title Co. of Fla.*, 793 So.2d 1066, 1069 (Fla. 4th DCA 2001). Negligence claims for product defects can include failure to properly design a product, failure to properly manufacture a product, or failure to warn of a product's dangerous condition.

DUTY
The existence of a legal duty is a threshold question for the court. *Aime v. State Farm Mut. Ins. Co.,* 739 So.2d 110, 112 (Fla. 4th DCA 1999). "[A] legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992). Once that foreseeable zone of risk has been created, the defendant has a duty "either to lessen the risk or to see that sufficient precautions are taken to protect others from the harm that the risk poses." *Kaisner v. Kolb,* 543 So.2d 732, 735 (Fla. 1989). Thus, "[*a*]*s to duty,* the proper inquiry is whether the defendant's conduct created a

foreseeable zone of risk, *not* whether the defendant could foresee the specific injury that actually occurred." *McCain,* 593 So.2d at 504 (emphasis added).

Placing a defective product into the stream of commerce falls within the zone of risk which requires the exercise of reasonable care to prevent the product from causing harm to others. *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859 (Fla. 5th DCA 1996). The law imposes upon manufacturers a duty to exercise reasonable care so their products in the marketplace will not harm persons or property. Id.

BREACH

Any claim of negligence will require establishing a breach of the standard of care. If a duty is breached resulting in injury to the plaintiff, the person or legal entity that breached the duty is a proper party in a products liability action based on negligence. *Cintron*, 681 So. 2d 859. Whether duties have been breached is ordinarily a question for the finder of fact to decide. *Beebe v. Kaplan,* 177 So.2d 869, 871 (Fla. 3d DCA 1965). At a minimum, the defendants in the Chinese drywall litigation will be measured by the manner and method by which the drywall was manufactured, shipped, stored, and installed. Therefore, an analysis of the facts of each case will be required to determine whether the defendants in the Chinese drywall litigation breached a duty of care.

CAUSATION

For a plaintiff to prevail on a negligence claim, it must prove that the breach of duty was a proximate cause of the damages. Causation requires "a natural, direct and continuous sequence between the negligent act and the injury [so] that it can reasonably be said that but for the act the injury would not have occurred." *McDonald v. Fla. Dep't of Transp.,* 655 So.2d 1164, 1168 (Fla. 4th DCA 1995). The harm is proximate "if prudent human foresight would lead one to expect that similar harm is likely to be substantially caused by the specific act or omission in question." *McCain,* 593 So.2d at 503. In other words, the injury was not "caused by a freakish and improbable chain of events." *Id.* "In this context, foreseeability is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created." *Id.* Due to the fact-intensive nature of this proximate cause analysis, it is generally left to the fact-finder to decide whether the breach caused the damages. *Id.* at 504; *Dadic v. Schneider,* 722 So.2d 921, 923 (Fla. 4th DCA 1998).

STRICT LIABILITY

In strict liability cases, the focus of the inquiry is on the product and whether it is defective rather than on whether the defendant acted with reasonable care. *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 (Fla. 1st DCA 1981). In order to prevail in any products liability action based on strict liability, the plaintiff must allege and prove: (1) the manufacturer's relationship to the product in question; (2) a defect in the product; and (3) the existence of a proximate causal connection between the defective product and the plaintiff's injury. *West v. Caterpillar Tractor Company*, 336 So.2d 80 (Fla. 1976).

MANUFACTURER'S RELATIONSHIP TO PRODUCT

The elimination of the privity requirement in strict liability claims by Florida courts has expanded the reach of the doctrine beyond the manufacturer to include others in the product distribution chain, such as retailers, wholesalers, and distributors. *West*, 336 So.2d 80. As such, the Chinese drywall manufacturers, distributors, suppliers, as well as the builders who used the Chinese drywall in the construction of property, will all be properly named defendants in a cause of action for strict liability. However, an individual or entity not within the distribution chain, such as consultants or providers of information on the product, will not be strictly liable. *Siemens Energy & Automation, Inc. v. Medina*, 719 So.2d 312 (Fla. 3d DCA 1998).

DEFECT IN THE PRODUCT

Types of Defects

An essential element of any products liability action is the existence of a defect in the product that existed at the time the product was in the possession of the manufacturer or seller and at the time of the damage. *West*, 336 So. 2d 80. A defect in a product may arise from a flaw in the manufacturing process, a flaw in the design of the product, or a failure to give an adequate warning of dangers associated with use of the product. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th DCA 1998).

Manufacturing Defects

A manufacturing defect may occur when a mistake is made in the manufacturing process that results in a departure from the normal process thereby producing a flaw in an otherwise correctly designed product. *Husky Industries, Inc. v. Black*, 434 So. 2d 988, 991 (Fla. 4th DCA 1983).

The standard jury instruction applicable to manufacturing defects in strict liability cases simply provides that a product is defective if "it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition." *Fla. Stand J. Inst. (Civil) PL 4*. This instruction does not define the term "unreasonably dangerous." However, the court in *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st DCA 1981) does define the term. Therefore, the following instruction incorporates the definition and complies with the holding in *Cassisi*:

> A product is defective if it is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition. A product is unreasonably dangerous because of its manufacture if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer. *Fla. Stand J. Inst. (Civil) PL 5 (term "manufacture" replacing "design").*

Under this theory, it will be necessary to evaluate the manner and method by which the drywall was manufactured to prove that the manufacturing process caused the defect.

Design Defects

Design defects generally occur in the planning stages of a particular product. The manufacturer conceives an idea for a product and undertakes the planning, research, and testing to determine how the product may be manufactured. It is during this process that a flaw develops.

There are two general principles that courts consistently repeat in their opinions in strict liability cases involving design defects. *Husky Industries, Inc.*, 434 So. 2d 988. First, manufacturers are not insurers of the products they produce. *Id*. Second, the courts emphasize that manufacturers are under no duty to design a product that is accident proof. *Id*. The standard jury instruction for design defects states:

> A product is defective if by reason of its design the product is in a condition unreasonably dangerous to the user and the product is expected to and does reach the user without substantial change affecting that condition. A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer. *Fla. Stand J. Inst. (Civil) PL 5*.

Under this theory, it will be necessary to evaluate the manner and method by which the manufacturers designed the production of the drywall to determine whether a design defect exists.

Failure to Warn

An otherwise safe product may be considered defective solely by virtue of an inadequate warning or no warning at all. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th DCA 1998); *Giddens v. Denman Rubber Mfg. Co.*, 440 So. 2d 1320 (Fla. 5th DCA 1983). In *Giddens* the court held that failure to warn the consumer that a particular use of the product may pose a risk of danger makes the product defective within the meaning of the *Restatement (Second) of Torts, § 402A*. The court noted that where the seller "has reason to anticipate that danger may result from a particular use … he may be required to give adequate warning of the danger (see comment j), *and a product sold without such a warning is in defective condition.*" *Giddens*, 440 So.2d at 1322.

Standards to Determine Whether Defect Exists

Florida courts recognize two basic standards to determine whether a product is defective in strict liability cases: the consumer expectation standard and the risk utility standard. Florida courts have unfortunately used them interchangeably and have created some inconsistency on when each apply to determine whether a product is unreasonably dangerous and defective in cases involving manufacturing and design defects.

Consumer Expectation Standard

For a plaintiff to establish that a product is defective under the "consumer expectation standard," it must prove that the ordinary consumer's expectations were frustrated by the product's failure to perform under the circumstances in which it failed. *Cassisi*, 396 So. 2d at 1144–45. Florida courts note that this standard is not derived from negligence principles. Therefore, the plaintiff is not required to impugn the manufacturer or seller of the defective product. Instead, the plaintiff must impugn the product that caused his injury. *Id*. at 1145. Therefore, in the Chinese drywall litigation, it will be necessary to present evidence to reflect a consumer's expectation of drywall and whether it met these expectations.

Reasonably Prudent Manufacturer Standard: Risk-Utility Analysis

Some courts have rejected the consumer expectation test in design defect cases in favor of a test that would weigh the utility of the design versus the magnitude of the risk. These courts suggest that the appropriate standard to determine whether a product is defective is the reasonable manufacturer standard. *Auburn Mach. Works Co., Inc. v. Jones*, 366 So. 2d 1167 (Fla. 1979). This standard is more commonly referred to as the risk-utility test.

The specific factors that enter into the balancing process are: 1) the usefulness and desirability of the product; 2) the availability of other and safer products to meet the same need; 3) the likelihood of injury and its probable seriousness; 4) the obviousness of the danger; 5) common knowledge and normal public expectation of the danger (particularly for established products); 6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and 7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive. *Id*. at 1170. A finder of fact will be required to balance the factors to determine whether a product is defective.

Cassisi/Greco Inference of Defect

In order to establish strict liability in a products liability case, the plaintiff must prove he was injured by a defect in the product that existed at the time it left the hands of the manufacturer or seller. *Cassisi*, 396 So. 2d 1140. In most cases, the defect is established by direct evidence or by circumstantial evidence presented in the form of expert testimony. *Id*. However, there are instances where several possible explanations are presented by the plaintiff for the accident because he is unable to prove by either direct or circumstantial evidence that the defect in the product existed when it was in the possession of the manufacturer or seller.

The *Cassisi* court adopted the rule in *Greco* which is now commonly referred to as the Cassisi/Greco rule. This rule simply provides that when a product malfunctions during normal operation, a legal inference arises that the malfunction was caused by a defect. This inference allows the plaintiff to establish a prima facie case for the jury to consider. *Cassisi*, 396 So.2d at 1148. In other words, the malfunction of the product constitutes evidence of a defect. *ISK Biotech Corp. v. Douberly*, 640 So. 2d 85 (Fla. 1st DCA 1994).

The inference is typically applied in cases where the product is either destroyed or lost. However, it may be applied in cases where the product remains intact and is not lost because the essential facts that must be established for the inference to apply are simply: (1) a malfunction of the product, and (2) during normal operation. *Cassisi*, 396 So. 2d 1140. Thus, the user's testimony of the circumstances of the accident may be all the evidence that is required to establish a defect in the product. *Miller v. Allstate Ins. Co.*, 650 So. 2d 671 (Fla. 3d DCA 1995); *Cassisi*, 396 So. 2d 1140.

The inference is only sufficient to get the plaintiff past a motion to dismiss, motion for summary judgment, or motion for directed verdict. *Diversified Products Corp. v. Faxon*, 514 So. 2d 1161 (Fla. 1st DCA 1987). The inference alone does not allow the trial court to grant summary judgment in the plaintiff's favor. *Diversified Products Corp.*, 514 So. 2d 1161. In other words, the inference creates a prima facie case and gets the case to the jury, who must decide whether there is sufficient evidence to establish whether a defective product caused the plaintiff's injuries. *Diversified Products Corp.*, 514 So. 2d 1161. The inference does not place the burden of proof or the burden of producing evidence on the defendant. *Id.*; *Cassisi*, 396 So. 2d 1140. However, if the defendant fails to present any evidence in a case where the inference is applied, it might run the risk of having the jury return a verdict in the plaintiff's favor. *Id*.

The inference does not allow the trial court to give a jury instruction regarding the inference. *Gencorp, Inc. v. Wolfe*, 481 So. 2d 109 (Fla. 1st DCA 1985). Such an instruction is prohibited because it would be tantamount to directing a verdict for the plaintiff. *Id*. However, the jury may consider other relevant factors such as the products

age, the length of the products' use, the severity of its use, the state of its repair, its expected useful life, and whether it was subjected to any abnormal operation. *Warner v. Sony Corp. of America*, 560 So. 2d 399 (Fla. 4th DCA 1990); *Cassisi*, 396 So. 2d 1140.

Whether the inference applies in the Chinese drywall litigation will be a question of law for the court to decide.

PROXIMATE CAUSE BETWEEN DEFECT AND DAMAGE

The plaintiff must also establish that the product defect caused the damage. Even though strict liability is a separate and distinct legal theory from negligence, the courts apply the same principles of causation in both types of cases.

OTHER REQUIREMENTS

For a plaintiff to prevail in any suit involving strict liability, plaintiff must have used the product for the purpose intended and the product must not have been substantially changed from the condition in which it was sold. *High v. Westinghouse Elec. Corp.*, 610 So.2d 1259 (Fla. 1992).

IMPLIED WARRANTIES

In products liability cases based on breach of warranty, the focus of the litigation is whether a warranty was made, the type of warranty that was made, and whether the seller breached the warranty. These issues are usually determined by examination of the sales agreement between the seller and buyer of the product.

In order to prevail in any action based on breach of warranty under the Uniform Commercial Code, the plaintiff must allege and prove: a sale of the goods, identification of the type of warranty, breach of the warranty, notice to the seller of the breach, and the injuries sustained by buyer as a result of the breach. *Dunham-Bush, Inc. v. Thermo-Air Service, Inc.*, 351 So.2d 351 (Fla. 4th DCA 1977).

The following discusses the warranty of merchantability, which is based on the *ordinary* purposes for which the goods are used, and the warranty of fitness for a particular purpose, which is based on a *particular* purpose. These warranties have been extended to purchasers of new homes, such as condominiums, for the failure of construction materials within the condominiums. *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972).

IMPLIED WARRANTY OF MERCHANTABILITY

The implied warranty of merchantability is contained in *F.S.A. § 672.314* which provides in part that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Therefore, the following factors must be met to prove that a warranty of merchantability exists.

Code Required Factors

Goods

The term "goods" is defined in *F.S.A. § 672.105(1)* to mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 678) and things in action." The courts distinguish a contract to sell goods which may create an implied warranty of merchantability from a contract to render a service which does not. *Lonnie D. Adams Bldg. Contractor, Inc. v. O'Connor*, 714 So. 2d 1178 (Fla. 2d DCA 1998).

Merchantable

The standards that determine whether goods are merchantable are listed in *F.S.A. § 672.314(2)*, which provides that merchantable goods must:

a. Pass without objection in the trade under the contract description; and
b. In the case of fungible goods, are of fair average quality within the description; and
c. Are fit for the ordinary purposes for which such goods are used; and
d. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved: and
e. Are adequately contained, packaged, and labeled as the agreement may require; and
f. Conform to the promises or affirmations of fact made on the container or label if any.

The requirement of merchantability is meant to be a flexible concept which depends upon the description of the goods and the circumstances of the sale. *McCormick Machinery, Inc. v. Julian E. Johnson & Sons, Inc.*, 523 So. 2d 651, 655, (Fla. 1st DCA 1988). Therefore, the standards listed in the statute are not exclusive and do not exhaust all of the factors that may determine whether goods are merchantable. *F.S.A. § 672.314*, *comment 6*.; *McCormick Machinery, Inc.*, 523 So. 2d 651. These are minimal standards and the statute leaves open other possible attributes of merchantability. *Id.*

Sale of Goods

The relevant sections of Florida's Uniform Commercial Code relating to warranties speak in terms of "sale," "seller," and "buyer." *F.S.A. §§ 672.313, 672.314*, and *672.315*. Thus, as a general rule, a cause of action for breach of warranty must be based on an agreement for the sale of goods. The courts distinguish a sale of goods from an agreement to render a service. *Lonnie D. Adams Bldg. Contractor, Inc.*, 714 So. 2d 1178. In cases involving the implied warranty of merchantability, for example, the courts have held that the warranty is incident to the existence of a contract of sale. *Marini v. Town & Country Plaza Merchants Ass'n, Inc.*, 314 So. 2d 180 (Fla. 1st DCA 1975). Therefore, the existence of the contract for goods assumes or implies the existence of the warranty. *Id*.

Merchant

The term "merchant" is defined in *F.S.A. § 672.104(1)* as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." The status of a merchant under this definition may be based on specialized knowledge of the goods, specialized knowledge as to business practices, or specialized knowledge as to both.

For purposes of the implied warranty of merchantability under *F.S.A. § 672.314*, however, the qualification that the seller must be a "merchant with respect to goods of that kind" obviously restricts application of the warranty to a much smaller group than everyone who is engaged in business. *F.S.A. § 672.104*, *comment 2*. In essence, it requires a professional status as to particular kinds of goods for the warranty of merchantability to be implied. *F.S.A. § 672.104*, *comment 2*.

In *Ashley Square, Ltd. v. Contractors Supply of Orlando, Inc.*, 532 So. 2d 710 (Fla. 5th DCA 1988), the plaintiff contracted with a contractor to construct a building on the plaintiff's property. The contractor entered into a subcontract for the application of the stucco on the building. The subcontractor contacted the manufacturer of the stucco who would only supply it through the defendant who was its local distributor. The subcontractor obtained the stucco from the defendant and applied it to the building. When it became obvious that the stucco was defective, the plaintiff sued the defendant alleging breach of an implied warranty of merchantability. The defendant alleged the warranty did not exist because it was not a merchant under the definition of that term in *F.S.A. § 672.104(1)* because it does not regularly supply stucco and the order for the particular stucco involved in the sale to the subcontractor was the first time it had been asked to supply stucco. The court held that the defendant was a merchant under the definition of *F.S.A. § 672.104(1)* and that the warranty did exist under the facts of the case. The court stated:

> Contractors Supply clearly deals in goods of this kind. Its very name indicates the nature of its business, and the record reveals that it was the local distributor of the manufacturer. The statute is written in the disjunctive, so if the person deals in goods of the kind, he is a "merchant" under this section, whether or not he holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

Ashley Square, Ltd. 532 So.2d at 711.

Court Required Factors

In addition to the Code provisions, the courts require that other elements must be established in order to recover in a products liability action based on breach of an implied warranty. These elements are:

1. Plaintiff was a foreseeable user of the product;
2. The product was being used in the intended manner at the time of the injury;

3. The product was defective when transferred from the warrantor; and
4. The defect caused the injury.

Amoroso v. Samuel Friedland Family Enterprises, 604 So. 2d 827, (Fla. 4th DCA 1992).

The first element recognizes that the merchant could foresee the plaintiff as a user of the product and is not someone who does not know how to use the product or put it to its proper use.

The second element simply recognizes that product misuse, which is subsumed in the doctrine of comparative negligence, is a defense that may be asserted by a seller or manufacturer to reduce the plaintiff's damages. *Coulter v. American Bakeries Co.*, 530 So. 2d 1009 (Fla. 1st DCA 1988).

The third element recognizes that product alteration or modification, like product misuse, is a defense that may be asserted to reduce or apportion the plaintiff's damages. If the product complied with the requirements of merchantability and fitness for a particular purpose at the time of the sale or when the seller parted with possession of it, the defect may not have been caused by the seller and he may be relieved of liability. Thus, if the product was modified or altered after the sale, the defendant may assert comparative fault as a defense or he may contend that the requirement of causation was not established by the plaintiff.

The fourth element of causation is an essential element of any products liability action regardless of whether it is based on negligence, strict liability, or breach of warranty. If the defect in the product did not cause the plaintiff's injuries, he will not recover in a products liability action.

Defect In Product

The standard jury instruction relating to breach of the implied warranty of merchantability states that "[a] product is defective if it is not reasonably fit for the uses intended or reasonably foreseeable by (defendant)." *Fla. Stand. J. Inst. PL 2.*

The defect that must exist in a product to render it unfit for its intended purpose may arise from a flaw in manufacturing the product or a flaw in the design of the product. *Evancho v. Thiel*, 297 So. 2d 40 (Fla. 3d DCA 1974). In order to establish that an article is not fit for the ordinary purpose for which such goods are intended, the plaintiff does not have to establish or show any exact deficiency which rendered the article defective and caused it to fail. *Armor Elevator Co. v. Wood*, 312 So. 2d 514 (Fla. 3d DCA 1975). In appropriate cases, a defect may be inferred from the fact that a new product performed in such a manner as to preclude any other reasonable inference which would suggest that the product was not defective. *Id*. Thus, if an injury can be traced to a product (like Chinese drywall), and the evidence shows that it was being put to its ordinary use in the ordinary way when it failed, it is reasonable to find that it failed because of some flaw or defect. *Id*.

The implied warranties of merchantability do not impose on the merchant a duty to furnish the very best product of its kind or a product equal in quality to any other similar or competing product. *Borrell-Bigby Elec. Co., Inc. v. United Nations, Inc.*, 385 So. 2d 713 (Fla. 2d DCA 1980). The implied warranty of merchantability only requires the merchant to furnish goods that are fit for the ordinary purpose for which such goods are furnished. Thus, if a product has a defect that does not render it unfit for its ordinary purpose, there may not be a recovery for breach of an implied warrant of merchantability. *Fletcher Co. v. Melroe Mfg. Co.*, 238 So. 2d 142 (Fla. 1st DCA 1970).

Privity

With the adoption of strict liability as a valid cause of action, the courts require that the plaintiff establish privity with the manufacturer or supplier as an additional element of a cause of action based on implied warranty. *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988). Privity is required in a cause of action based on implied warranty because an implied warranty arises from a contractual relationship that necessarily requires privity between the parties. *Id*. If the plaintiff cannot establish privity, then the appropriate cause of action for him to pursue is strict liability. *Id*.

An exception to the privity requirement is found in *F.S.A. § 672.318* which provides that implied warranties may extend to any natural person who is in the family or household of the buyer, who is a guest in his home or an employee, servant or agent of the buyer if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured by breach of the warranty. *F.S.A. § 672.318*.

Notice

The plaintiff must establish that it gave the seller notice of the breach of warranty. *Dunham-Bush, Inc. v. Thermo-Air Service, Inc.*, 351 So. 2d 351, (Fla. 4th DCA 1977).

If a buyer accepts nonconforming goods, he must notify the seller that the goods are nonconforming in order to recover damages for breach of warranty. *F.S.A. § 672.607(3)(a)*; *General Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, (Fla. 2d DCA 1980). This rule is contained in *F.S.A. § 672.607(3)(a)* which provides that "[w]hen a tender has been accepted the buyer must within a reasonable time after he or she discovers or should have discovered any breach notify the seller of breach or be barred from any remedy… ." The burden is on the plaintiff to show that he complied with this statute and that he gave the seller notice of the breach within a reasonable time. *General Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, (Fla. 2d DCA 1980).

What constitutes a reasonable time will depend on the facts and circumstances of each case. In some cases, however, the facts will permit the courts to decide the issue as a matter of law. For example, in *Hapag-Lloyd, A.G. v. Marine Indem. Ins. Co. of America*, 576 So. 2d 1330, (Fla. 3d DCA 1991) the buyer became aware of a defect in a top loader he purchased from the seller but continued to use it until he could repair the defect. The buyer used the equipment for four weeks with knowledge of the defect without repair and notice to the seller. After an accident occurred that resulted from the defect, the buyer gave the seller notice and instituted suit for breach of warranty. The court held as a matter of law that the buyer failed to give notice of the alleged breach within a reasonable time after it was discovered and, therefore, could not recover. The court reasoned as follows:

> It is obvious that the failure to afford the seller reasonable notice of an already discovered defect until after the loss caused by the breach of warranty had already occurred - when, as clearly appears, the seller could have remedied the defect and prevented the loss - requires a conclusion that, as the statute provides, the buyer is "barred from any remedy."

The notice requirement applies only to the buyer and not to warranty beneficiaries under *F.S.A. § 672.318*. *Carlson v. Armstrong World Industries, Inc.*, 693 F. Supp. 1073, (S.D. Fla. 1987).

Sufficiency of the notice is an issue that the courts have not directly addressed. *Comment 4 to F.S.A. § 672.607* is instructive and provides:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Pursuant to *F.S.A. § 672.315*, where the seller at the time of contracting has reason to know of any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified, an implied warranty that the goods shall be fit for such purpose.

The implied warranty of fitness differs from the implied warranty of merchantability. The particular purpose for which the goods are required differs from the requirement of merchantability under *F.S.A. § 672.314* because the particular purpose requirement contemplates a specific use by the buyer that is peculiar to the nature of his business. On the other hand, the "ordinary purpose for which such goods are used" requirement of the implied warranty of merchantability relates to uses that are customarily made of the goods sold to the buyer. Therefore, goods that are merchantable may not necessarily meet the implied warranty of fitness for a particular purpose.

Seller
The implied warranty of fitness for particular purpose may exist when a seller sells or furnishes goods to a buyer. A seller is defined in *F.S.A. § 672.103(1)(d)* as "a person who sells or contracts to sell goods." For example, a local distributor of a manufacturer of Ford engines who sells those engines to purchasers is a seller under this statutory definition in determining whether an implied warranty of fitness or merchantability exists. *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60 (Fla. 3d DCA 1985). The manufacturer of goods which distributes them to an authorized dealer for sale to consumers and who does not sell them directly to the consumer is not a seller under this definition. *Ford Motor Co. v. Pittman*, 227 So. 2d 246 (Fla. 1st DCA 1969). Also, a provider of services does not fall within the definition of seller. *Lee v. C & P Service Corp.*, 363 So. 2d 586 (Fla. 3d DCA 1978).

Buyer
A buyer is defined in *F.S.A. § 672.103(1)(a)* as "a person who buys or contracts to buy goods." Privity must be established between the injured party and the seller in order to recover for breach of warranty. Therefore, in most cases, the injured party must be the buyer who purchased the defective product from the seller. However, the exception to the privity requirement mentioned in the implied warranty of merchantability "Privity" section also applies to implied warranties of fitness for a particular purpose.

Purpose Intended
The implied warranty of fitness for a particular purpose places upon the seller the obligation to furnish goods reasonably fit for the purpose intended. *Borrell-Bigby Elec. Co., Inc. v. United Nations, Inc.*, 385 So. 2d 713 (Fla. 2d DCA 1980). It does not require the seller to furnish the very best article of its kind or an article equal to any other similar or competing article. *Id*. The seller simply must have reason to know the particular purpose for which the goods are required at the time of sale. *F.S.A. § 672.315*; *Halpryn v. Highland Ins. Co.*, 426 So. 2d 1050 (Fla. 3d DCA 1983).

Seller's Skill and Judgment
The plaintiff must establish that he relied on the seller's skill or judgment in selecting or furnishing suitable goods for the intended purpose. *F.S.A. § 672.315*; *Ryan v. Atlantic Fertilizer & Chemical Co.*, 515 So. 2d 324 (Fla. 3d DCA 1987). If the buyer relied on his own judgment or that of a third party rather than the judgment or skill of the seller, the warranty will not exist. *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60 (Fla. 3d DCA 1985). Furthermore, reliance may not exist if the buyer's knowledge equals or exceeds that of the seller regarding the goods and their fitness for the intended purpose. *Light v. Weldarc Co., Inc.*, 569 So. 2d 1302 (Fla. 5th DCA 1990). This issue of reliance is generally a question of fact to be resolved by the jury. *R.A. Jones & Sons, Inc.*, 470 So. 2d 60.

Defect In Product
The standard jury instruction relating to this implied warranty states that "[a] product is defective if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which the purchaser bought the product in reliance on the judgment of (defendant)." *Fla. Stand. J. Inst. PL 3.* In cases involving breach of an implied warranty of fitness for a particular purpose, the product may be defective because of a manufacturing or design defect, or simply because the merchant selected an otherwise non-defective product that was designed and manufactured for a purpose other than the particular use intended by the buyer. Thus, a breach of an implied warranty of fitness may occur simply because of the wrong selection of product by the merchant.

VIOLATION OF FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

The Florida Deceptive and Unfair Trade Practices Act regulates methods of competition and unfair or deceptive acts or practices. *F.S.A. § 501.201*. The ultimate purpose of the law is to protect consumers from purchasing goods diminished in value by unfair trade practices and to protect the unwary consumer. *Warren v. Monahan Beaches Jewelry Center, Inc.*, 548 So. 2d 870 (Fla. 1st DCA 1989). The Act is to be construed consistently with federal antitrust law. *Morris Communications Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269 (M.D. Fla. 2002).

To prove the defendants in the Chinese drywall litigation violated the Florida Deceptive and Unfair Trade Practices Act, it will be necessary to prove three elements: (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages. *Rebman v. Follett Higher Educ. Group, Inc.*, 248 F.R.D. 624, (M.D. Fla. 2008).

DECEPTIVE ACT

A "deceptive act" occurs within the meaning of the Act if there is a representation, omission, or practice that is likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment. The standard requires a showing of probable, not possible, deception that is likely to cause injury to a reasonably relying consumer. *Zlotnick v. Premier Sales Group, Inc.*, 480 F.3d 1281 (11th Cir. 2007). An act does not need to violate a specific rule or regulation in order to be considered deceptive. *State of Fla., Office of Atty. Gen., Dept. of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288 (S.D. Fla. 2005).

UNFAIR PRACTICE

An "unfair practice," within the meaning of the Act, is one that offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Rebman v. Follett Higher Educ. Group, Inc.*, 575 F. Supp. 2d 1272 (M.D. Fla. 2008).

TRADE OR COMMERCE

"Trade or commerce," under the Act, means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, tangible or intangible, or any other article, commodity, or thing of value, wherever situated. *F.S.A. § 501.203(8)*.

The Act applies to any act or practice occurring in the conduct of any trade or commerce, even as between purely commercial interests. *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350 (M.D. Fla. 2007). It protects any person, businesses and consumers alike, against unfair trade practices and applies to private causes of action arising from a single unfair or deceptive act in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract. *Pepsico, Inc. v. Distribuidora La Matagalpa, Inc.*, 510 F. Supp. 2d 1110 (S.D. Fla. 2007).

DAMAGES, ATTORNEY FEES, AND COSTS

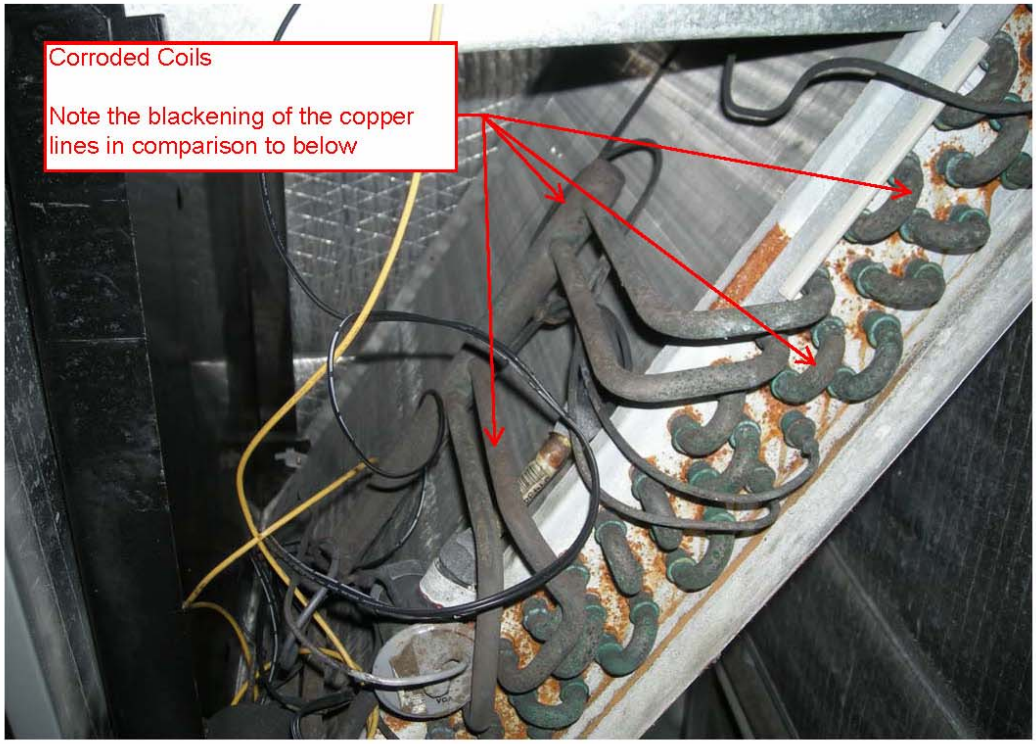
In any action brought by a person who has suffered a loss as a result of a violation of the Act, that person may recover actual damages, plus attorney's fees, and court costs. *F.S.A. § 501.211(2).* As a general rule, the measure of actual damages under the Act is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313 (M.D. Fla. 2002). A notable exception to the rule may exist when the product is rendered valueless as a result of the defect; then the purchase price is the appropriate measure of actual damages. *Id*. The Act does not provide for consequential damages such as repair damages or resale damages. *Ace Pro Sound and Recording, LLC v. Albertson*, 512 F. Supp. 2d 1259 (S.D. Fla. 2007). Moreover, no damages, fees, or costs are recoverable against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the Act. *F.S.A. § 501.211(2)*. Further, the Act does not provide for the recovery of punitive damages, nominal damages, speculative losses, or compensation for subjective feelings of disappointment. *City First Mortg. Corp. v. Barton*, 988 So. 2d 82 (Fla. 4th DCA 2008); *F.S.A. § 501.201 et seq.*

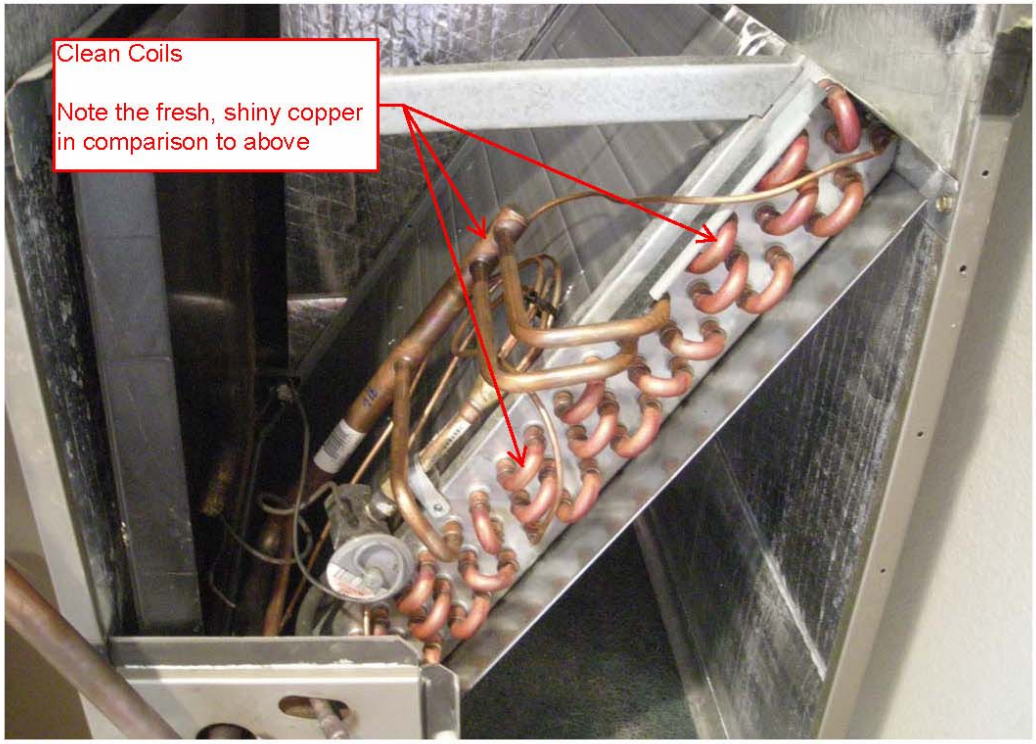
In any civil litigation resulting from a violation of the Act, with the exception of an action initiated by the enforcing authority, *the prevailing party*, after judgment in the trial court and exhaustion of all appeals, if any, may receive reasonable attorney's fees and costs from the nonprevailing party. *F.S.A. § 501.2105(1) (emphasis added).*

MULTIDISTRICT LITIGATION

On June 15, 2009, a special panel on multidistrict litigation ordered 10 federal cases involving liability for Chinese drywall consolidated in the U.S. District Court of the Eastern District of Louisiana with Judge Eldon E. Fallon. It was ordered that another 67 related liability actions pending in numerous federal districts as well as any other related action be treated as potential tag-along actions. Multidistrict litigation is a procedure utilized in the federal court system to consolidate pending federal civil cases filed throughout the United States with common questions of fact. The consolidation allows one federal judge to manage, among other things, pretrial procedures, discovery, and dispositive motions. However, after all discovery and pretrial rulings, if issues remain to be tried, the case will be remanded back to the court where it was originally filed for trial.

PHOTOS OF DAMAGES





Corroded copper tubing.

Normal copper tubing.

SUMMARY

The discussions and concepts addressed within this article provide an outline of pending and prospective litigation associated with Chinese drywall. Specific decisions as to whether recovery actions should be pursued and against whom will require the review of each claim on the basis of its own facts and circumstances.

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