

CHINESE DRYWALL SPURS NEW LAWSUITS

A recent surge of cases based on the use of drywall from China appears to signal a new attack against the construction and insurance industries. The cases involve both construction defect and personal injury claims impacting builders, suppliers, distributors, manufacturers, and their respective insurers. From 2004 to 2007, in the midst of the housing "boom" and as a result of the loss of production in U.S. manufacturing from hurricanes Katrina and Wilma, the building industry began importing large amounts of drywall from abroad to meet the growing demand. Supplying this foreign drywall were companies like German-based Knauf and its Chinese subsidiary Knauf-Tianjin and Taishan Gypsum Company, Ltd. The recent lawsuits claim that some of this drywall is defective and causing significant property damage and personal injuries to the homeowners.

According to studies conducted on behalf of homeowners and some builders, the drywall contains sulphur and sulphur compounds that occur either naturally from the minerals mined to make the gypsum or that result from the processing of synthetic gypsum produced from residues from coal-burning power plants. The sulphur in the gypsum material emits gases such as hydrogen sulfide. The claims allege these gases emitted from the sulphur in the drywall create not only noxious odors like rotten eggs, but they also accelerate the corrosion of anything metal in the home, such as air conditioner and refrigerator coils, kitchen appliances, utensils, plumbing fixtures, electrical wir-

ing, and electronic components of household products such as computers. The claims also assert that long-term exposure to low levels of sulfides have been associated with health conditions such as fatigue, loss of appetite, headaches, irritability, poor memory, dizziness, and reproductive problems. As such, the claims involve damage to the construction itself, to other property within the homes, and to persons living in the homes. Considering the number of homes built using Chinese drywall, the number and type of claims likely to arise will become a major subject of litigation in courts throughout the United States for years to come.

So far, the homeowner has been the primary claimant, and the defendants have included the builder, supplier, distributor, and all participants in the process including the manufacturer. One Virginia Beach lawsuit even includes a claim against the homeowner's insurance company for wrongfully denying coverage for the claims. More recently, lawyers from several states have filed a class-action lawsuit naming the manufacturer, distributor, and installer as primary defendants with claims of negligence, negligence per se, breach of express and implied warranties, breach of contract (against a developer only), private nuisance, unjust enrichment, violation of the Virginia Consumer Protection Act, and equitable and injunctive relief. The lawsuit seeks monetary damages and/or injunctive relief to remove and replace the allegedly defective drywall throughout the homes. The class-action suit also seeks the equitable remedy of medical monitoring of the homeowners for long-term health problems caused by the exposure.

As the claims arise from the defective nature of the drywall itself, the claims against foreign manufacturers fall under products defect doctrines. In these Virginia cases, the plaintiffs allege that the foreign

manufacturers and/or distributors conducted their businesses in Virginia based on alleged direct sales in Virginia. If facts do not support these direct contacts claims, Due Process law from notable United States Supreme Court cases such as Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026 (1987) and Burger King Corporation v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174 (1985) may provide a substantial defense to the foreign entities for not having sufficient contacts with Virginia or purposely availing themselves of the benefits of the Virginia market.

If Virginia Courts do maintain jurisdiction, Virginia's general product liability law requires a product to be fit for the ordinary purposes for which it is to be used. This is so whether the theory of recovery is negligence or warranty. Garrett v. I.R. Witzer Co., Inc., 258 Va. 264 (1999). When applied to a manufacturer, a Plaintiff not only must prove that the product was unreasonably dangerous either for the its ordinary use or for some other reasonably foreseeable purpose, but also that the dangerous condition existed when it left the manufacturer's hands. Jeld-Wen, Inc. v. Gamble, 256 Va. 144 (1998). While a defect must be shown to be unreasonably dangerous, the claims that the sulphur gases damage metal elements of the house and cause respiratory and other health issues appear to make it certain that a Plaintiff can make out a prima facie case of liability against the manufacturer. On the other hand, Virginia has a relatively short 5 year statute of repose (Va. Code 8.01-250), Since discovery of the condition is not the triggering event for the cause of action, the claimant must file his or her claims for the defective drywall within 5 years of the time the work was completed. Most Chinese drywall was imported in



2004 or later, so the statute of repose may begin to be an issue in these cases. When considering the statute of repose, it is worth noting that the second paragraph of the statute excludes its application to manufacturers and suppliers of "other articles installed in a structure upon the real property." Notwithstanding this language, no less than five Va. Supreme Court decisions in have held that ordinary building materials such as wall panels, electrical boxes, steel panels, braces and vinyl liners to pools, and a pool drain cover were covered by the statute of repose. See, Cape Henry Towers, Inc. v. National Gypsum Co., 229 Va. 596 (1985) Grice v. Hungerford Mechanical Corp., 236 Va. 305 (1988), Luebbers v. Fort Wayne Plastics, Inc., 255 Va. 368 (1998), Cooper Industries, Inc. v. Melendez, 260 Va. 578 (2000) and Baker v. Poolservice Company, 272 Va. (2006).

Although some states such as Maryland allow distributors and suppliers a "pass-through"

defense for not changing a product received from an entity above them in the chain of distribution, Virginia law generally allows claims to go up through the chain of distribution potentially affecting every entity in that chain. Because of this, lawsuits will involve claims and cross-claims against other parties named and the contractual agreements between parties will be major issues of dispute within the lawsuits.

Moreover, the exposure to liability for these very expensive claims has led to proactive lawsuits by insurers seeking preliminary rulings from the courts that they do not have to cover the damages. The primary provision at play in the typical builders or general liability policy is a pollution exclusion that excludes coverage for noxious gases, odors, and such. While a general liability policy may provide initial coverage for property damages caused by defects in the building of a house, the pollution exclusion specifically excludes such property damage caused by the emission of pollutants from the work. As such,

if the courts find that this exclusion is valid and effective, builders may find themselves without coverage for claims against them. Additionally, although some builders have taken proactive steps to settle claims or potential claims by affirmatively replacing drywall in homes they have built, such actions may also preclude them from seeking reimbursement under their policies of insurance, as the insurer typically must agree to any settlement activities as a condition precedent to coverage.

Because the claims have just begun to arise in Virginia, it is important for builders, suppliers, and distributors in Virginia to confirm solid contractual protections for themselves.



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