

Client Alert

A report
for clients
and friends
of the Firm November 2009

New Developments In Chinese Drywall Litigation

Testing for a Causal Connection Between Chinese Drywall & Property Damage and Health Complaints

Last week, the interagency task force on Chinese drywall released the initial results of several studies it is overseeing. The task force, which is led by the U.S. Consumer Product Safety Commission ("CPSC"), includes various federal and state agencies such as the EPA and CDC. Three types of studies were involved: elemental and chemical testing, chamber studies, and indoor air testing.

Elemental and chemical testing aimed at characterizing the composition of Chinese and non-Chinese drywall showed higher concentrations of elemental sulfur and strontium in 17 samples of Chinese drywall compared with the non-Chinese drywall samples. The drywall samples were unpainted and uninstalled. Chamber studies, which tried to isolate the chemicals emitted from drywall, showed higher emissions of total volatile sulfur gasses from Chinese drywall than non-Chinese drywall. Indoor air testing of almost a dozen homes, both with and without Chinese drywall, in Florida and Louisiana detected little or no indications of various sulfur compounds, namely, hydrogen sulfide, carbon disulfide and carbonyl sulfide. Formaldehyde and acetaldehyde also were detected in homes with and without Chinese drywall, though the concentrations of formaldehyde were not unusual for new homes.

The interagency task force warned that these results were preliminary and it cautioned against drawing any conclusions about the connection between Chinese drywall and the reported health problems and corrosion of electrical and air-conditioning system

components in affected homes. Further studies were needed to determine any nexus. Results from a broader indoor air study of 50 homes are expected later this month and a study of long-term corrosion issues will be complete by next June.

Although preliminary, these test results are important from an insurance coverage perspective. To date, insurers' main line of defense against providing coverage for Chinese drywall claims has been policies' pollution exclusion and other endorsements that exclude coverage for claims arising from the presence of contaminants, irritants, or other substances such as silica, beryllium, fungus, or bacteria and microorganisms. To the extent drywall ordinarily contains any of the substances reported in the test results, it will be harder for carriers to deny coverage on the theory that the drywall claims arise from the presence of a "contaminant." But more important, because the lead organization tasked with investigating the Chinese drywall problem has yet to determine its cause, denying coverage based on the exclusions mentioned above is necessarily grounded in speculation, not facts.

Florida Insurance Commissioner Says Chinese Drywall is Not a Covered Peril

Florida continues to be "ground zero" for homes affected with Chinese drywall. Estimates place the number of Florida homes impacted by Chinese drywall at 35,000, about a third of all homes estimated to be affected throughout the United States. Now, the state's Insurance Commissioner, Kevin McCarty, has weighed in on the coverage debate, though he appears to have limited his remarks to homeowners' insurance. Speaking to state legislators, McCarty warned that insurers have no obligation to cover defective Chinese drywall. He said that Chinese drywall is not a covered peril such as a fire, storm or broken pipe. It was "a malfunction based upon a defective material that was installed in the building. And that historically has been excluded from a homeowner's policy." McCarty also indicated that homeowners could lose coverage

altogether if they move out of their homes for extended periods of time under an “underwriting standard” that allows companies to drop coverage of unoccupied dwellings.

What is McCarty’s solution to the estimated billions of dollars it will cost to repair homes impacted with Chinese drywall? Although he indicated that the Chinese drywall manufacturers are financially responsible for the problem, McCarty told lawmakers that what is needed is a plan for a “funding source” to take care of this.

Chinese Drywall Manufacturer Agrees to Accept Service in the United States

Knauf Plasterboard (Tianjin) Co., Ltd. (KPT), one of the Chinese drywall manufacturers involved in recent defective drywall complaints, has offered to accept service of process of an omnibus class action complaint that is being prepared in the MDL proceeding pending in the United States District Court for the Eastern District of Louisiana, *In re Chinese Drywall Products Liability Litigation*. The agreement will allow homeowner claimants with KPT drywall to consolidate their claims in one lawsuit against KPT. Before, service of process of any lawsuit against KPT had to be made through the Hague Convention, which is time-consuming and costly, not to mention complicated for those who are unfamiliar with the process. Time is of the essence, however. All claimants who want to be included in this omnibus class action complaint must submit proof that their properties contain KPT-manufactured drywall to Plaintiffs’ Lead Counsel by December 2.

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