

China's Not So Great Walls

Allegedly Defective Drywall Creates Legal House of Horrors

by Michael R. Carroll

Starting around 2004, a residential housing boom in the United States led to a shortage of domestic drywall. To meet the increased demand, a substantial amount of drywall was imported from other countries, including China. Hundreds of homeowners now claim that defects in the Chinese drywall have caused all manner of alleged damages, from ill health to foul smells, and in many cases severe corrosion of metals in the affected homes. Organizations, both governmental and private, have been investigating the cause and extent of these damages, and the resulting legal morass leaves many unanswered questions regarding who is ultimately responsible for repairing the damage.

WHAT HAPPENED?

A number of factors—particularly hurricanes in the southern United States—led to a major boom in residential home construction starting around 2004. The resulting shortage of building materials led to a substantial increase in the use of materials from foreign manufacturers. This was particularly true for drywall, with a significant portion of the shortage filled by drywall from China.

Between approximately 2004 and 2008, some 500 million pounds (accounting for about 300 million square feet) of Chinese drywall was imported for use in new residential homes in the U.S. Now, many of these homeowners are claiming problems allegedly resulting from

defects in this Chinese drywall. The claims involve ill health effects (including skin irritation, respiratory problems, headaches and other medical issues), a foul, “rotten egg” odor, and significant corrosion of metals in the homes. The metal corrosion is claimed to be affecting everything from copper pipes to silverware, and is further causing premature failure of air conditioners, televisions and other major appliances and electronics.

WHAT IS KNOWN?

The United States Consumer Product Safety Commission (CPSC) is leading a federal/state interagency task force in investigating many aspects of the Chinese drywall problem, including the identification of affected homes, the potential impact of the allegedly defective drywall and possible remedies. The CPSC has created a website as a clearinghouse for information and a place to register complaints, at www.cpsc.gov/info/drywall/index.html.

The CPSC has received over 2,700 complaints from 36 states, the District of Columbia and Puerto Rico, and this number will undoubtedly grow. The alleged defect is believed to be related to the emission from the drywall, under certain circumstances, of hydrogen sulfide.

The most recent update from the task force was released in November 2009, and concluded that:

There is a “strong association” between the problem drywall, the hydrogen sulfide levels in homes

with the drywall, and corrosion occurring in those homes, with significant corrosion occurring to copper (including copper wiring) and silver.

The concentration of hydrogen sulfide and formaldehyde in the affected homes is below irritant levels, although “additive or synergistic effects of these and other compounds in the subject homes could cause irritant effects.”

The ongoing investigation will review the long-term impact of the corrosion, particularly with respect to electrical and fire safety. Additionally, the task force has begun developing: 1) a protocol to identify homes with corrosive drywall, and 2) “remediation options” to determine how best to address the impact of the allegedly defective drywall.

Estimates of the number of affected homes range from 35,000 to 100,000, depending on the amount of Chinese drywall used in each home. The cost of fixing a home with defective drywall has been estimated at approximately \$100,000 for an average-sized house, putting the total cost of remediating the problem into the billions of dollars. Indeed, some builders, particularly in heavily affected states like Florida and Louisiana, have already begun setting aside substantial funds for repairs.

LITIGATION

Hundreds of federal and state claims related to Chinese drywall have been filed to date, and more

are likely to follow. Plug the words “Chinese drywall” into Google™ and you will be directed to dozens of attorneys and law firms handling these types of claims.

The federal cases have been consolidated into a multidistrict litigation (MDL) before Judge Eldon E. Fallon in the Eastern District of Louisiana. Judge Fallon has pursued an aggressive schedule, and is attempting to hold the first trial in early 2010.

The litigation is substantially complicated by the fact that the most obvious defendants—the drywall manufacturers—reside in China, and do not conduct business in the United States. Judge Fallon has already held one such company in contempt for ignoring the suits. Accordingly, and in order to improve their chances of actually recovering a judgment, homeowner plaintiffs have filed suit against numerous other members of the

supply chain, including importers, contractors, builders, installers, and even realtors, much like what occurred in asbestos litigation after the major target defendants filed for bankruptcy.

The numerous allegations include claims of negligence, breach of contract, breach of implied and express warranties, product liability, private nuisance, unjust enrichment, fraudulent concealment and violations of state consumer protection statutes. Further complicating the litigation are the numerous cross-claims by defendants seeking indemnity and contribution.

Damages asserted in these cases extend beyond replacement of the defective drywall, as many of these plaintiffs are asserting health concerns and damage to additional real and personal property.

INSURANCE

A final wrinkle in the fallout from

the allegedly defective Chinese drywall involves the homeowners’ insurance companies. A number of insurers have already asserted that their policies do not cover either the defective drywall itself or any damage resulting from its use in the homes. Most homeowner insurance policies exclude from the policy damage caused by the “discharge, dispersal, seepage, migration, release or escape” of “pollutants.” States vary widely in their interpretation of the breadth of these pollution exclusions, but insurance companies maintain that the offending agents in the Chinese drywall qualify as pollutants within the meaning of the exclusion.

Insurers have further asserted that the allegedly defective drywall is a builder defect not covered by their policies. Homeowner policies generally do not cover faulty, inadequate or defective workmanship, construction, or materials. What is likely, however, is that coverage issues will become more prominent in the coming year, as the courts are faced with plaintiffs looking for someone from whom they can recover.

The inability of homeowner plaintiffs to recover from their homeowner insurance policies, particularly when combined with the inability to recover from the original drywall manufacturers, only serves to increase efforts to recover from others in the chain, including builders and installers. While the government agencies and the courts are moving at a rapid pace to understand and resolve the Chinese drywall problem, it is simply unlikely that these issues of liability, causation and damages will be resolved quickly due to the sheer scope of the problem and the complications presented by seemingly unreachable foreign defendants. ■

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