



## HOMEOWNERS BUILD CASES AGAINST CHINESE DRYWALL

LAWSUITS FILED AS INSURERS DENY COVERAGE FOR ALLEGED CHEMICAL DAMAGE

By **GERALD P. DWYER JR., JOHN P. MALLOY** and **CHRISTOPHER R. PERRY**

During the past seven years, drywall from China was used in home construction throughout the U.S., especially in the Southeast. Chinese drywall is suspected of emitting an invisible gas that smells like rotten eggs and eats away at copper plumbing and the metal components of household appliances.

Large numbers of homeowners have made claims under their homeowners policies. During the past few months, insurers have begun to explain to their policyholders why there is no homeowners coverage available for the claimed damage. The news is unwelcome and the litigation over the availability of first-party homeowners coverage has only just begun.

The massive rebuilding following Hurricane Katrina and the building boom in Florida resulted in a shortage of domestically produced drywall in the U.S. market. As a result, builders turned to drywall from China. While the bulk of Chinese drywall was imported between 2004 and 2006, Chinese-manufactured drywall has been found in homes built in Florida as early as 2000. It is estimated that over 600 million pounds of Chinese drywall was imported to the U.S. over the last seven years. To set the scope of the potential dispute, estimates of the number of impacted homes range from 100,000 to 300,000, and the estimated average cost to repair an affected home is \$50,000.

The primary complaints about Chinese drywall are that it emits chemical compounds that smell terrible,

corrode copper pipes and wiring, damage appliances, such as plasma TVs, and in rare occasions, cause respiratory problems. At this time, there is no established scientific link between Chinese drywall and these complaints. The lead federal agency investigating these claims, the Consumer Product Safety Commission, is expected to release an interim report in late November on the results of a 50-home air sampling study. More information about the governmental response can be found at [www.cpsc.gov/info/drywall](http://www.cpsc.gov/info/drywall).

As scientific investigation continues into the suspected link between Chinese drywall and the homeowners' complaints, litigation over such drywall is nevertheless proceeding on several fronts, including a federal multi-district litigation action (MDL) pending in Louisiana. More information about the Chinese drywall MDL is available at [www.laed.uscourts.gov/drywall](http://www.laed.uscourts.gov/drywall).

The current legal battle involves claims



Gerald P. Dwyer Jr.



John P. Malloy



Christopher R. Perry

for damages by homeowners against the contractors, manufacturers, distributors, suppliers and builders in connection with the construction of their homes. The MDL is in the discovery phase and has not issued any major substantive rulings. The next event is expected to be the identification of certain bellwether plaintiffs, *i.e.*, test cases. The process of identifying those plaintiffs will begin in January. Although there is a push underway to bring the insurance issues into the proceeding, it is currently unclear whether any insurance issues will be resolved through the MDL.

### Exclusion Defense

In the litigation over homeowners insurance coverage for drywall claims, insurers will likely defend on the ground that the cost to replace the allegedly defective drywall itself is not covered because the drywall has not sustained a direct physical loss. Insurers will also rely upon exclusions for loss caused by defective workmanship or by the use of defective materials in construction, common exclusions in homeowners policies.

Those exclusions, the insurers will argue, preclude coverage not only for the cost of re-

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*Gerald P. Dwyer Jr. is a partner in Robinson & Cole's Hartford office where he focuses his practice on complex commercial litigation. John P. Malloy is a Hartford-based partner with the firm who represents insurers in nationwide disputes. Christopher R. Perry is an associate in Hartford who practices in business litigation and white-collar criminal defense.*

placing the defective drywall itself, but also for any damage caused by gasses emitted from that drywall. Homeowners policies also typically contain exclusions for “inherent vice,” “latent defect,” and “corrosion,” which insurers will argue preclude coverage for the drywall-related claims. Finally, homeowners policies include “pollution exclusions,” which insurers maintain bar coverage for damage caused by the gasses from the allegedly defective Chinese drywall.

In response, it is likely that homeowners will argue that irrespective of the exclusions, their claims are nonetheless covered as ensuing losses. Homeowners policies frequently contain provisions called “ensu-

ing loss clauses” that limit the application of certain exclusions under specific circumstances. The homeowners’ expected ensuing-loss argument will be that the damage to their home was not caused by any excluded cause of loss (for example, not caused by defective construction or inherent vice), but rather was caused by a separate, later-in-time and not excluded cause of loss.

At this time, there have been no major

substantive rulings in any litigation over the scope and availability of homeowners coverage for Chinese drywall claims. The cases to watch on this subject include: *Amerson v. Lloyd’s of London*, No. 09-7227 (E.D. La.) (putative class action); *West v. State Farm Fire & Casualty Co.*, No. 2:09-cv-6356 (E.D. La.); *Baker et al. v. American Home Assurance Co. Inc.*, No. 09-188 (M.D. Fla.); *Finger v. Audubon Insurance Co.*, No. 09-8071 (La. Dist. Ct., Orleans Parish). ■



## Insurance Litigation