

Chinese Drywall: The Return of National Construction Products Liability Litigation : A
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make this a particular intractable issue.*

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The development and construction industry has faced a stream of products liability cases over the last 20 years. These cases have ranged from plumbing fixtures to insulation, from fire retardant plywood to synthetic stucco cladding (also known as exterior insulation finish systems, or EIFS). The latest product to stand accused, drywall manufactured in China, used extensively throughout this decade, may prove particularly devastating. Given the precarious nature of our economy in general, and the particularly sharp downturn in construction and development, the industry is not financially prepared to take another significant hit. In addition, the ubiquitous nature of drywall and the likely scope of claimed repairs are apt to make these cases extremely difficult to resolve.

Alleged problem

The first complaints to reverberate in the press were reported from Florida. Numerous homeowners began complaining that their new or relatively new homes had a very noticeable “rotten eggs” odor. News reports circulated during the fall of 2008 that Florida builders faced complaints from owners regarding installed drywall imported from China. Various parties conducted testing on the drywall. Testing conducted in Florida for Lennar Corp., one of the largest home builders in the United States, revealed the presence of sulfur and compounds containing sulfur in drywall it used in various Florida homes. Testing companies hired by the Florida Department of Health (FDOH) and by the United States Environmental Protection Agency reached similar results.

The complaints of homeowners have extended far beyond allegations relating to smell. Some owners observed significant levels of metal corrosion in their homes. The Internet is rife with pictures of blackened and corroded coils to heating, ventilation and air conditioning (HVAC) units in relatively new homes that are purported to contain drywall manufactured in China. Indeed, Lennar has indicated that it first identified problems with homes containing the drywall as a result of frequent and extensive air conditioning repairs and complaints.

As the plot has thickened, some interesting facts have emerged. One of the main manufacturers, Knauf-Tiajin, conducted testing in 2006 after odor complaints. They learned that sulfur was present in its gypsum. Knauf indicates they stopped using a specific mine containing iron sulfide in the gypsum as a result of testing. It is unclear whether they alleged elimination of this mine has reduced or eliminated Knauf’s drywall problems. Similarly, it is currently unclear as to whether other gypsum mines in China have resulted in similar or parallel chemical issues.

Litigation health claims

Chinese drywall has spawned a plethora of web sites, class action lawsuits, and individual legal actions. In addition to homeowner class action lawsuits pursued in a number of forums including Florida, Lennar has filed its own lawsuit against multiple parties seeking redress for its own damages. The cases are all at their beginning stages and reporting is limited to date. Moreover, reported Chinese drywall issues have moved beyond construction and repair concerns. Many homeowners claim that they and their families have suffered personal injuries as a result of exposure to Chinese drywall. However, the FDOH has stated it found no data indicating that

there was an immediate health threat from the drywall emissions. Testing efforts by Lennar and others have indicated similar findings to date.

Other stories have begun to analyze and comment on the drywall issue as well. Louisiana issued a request for assistance from the EPA and Centers for Disease Control. The Virginia Department of Health (VDH) issued a set of “frequently asked questions” relating to Chinese drywall. The VDH statement provides in part that preliminary data, “[I]ndicates that some Chinese drywall emits gases that contain sulfur and other chemicals. The gases that are emitted can smell like ‘rotten eggs’ and may irritate the respiratory system. However, current health data do not suggest any immediate or chronic health problems associated with Chinese drywall.” VDH states that some of the gases potentially emitted from the Chinese drywall can cause corrosion.

It is clear that the compounds found in Chinese drywall are associated with very serious health effects at higher concentrations. Testing data issued thus far appears to demonstrate levels of exposure to compounds released by the drywall, such as carbonyl sulfide and carbon disulfide, at levels well below recommended occupational exposure limits. But, these findings are not likely to end personal injury claims. It is almost certain that claimants will continue to attempt to produce credible expert testimony supporting such claims. Construction industry players should assume from a risk management perspective that the health-related claims will persist throughout this litigation and present significant potential exposure in the event such as a case reaches a jury.

How big is a problem?

Initial reporting and news coverage of the Chinese drywall issue has focused primarily on Florida. Since that time, the geographic range of the market for Chinese drywall has proven to be much broader. There are reports from consumer-related agencies of the discovery of “significant quantities” of Chinese drywall in Florida, Mississippi, Alabama, Louisiana, Maryland, Virginia, Arizona, and Texas. Over time, more states and markets have continued to emerge. Market penetration may turn out to be a locality-by-locality analysis. For example, in Virginia, it is clear that at least one supplier purchased the Chinese drywall in Norfolk, Virginia and the product was used in the Tidewater area. There are no reports thus far of product usage outside that limited area.

While geography may be in question, the potential national scope of the issue is quite clear. The Associated Press and other sources have reviewed shipping records and determined that more than 540 million pounds of plaster board, including both drywall and ceiling tiles, were imported from China between 2004 and 2008. Construction consultants estimate that sufficient material was shipped to the United States to build roughly 100,000 homes. While this number is obviously preliminary, it does serve to emphasize the tremendous potential breadth and depth of exposure relating to drywall claims.

What is the “fix”?

In Florida, Lennar has simply moved residents out of a number of homes. Lennar elected to remove and replace all of the drywall in these homes. When multiplied across 100,000 homes, the expense of this approach is daunting.

The next aspect of the question is whether other building systems will need repair or replacement. The potential for deterioration of wiring, piping, coils, and other metallic materials associated with the electrical, mechanical and plumbing systems raises a larger problem with defining an appropriate scope of repair. Builders determining an appropriate repair protocol may be concerned with liability exposure for performing a drywall repair that may arguably leave damaged metallic elements in place. These other elements may eventually be alleged to have

failed because of their exposure to the corrosive effects of the drywall. Finally, none of this repair protocol, and the extreme resulting expense, addresses the financial exposure associated with alleged personal injury damages.

Purely residential focus?

All of the reporting on Chinese drywall appears to be entirely focused on residential applications. This seems unrealistically limited. Drywall is used on virtually every type of construction project throughout the country. This breadth of use translates to potential problems that expand far beyond homes and into governmental, institutional, commercial, and industrial projects as well.

Next steps and recommendations

First and foremost, all parties involved in the construction process should be thinking of risk management relating to the Chinese drywall issue. In the past, contractors may have not cared where the cheapest drywall was coming from. That approach will obviously not work now.

Involved parties should first identify whether or not they may have a problem and then evaluate potential insurance coverage. There may need to be an investigation of details of product selection, purchase and installation. Finally, analysis of the liability and resources of other involved parties may be necessary to help defend such a case or share the burdens of a judgment or settlement.

Finally, regardless of whether you are at risk with respect to Chinese drywall, industry players should use it as a learning lesson. The repeated course of products liability exposure in the construction industry points to some serious flaws in product development, implementation, selection, contracting, and installation. In addition, cases like these are a constant reminder of flaws in contracts, risk assessment and management, and faulty assumptions regarding insurance coverage. A healthy and accurate understanding of risk, contracts, liabilities, and insurance is critical to the protection of parties involved in the construction and development industry.