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This Week's Feature

Chinese Drywall: A Building Problem
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A confluence of factors in the early 2000s – including the rebuilding efforts following the widespread destruction caused by Hurricanes Katrina and Rita and a residential housing boom in Southwest Florida – led to overwhelming demands for drywall in the Southeastern United States. Unable to meet those demands from traditional sources of domestically produced drywall, suppliers, distributors, and builders sought to solve this problem with increased reliance on drywall manufactured in China. Some estimates suggest that, between 2004 and 2007, as much as 600 million pounds of Chinese drywall – enough to build tens of thousands of homes – were imported into the United States to meet building demands.

While this influx of Chinese drywall allowed substantial building to proceed, it now appears that substantial litigation may build as well. Increasingly, homeowners who have – or who think they may have – Chinese drywall in their homes are asserting claims against builders, contractors, suppliers, importers, and manufacturers, alleging both property damage and personal injury claims linked to this product. Many claims share similar allegations of corrosive damage to air conditioning coils, water pipers, electrical wiring, appliances, mirrors, and jewelry, as well as respiratory irritation, nosebleeds, and headaches.

Preliminary testing by consumer groups, government agencies, and others suggests that at least some drywall manufactured in China contains higher levels of certain impurities – such as a coal by-product called fly ash and a highly reactive compound known as strontium sulfide – as compared to domestically produced drywall in the United States. Some have hypothesized that moisture and humidity mix with the impurities in Chinese drywall to form hydrogen sulfide gas and other sulfur-related compounds that, in turn, can lead to the kind of corrosive property damage and/or physical effects alleged by plaintiffs. The fact that these atmospheric conditions are more prevalent in the moist Southeastern portion of the United States, coupled with the booming demands for building products in that region, make it no surprise that the emerging epicenter of Chinese drywall claims is in that part of the country.

The United States Consumer Product Safety Commission (“CPSC”), which has received over 1500 reports of personal injury and/or property damage from residents in at least 27 states, has undertaken an investigation of these claims. The

focus of the CPSC's investigation is threefold, and includes (1) an evaluation of a relationship between Chinese drywall and the reported health complaints; (2) an evaluation of a relationship between Chinese drywall and the reported property damage complaint (specifically including electrical and fire safety concerns); and (3) an assessment of the origin(s) and distribution of Chinese drywall. CPSC's efforts are ongoing, and its findings are certain to play a role in the future course of litigation pertaining to Chinese drywall. More information on the CPSC's investigation can be found at <http://www.cpsc.gov/info/drywall/>.

Not surprisingly, suits pertaining to Chinese drywall have already been filed in various jurisdictions in state and federal courts and include both individual claims and proposed class actions on behalf of various classes of plaintiffs. Plaintiffs' claims are based on a variety of legal theories, including product liability, negligence, breach of implied and express warranties, breach of contract, violation of state consumer fraud laws, fraudulent concealment/ misrepresentation, and private nuisance. Because the defendants are not a homogenous group, the claims and allegations that may be directed against different types of defendants, e.g., manufacturers vs. installers, add complexities for plaintiffs. This diversity of defendants may also engender inter-defendant finger-pointing, as individual defendants seek to ascertain (and minimize) their potential exposure for plaintiffs' claims and (perhaps) to shift that exposure to others. All of this makes this litigation more, rather than less, complicated.

In June of this year, the United States Judicial Panel on Multidistrict Litigation created MDL-2047 – “Chinese-Manufactured Drywall Products Liability Litigation” – before Judge Eldon Fallon, United States District Court for the Eastern District of Louisiana, for consolidated handling of discovery and pretrial matters of all pending federal Chinese drywall suits. Since the initial transfer of actions to MDL-2047, a number of additional suits have followed as “tag-along” matters, and Judge Fallon is actively managing the matters before him. In August, Judge Fallon instituted a Threshold Inspection Program to gather inspection information from a number of homes through means such as visual inspection, air sampling, and product testing, and he has also announced his intention to try bellwether cases – limited to property damage claims – early in 2010. As with most coordinated MDL proceedings, it is likely that MDL-2047 will remain out in front of related pending state actions, and thus how the parties and Judge Fallon handle these claims will likely have a significant impact on the course of Chinese drywall claims across state courts as well. Current information regarding the status of MDL-2047 can be found at <http://www.laed.uscourts.gov/drywall/drywall.htm>.

Given the nature of the claims in Chinese drywall litigation, there are some significant, but not unexpected, issues and hurdles that the parties must address. One important issue is product identification, as it is axiomatic that a defendant is generally only responsible for its, and not somebody else's, products. Determining who manufactured, imported, supplied, distributed, installed, etc., the allegedly problematic drywall in an individual home is thus a critical threshold issue. Another important question is over what defendants courts in the United States can properly exercise jurisdiction. This is especially problematic for claims

against manufacturer defendants who, unlike importers, distributors, suppliers, and/or installers, may not have a United States business presence. A third crucial issue centers on the emerging science with respect to the alleged causal link between Chinese drywall and the myriad property damage and personal injuries advanced by plaintiffs. Defendants will undoubtedly subject the scientific underpinnings of plaintiffs' claims to rigorous challenge and scrutiny under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and/or comparable state-law analogues in other jurisdictions.

The full extent of the Chinese drywall litigation problem has probably not yet been realized. Given the widespread use of Chinese drywall, the geographical distribution of its installation into homes, and the potential latency due to the atmospheric conditions alleged to be involved, there may be significant numbers of homeowners who may not yet have discovered, or even developed, claims potentially related to Chinese drywall. As public perception of this issue grows – fed by the efforts of consumer groups, government agencies, and the plaintiffs' bar – it is likely that the number of claims for Chinese drywall-related complaints will continue to build.

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