Are the Wood-Treatment Wars Over?

In the ongoing legal battle between competing wood-preservative manufacturers Osmose and Viance — in which each has charged the other with false advertising — U.S. District Judge Jack T. Camp has issued an injunction that prohibits Viance from making certain negative claims about MCQ, a preservative manufactured by Osmose. In the same court order, the judge denied Viance's counter motion to place restrictions on Osmose's advertising.

Background

Charlotte, N.C.–based Viance makes the wood preservative ACQ. In that chemical, copper is in an ionic form, which goes into solution easily and combines readily with other elements — which in turn is why it's corrosive to some metals. Osmose makes MicroPro, a micronized-copper quaternary (MCQ) formulation that was developed as a less corrosive alternative to ACQ. In MCQ, the copper is finely ground — to one micron or less — and dispersed in a suspension rather than a solution.

In the summer of 2007, Viance began an advertising campaign alleging that the micronized-copper formulations didn't actually preserve wood very well.

Specifically, Viance claimed research it had done at test sites in Japan and Hawaii demonstrated that off-the-shelf MicroPro-treated wood showed an early susceptibility to decay. Viance also pointed out that MicroPro and other micronized copper formulations hadn't been approved by the American Wood Protection Association (AWPA).

Osmose responded with its own media campaign, including a Web site, treatedwoodtruth.com. Osmose stated that Viance's testing did not follow industry protocol. Additionally, Osmose pointed out that AWPA approval was only one way to gain code acceptance, and that it had simply used a different path, obtaining an ICC-ES report.

Documented Failure or Not?

The conflict ramped up in January 2009, as reported in these pages in the March/April 2009 issue, when Viance claimed to have found in-service wood treated with micronized copper that showed signs of decay after only a few years in the ground. The company hired an independent lab, Timber Products Inspection (TP) of Conyers, Ga., to test the wood, and in press releases issued in February, Viance cited a report prepared by TP and stated that the "decay findings raise serious concerns about the structural integrity and safety of outdoor structures, such as decks and fencing, built with micronized copper preservatives within the last three years," and that existing decks built with MCQ-treated wood "may be subject to early failure and possible collapse."

Then in a public letter dated February 12, 2009, Timber Products Inspection cautioned the industry not to draw broad conclusions based on its earlier report to Viance. The letter reads in part: *With respect to the posts that TP tested, TP was involved from the time the posts were extracted. However, TP was not directed to, and thus did not, identify a random sampling of posts treated with MCQ for testing. The location of the posts that were included in the testing occurred prior to TP's involvement. Thus, the posts described in the Report should not necessarily be viewed as a representative sample of MCQ posts in use at this time in the United States. There is a subjective element to the grading reflected on the Report. Thus, although the grades in the Report were assigned by highly-trained and experienced personnel, it is possible that other colleagues would have assigned slightly different values to the tested samples.*

Here Come the Lawyers

Osmose filed suit in federal court on March 3, 2009, alleging that Viance's negative advertising claims about MCQ were false and misleading. Viance responded with counterclaims alleging that Osmose had published false and misleading statements in its promotion of MCQ.

On March 20, Judge Camp granted Osmose a temporary restraining order that, among other conditions, barred Viance from claiming that the Timber Products report verified Viance's allegations about micronized copper. The judge denied Viance's request for a restraining order against Osmose and its advertising campaign.

The battle continued over the summer, and on September 29, Judge Camp issued a preliminary injunction in favor of Osmose, writing that "the in-service survey conducted by Viance and the Hawaii/Japan field stake tests do not support broad conclusions about the safety of consumers or the integrity of structures built with Micronized treated wood."

The judge denied Viance's motion against Osmose, however, on the basis that Viance "failed to demonstrate a likelihood of success on the merits of their false advertising claims."

The terms of the injunction follow:

1. Viance "may publish the results of the in-service survey performed by Viance and the field stake tests conducted in Hawaii and Japan."

2. Viance cannot claim or imply "that those studies

demonstrate that structures built using micronized copper-treated wood are unsafe, pose a threat to consumers, or are structurally unsound."

3. Viance cannot claim or imply that the studies "demonstrate that micronized copper preservatives are defective in general or are less effective than solubilized copper preservatives."

4. Viance "may not draw their own conclusions about what the studies indicate and then attribute those conclusions to the studies themselves unless the data in the studies clearly support such conclusions. Any conclusions attributed to the studies must be stated in the studies themselves or must be readily apparent from the data contained in the studies."

5. Viance "may not indicate or imply that any conclusions or opinions stated in their advertisements concerning the effectiveness of micronized copper preservatives or the safety of structures built with micronized copper-treated wood are verified or endorsed by Timber Products."

6. Viance "may not claim or imply that Osmose's MicroPro process was not certified as an Environmentally Preferable Product (EPP) by SCS [Scientific Certification Systems], or that SCS did not consider life cycle analysis including efficacy analysis in awarding EPP certification to Osmose's MicroPro process."

According to Viance, this new ruling is less restrictive than the one issued in March. Additionally, Viance claims, "In its ruling, the Court reached no conclusion on the effectiveness of micronized-copper wood preservatives or ACQ and permits Viance to continue to publish results of tests and studies on micronized-copper preservatives and their performance in service."

Citing legal concerns, neither company's spokesman would say much beyond what was contained in their press releases. Viance has not yet decided whether to appeal the judge's decision, but it does intend to continue to publish its research "within the guidelines set forth by the Court." And Osmose continues to vigorously defend the efficacy of micronized copper and points out there are billions of board feet of MicroPro-treated wood in service.

Osmose and Viance are next scheduled to meet with Judge Camp on January 5, 2010, at the U.S. Courthouse in Newnan, Ga. The entire text of the court order can be found at straightclaw.com/blogstuff/OsmoseViance Order9-29-09.pdf. — *Andy Engel*

The International Residential Code, in English

Okay, the IRC *is* published in English. But like reading most legal tomes, reading it is a slog. In the new book *Deck Construction Based on the 2009 International Residential Code, PDB* contributing editor Glenn Mathewson translates the portions of the IRC that pertain to decks into terms someone who isn't a building inspector can easily understand. Mathewson is the perfect author for this book — he's not only a building inspector, he used to be a deck builder.

A typical page starts with a quote from the IRC followed by several paragraphs explaining the code's intent and practical application. A wealth of drawings, tables, and photos supports Mathewson's clear and approachable writing.

What I like most about *Deck Construction* is that it's a peek into the mind of a building inspector. These folks live and breathe building codes. They think about them and discuss them with other inspectors and so know useful things about the code that the rest of us don't have time to figure out. What's not said in the IRC can be as important as what is said, and Mathewson points out this sort of nuance.

For example, most of us know that all the risers within a flight of stairs have to be consistent within 3/8 inch. But did you know the riser height can differ at either side of a landing? Now, the code doesn't specifically state this, but it does say that a flight of stairs terminates at a landing. And it doesn't state that riser heights have to be consistent on either side of a landing, only within each flight. That's valuable information. If your helper builds a landing at an imperfect height, knowing it doesn't have to be rebuilt in order for the stairs to be compliant would have just saved you far more than the book's $40 price tag. And that's only one page in a book chock full of useful nuggets. — *A. E.* ❖

Deck Construction Based on the 2009 International Residential Code

The International Code Council, 2009

Price: $40 for non-ICC members, $32 for members.