

In the News

Chinese Drywall Liability: Who's on the Hook?

Legal action is heating up in lawsuits over defective Chinese drywall. Imported mostly during the boom years of 2004 through 2006, the material emits offensive-smelling sulfurous gases that blacken copper wiring, damage or destroy air conditioner coils, and irritate the eyes, nose, and throat. The damage and complaints are most widespread in Florida, but they've sparked lawsuits in other states as well. Many of those suits have now found their way to a class-action "multidistrict litigation" process in the U.S. District Court for Eastern Louisiana, presided over by U.S. Judge Eldon Fallon.

Assigned to the case in June, Fallon has focused on a handful of suits in which the plaintiffs allege only property damage — not health problems. These "bellwether" cases are intended to quickly establish the basic common facts about the drywall and its emissions and to determine where the law assigns responsibility — with the homeowners themselves, the builders, the drywall installers, the drywall distributors, the importers, the original manufacturers in China, any of their various insurance carriers, or some combination of parties. Trials could begin as soon as January.

To organize the process, Judge Fallon has appointed two attorney "steering committees," one each for the plaintiffs and the defendants. And because home builders have unique interests both as defendants (sued by homeowners) and as plaintiffs (suing drywall manufacturers, installers, importers, or insurance companies), Fallon took the unusual step of appointing a third "home-builder steering committee" to advocate the builder point of view.

"The only true defendant in these cases is going to be the manufacturer," Miami attorney Robert Brown III told a New Orleans lawyers conference in June. "Every other participant is going to be either a pure plaintiff, like the homeowners that my firm represents, or a combination of plaintiff and defendant. Everybody upstream from the homeowners is going to be looking to move the ball uphill as a plaintiff to get money, and also downhill as a defendant." Basically, everybody is hoping that the responsibility will fall with the Chinese — but in building-defect lawsuits, it's not unusual for the cost to get spread around. Here's a quick look at the various stakeholders and the ways they are exposed to loss.

Homeowners. Although homeowners are plainly the victims in this case, the remedies available to them vary in complex ways, depending on state law. One option is to file an insurance claim with the homeowners' insurance carrier. But in Florida, insurance companies have denied the claims, saying that defective construction is not covered. Some homeowners have even had policies terminated or renewals refused after filing a claim for Chinese drywall damage.

■ One hundred twenty-two softwood sawmills across the U.S. and Canada have closed since 2007, resulting in the permanent loss of more than 10 billion board feet (bbf) of production capacity, according to an analysis of data compiled by the U.S. Forest Service's Forest Products Laboratory. Softwood production — which peaked at 74.9 bbf in 2005 — is projected to fall to less than 39 bbf by the end of 2009. Sawmills have been particularly hard hit by the slump in home building, which accounts for about 45 percent of annual lumber consumption.

■ With the popular \$8,000 tax credit for first-time home buyers extended until next June and a new \$6,500 credit available for certain existing homeowners who buy a new house, bargain hunters may want to check out Casa Teresa, the official show home for the 2007 International Builders' Show. Vacant since that event, the 6,600-square-foot mansion with leather floors and ceiling inlays is currently listed at \$1,999,850, less than half the original asking price. It's one of 650 homes for sale in the Orlando, Fla., area in the \$1.2 million to \$4 million price range.

In the News

When homeowners turn to builders for a repair, they could run into other problems. Florida, for example, has a “right to repair” home warranty law in effect that allows builders a six-month grace period before a homeowner can sue (even if the builder is in bankruptcy). But when a builder has gone bankrupt, the deadline for filing a claim in the bankruptcy proceeding may expire before the builder’s “right to repair” grace period does, leaving homeowners in the lurch.

Lennar Homes, a major national builder with a large presence in Florida, has addressed its Chinese drywall problem head-on, moving homeowners into temporary lodging while the drywall is removed and replaced and other damaged building components are repaired. But attorneys have cautioned that it’s not clear whether any remediation will pass muster in the long run — to date, there is no established standard for remediating contaminated homes.

Some attorneys have argued that removing bad drywall before a court has acted destroys evidence in the lawsuit; homeowners who want someone else to pay, they suggest, should leave the drywall in place. But if you don’t remove the bad drywall, the damage to metals in the home is progressive — meaning that a defendant could try to argue that the homeowner, builder, or anyone else who could have acted to remove the drywall is partially to blame for any damage. It’s a dilemma for homeowners. However, California attorney Patrick Schoenburg says courts will likely give homeowners plenty of slack on that point: “You could certainly preserve enough of the drywall to protect the evidence. And there is a duty to take reasonable steps to limit the ongoing damage — the question there is what’s ‘reasonable.’ I think that while damage to copper wire and things may be happening, reasonable steps probably would not

include having to remove all the drywall from your house, unless you clearly have the means to do so and there was some easy, well-known, accepted way to do it — which there is not.”

Even after the damage does get fixed, real estate appraisal expert John Kilpatrick told the New Orleans conference, repairing a defective home usually leaves behind a loss in value called “stigma,” a perceived inferiority that reduces the repaired home’s market price compared with other homes on the market. And in fact, Kilpatrick said, further repairs often *can* make a stigmatized house more expensive to own and live in. Ultimately, homeowners may have to eat at least part of that so-called “diminution of value.”

Builders. For the most part, builders are likely to be held responsible to homeowners — at least for repair costs and possibly also for the loss of market value. In turn, the builders can try to collect on general liability insurance policies (as Lennar Homes has said it plans to do). But insurers are trying to avoid paying based on what’s known as a “pollution exclusion” — language in many policies that excludes coverage for things like toxic chemical spills or acid rain, and that has been stretched in some cases to deny coverage related to building-product off-gassing.

“The absolute pollution exclusion is where the fighting is going to be most heavy with respect to whether a builder’s or contractor’s liability for Chinese drywall is covered by its commercial general liability policy,” said Pennsylvania attorney Robert Stickley at the conference.

Subcontractors. Home builders — along with homeowners — could also turn to drywall installers for relief. Ordinarily, trade contractors don’t represent a deep pocket for product-defect lawsuits; furthermore, many drywallers — like many builders — have gone broke in the current recession.

Nevertheless, the insurance coverage wrinkle could make the subs a fat target in this case: Their policies often name the builder as a “named insured,” and depending on the language, this coverage for the builder may not involve any pollution exclusion. Even if a sub has gone out of business, his insurance company may not have — and his old policy might still pay off. “Some of my clients have made the most money suing subcontractors,” Dallas attorney Sandy Esserman told the conference. “Why? They usually have fantastic insurance programs.”

Whether a sub’s insurance policies will cover builders or homeowners in drywall cases will depend on the policy language and the facts of the particular case. But the legal issues involved will also be treated differently by courts in different states, thanks to the legal concept of “choice of law”: When you sue an insurance company, the suit could be tried under the law of the insurance company’s home state, the law of your home state, the law of the state where the damage occurred and the claim arose, or even, if the court so chooses, the law of some other state that is involved in some way.

Manufacturers. Ultimately, it’s a handful of Chinese manufacturers who created this problem when they manufactured drywall using minerals, chemicals, and organic materials that U.S.-made drywall typically does not contain. But like everyone else, Chinese companies are acting to protect their assets. One company, Taishan Gypsum, has simply stonewalled — failing even to show up in court to answer the complaint. Judge Fallon in September issued a “default judgment” against Taishan, essentially finding the company guilty in absentia.

U.S. product liability attorneys usually shy away from pursuing overseas defendants, because suing in international courts is expensive and slow, and

In the News

foreign governments such as China will not enforce damage judgments reached in U.S. domestic courts. But lawyers in this case say that a range of options are being considered to get the attention of the Chinese — seizing foreign vessels in U.S. ports that have transported the dry-wall, for instance, and suing U.S. investors who have an ownership stake in the Chinese manufacturing firms. Plaintiffs

attorney Russ Herman, for one, seems to think that Chinese manufacturers are not immune. “I think we can bust the dam in this case,” he recently told The Associated Press. With tens of thousands of homes affected by the problem drywall, and with repair estimates running at \$100,000 per house and more, there are countless homeowners, builders, and subcontractors who hope he’s right. — *Ted Cushman*

OSHA Announces 2009’s Top Safety Violations

OSHA has released its preliminary report on 2009’s most frequently cited safety violations, and once again scaffolding tops the list, with 9,093 citations. Overall, the number of violations has increased almost 30 percent from 2008. The agency’s final report will be released by the end of the year. Here is the list, with the number of violations cited in each category.

1. Scaffolding / 9,093
2. Fall protection / 6,771
3. Hazard communication / 6,378
4. Respiratory protection / 3,803
5. Lockout-tagout (equipment safeguards) / 3,321
6. Electrical (wiring) / 3,079
7. Ladders / 3,072
8. Powered industrial trucks (including forklifts) / 2,993
9. Electrical (general) / 2,556
10. Machine guarding / 2,364

■ The news from the NAHB isn’t all bad. The group has introduced a new logo, “the first rebranding of NAHB in the association’s 67-year history,” according to a spokesperson. Meanwhile, membership in the organization has declined from a peak of 256,000 in May 2007 to 190,000 in August 2009, forcing the group to cut its staff by 25 percent over the past year.

■ Until recently, shingle thefts were generally limited to a few squares at a time and occurred mainly on construction sites.

But thanks to sky-high shingle prices, thieves are now targeting warehouses and hauling off tractor-trailer loads of the product. In Texas, more than \$4 million worth of shingles have been stolen this year. Investigators speculate that thieves are stockpiling in anticipation of hurricanes, tornadoes, and other storms, which are typically followed by surges in demand. In response, suppliers are beefing up security, adding GPS tracking equipment to their trucks, and adding paint to their packaging to help track stolen shingles.

Texas Requires Water-Saving Toilets

Texas recently became the second state — after California — to require high-efficiency toilets, or HETs, in all new residential and commercial construction. HETs use 1.28 gallons of water per flush (gpf), which is 20 percent less than the current 1.6-gpf federal standard. In both states, the new rule takes effect in January, at which point manufacturers have to certify that 50 percent of the toilets sold in the state are HETs. By January 2014, all of the toilets sold in those states must be HETs. The Texas law also sets maximum showerhead flow rates at 2.5 gallons per minute and urinal flush volumes at 0.5 gpf.

The Texas law is the first to reference the EPA’s WaterSense program and its list of over 200 certified HET toilets from more than 20 manufacturers (see epa.gov/watersense/pp/find_het.htm). Qualified toilets have to be third-party tested to receive the WaterSense label. In addition to meeting ASME water-use standards, eligible toilets also have to pass the EPA’s performance guidelines, which are based on the MaP (maximum performance) testing protocol (see *In the News*, 9/06).

Exempt from the Texas law are toilets with “atypical designs,” such as tankless toilets and those with wall-mounted tanks. These fixtures — along with toilets in daycare facilities and correctional institutions — can still use up to 2 gpf. And in a concession to opponents of the bill who argued that the new standards will lead to clogging in older sewer lines, local governments with infrastructure problems will be allowed to opt out of the HET requirement. — *Andrew Wormer*