

## CHINESE DRYWALL

### BACKGROUND

Between 2004 and 2007, during a period of peak construction (heightened by the post-Katrina and Wilma hurricane reconstruction), domestic construction materials were in short supply. Eager to begin the rebuilding process, contractors filled the supply gap quickly by importing more than 500 million pounds of drywall from China – enough to build roughly 100,000 homes. Unfortunately, no one was aware of the potential health issues and liability questions that were apparently imported along with the drywall.

Nearly 60% of the Chinese drywall entered the U.S. through Florida ports: Miami's port received approximately 100 million pounds; Port Everglades, about 80 million pounds; and Tampa about 50 million pounds. Port Manatee, Pensacola, Port Canaveral and Jacksonville also received significant shares. Not surprisingly, then, the current spate of complaints and litigation centers in the southeast – Florida, Louisiana and Alabama. Chinese drywall has also been found, to varying degrees, in 11 other states: Texas, Arizona, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, Colorado, New Mexico and Nevada.

Named in most of the lawsuits is Knauf Gips KG, a German-based drywall manufacturer that has 150 factories worldwide. Three production facilities were established in China – Knauf Plasterboard Tianjin, Knauf Plasterboard Wuhu and Knauf Plasterboard Dongguan. These facilities sold the Chinese drywall to various suppliers in Florida. (It is believed that the Tianjin affiliate is now out of business and may not have procured Liability insurance.)

### THE PRODUCT

Drywall (gypsum board) is manufactured with byproducts of coal combustion power plants. Drywall consists of one part each of dihydrous calcium sulfate and calcium sulfate, and two parts water. It is made when powdered gypsum is combined with water to form a slurry, which is then sandwiched between two paper rolls and heated. When dry, the drywall is rigid and strong enough to use as a building material.

The drywall imported from China consists of two types: one-half inch "standard" drywall and five-eighth inch "fire-rated" drywall. The



latter is mandated by many construction building codes, which require its installation on interior and exterior walls near furnaces.

### THE PROBLEM

**For reasons currently under investigation by state and federal agencies, among others, the Chinese drywall apparently emits various toxins alleged to have caused such health problems as eye, ear and nose irritation, respiratory problems, fatigue and headaches, as well as damage to material within the homes (copper wires, electric outlets and air conditioning coils). One such toxin, hydrogen sulfide, emits a rotten egg odor, alleged to render the premises uninhabitable.**

The gypsum used in the Chinese drywall apparently contains contaminants that emit sulfide gases. Three gases in particular have been associated with Chinese drywall: carbon

disulfide, carbonyl sulfide and hydrogen sulfide. According to several independent environmental testing firms and building experts, the source of the drywall problem is waste materials from the scrubbers of the coal-fired power plants used to make the drywall in China. Furthermore, the water used in the gypsum mixing process may be wastewater, which contains chemicals – including sulfur. The Chinese drywall is made with fly ash, a coal byproduct that is apparently less refined than the form used by U.S. drywall makers. Another potential source of the problem that experts are investigating is the fumigants that are sprayed on the drywall.

**Although all imported drywall is supposed to be accompanied by documentation that it meets international fire standards, port officials in Tampa have reported that a significant portion of the drywall that arrived from China in the last several years did not contain the mandated documentation or official stamps.**

In response to several hundred homeowner complaints of health problems caused by the drywall, the Florida Department of Health is investigating the Chinese drywall and its alleged health risks. One of their initial sample tests revealed higher levels of sulfuric and organic compounds than are found in American drywall samples.

At this time, the Department of Health has not indicated that Chinese drywall poses a medical hazard or that the data suggests an imminent or chronic health hazard.

On the federal level, the Senate and the House have introduced identical legislation (S.739 and H.R. 1977) that would require the Consumer Product Safety Commission (CPSC) to:

- Within 120 days (four months), study the composition of Chinese drywall imported to the U.S. between 2004 and 2007, analyzing the drywall's chemical and organic compositions, their effect on metal fixtures in residences, and the health and environmental impacts from exposure
- Within 180 days (six months), determine whether a standard to regulate the composition of drywall materials is necessary to protect the health and safety of residential homeowners
- Within 30 days of the enactment of this legislation, impose a temporary ban on drywall that contains in excess of 5% organic compounds by weight. The ban would remain in effect until the CPSC determines, in writing, that a safety standard regulating drywall components is no longer necessary

Clearly, the political implications inherent in the issues surrounding Chinese drywall – whether on the local, state, national or international level – are significant and cut across all party lines.

Many residents of homes containing Chinese drywall complain of symptoms that include nose bleeds, respiratory problems, headaches, nausea and skin itching – symptoms that disappear when they leave the premises and reappear when they return. The rotten-egg smell emitted, apparently, by hydrogen sulfide, is also a recurring complaint.

## POTENTIAL CLAIMS

The problems associated with Chinese drywall involve both bodily injury and property damage claims. Sulfur-based gases released from the drywall are claimed to corrode piping, wiring and air-conditioning coils and cause electronics and appliances (including washing machines, dryers, microwave ovens and refrigerators) to fail. Many residents of homes containing Chinese drywall complain of symptoms that include nose bleeds, respiratory problems, headaches, nausea and skin itching – symptoms that disappear when they leave the premises and reappear when they return. The rotten-egg smell emitted, apparently, by hydrogen sulfide, is also a recurring complaint.

The only current solution to these problems is to remove the drywall entirely and replace it – there are no less intrusive solutions (e.g., encapsulating the potential emissions by painting the drywall). Although, a Florida-based environmental firm – SabCo – has recently developed a patent-pending process they claim can remove the toxic and corrosive compounds from the air. The process, called the RISS System, is trumpeted as a safe, inexpensive and non-intrusive solution to the ill effects of Chinese drywall. The system is currently being evaluated by an independent testing laboratory. This is a promising development that will no doubt receive continued and close scrutiny.

## POTENTIAL TARGETS

The target defendants of lawsuits are those that face strict product liability exposures and are viewed to be the deep pockets from whom recovery is deemed most likely to succeed. These include the manufacturers and distributors of the drywall, as well as the home builders and general contractors that built the residences.

## COVERAGE ISSUES

The variety of entities, jurisdictions and time periods involved create a comparable batch of insurance coverage issues in dealing with Chinese drywall claims. While a number of lines of insurance coverage may be implicated when dealing with these claims (e.g., first-party Property, CGL, excess, Pollution, Environmental, Professional Liability, Product Liability, etc.) the CGL coverages are likely to be most heavily involved, in large part because they may provide the sole source of potential coverage for many of the involved entities. Areas where potential coverage defenses may be asserted under the CGL policy include the definition of occurrence, bodily injury, property damage (including “rip and tear”) and policy exclusions terms such as “your work,” “your product,” “impaired property,” “pollution,” “known injury or damage,” and “residential construction.”

This list is by no means complete – coverage will ultimately be determined by the terms and conditions of each specific policy and the state law that applies to the interpretation of the policy language. CGL carriers are just now beginning to lay out their preliminary coverage positions. It is safe to say that few, if any, are undertaking defense or investigative activities of these claims without fully reserving their rights to ultimately decline coverage, particularly CGL insurers. Those entities that have procured Pollution coverage and/or Contractor’s Rework coverage (rip and tear) will likely be in a better position.

## SUGGESTED ACTIONS

Whether your connection to drywall is as an installer, distributor, contractor or other, we suggest that, at a minimum, you undertake the following steps in order to be prepared in the event a claim is presented or suit is filed:

- Attempt to trace the ultimate source of drywall used in your business over the last several years (to the extent possible)
- Obtain and review all drywall purchase orders, invoices, etc. to ascertain whether an indemnity may run in your favor from the supplier/manufacturer of the drywall
- If you are an upstream contractor/developer, gather all contracts and certificates of insurance with respect to the installation of drywall from each project to be prepared to tender any claim to the appropriate entity/insurer

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- Gather all relevant insurance policies (GL, Pollution, Environmental, primary, excess, etc.) for each project to ensure timely and comprehensive notification should a claim be asserted
- Engage the Willis HRH Construction Claim resources for both pre- and post-claim discussions, including advocacy and consulting designed to maximize claim outcomes on your behalf

## CONTACTS

For more information, or if you have any questions, please contact:

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