CHINESE DRYWALL LITIGATION:
A PRIMER AND GUIDE TO THE BASIC INSURANCE COVERAGE ISSUES

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1. The genesis of the Chinese Drywall problem and the formation of the MDL.

A combination of the housing boom of the mid-2000s and the devastating hurricanes of 2005 resulted in a shortage of U.S.-manufactured drywall. Several Chinese-based manufacturers were ready to respond to the demand for drywall needed to build new homes and to restore flood-damaged homes. U.S. suppliers turned to these sources to obtain the drywall their customers demanded. For the most part, the drywall when imported exhibited no obvious defects and in some instances was affirmatively represented by the manufacturer to comply with U.S. standards. Homebuilders and renovators eagerly snapped up the newly-available drywall and incorporated it into new and repaired homes.

Unfortunately, with the passage of time homeowners began to notice problems with metallic and electrical components of their homes: air conditioning coils commonly failed, copper wiring corroded, and computers and other appliances began operating erratically. Additionally, residents of the homes noticed a pervasive noxious odor that permeated clothing, carpeting, and curtains, and people who were exposed to the odors experienced burning eyes, headaches, and other irritant symptoms.

In early 2009, this growing problem came to the attention of a reporter for the Wall Street Journal, Michael Corkery, who began to publicize the problem through a series of articles. Soon a cadre of plaintiff attorneys began investigating and filing suits in state and federal courts, naming as defendants Chinese Drywall manufacturers, importers, suppliers, homebuilders, contractors, and installers. On June 15, 2009 the Judicial Panel on Multidistrict Litigation issued an order forming MDL No. 2047 entitled *In re Chinese-Manufactured Drywall Products*

Liability Litigation. The Judicial Panel selected Judge Eldon Fallon of the Eastern District of Louisiana to handle this MDL.

Judge Fallon was well-experienced in complex litigation including having handled two previous prescription drug MDLs, *In re Propulsid Products Liability Litigation*, MDL No. 1355 and *In re Vioxx Products Liability Litigation*, MDL No. 1657. His ground-breaking article, *Bellwether Trials in Multidistrict Litigation*, 82. Tul. L. Rev. 2323 (2008), set forth his philosophy of selecting representative individual cases and taking them through motion practice and trial to provide information by which the parties could evaluate their exposure and reach a global settlement. Judge Fallon also gained the cooperation of many state court judges, so that cases filed in state courts and not removable to federal court fell informally within the penumbra of the MDL.

The Chinese Drywall MDL however, presented significant challenges that most MDLs do not. Foremost, the MDL contained at least 1,000 defendants, instead of one or two as in other MDLs. In order to provide a structure by which to even gauge the scope of the cases, Judge Fallon devised a procedure of filing omnibus complaints, each of which listed hundreds of class representative plaintiffs and an equal if not greater number of defendants. Each defendant was the target of its own subclass. To help manage this unwieldy conglomeration, Judge Fallon appointed committees including a plaintiffs committee, a defendants committee, a homebuilders committee, and last but not least, an insurers committee.

2. The involvement of insurers in the Chinese Drywall litigation.

In April 2010, the Consumer Product Safety Commission issued a guidance to consumers to remove all possible problem drywall from their homes, and replace electrical components and wiring, gas service piping, fire suppression sprinkler systems, smoke alarms and carbon

monoxide alarms**.** However, to date the Commission has not been able to document a link between Chinese Drywall and serious health problems.

Homeowners who could afford to do it have undertaken the cost of remediating their homes themselves. A handful of builders with sufficient means have voluntarily remediated homes they built. Other homeowners have simply moved out or live with the problem.

Some homeowners have sued their homeowners insurers seeking recompense. Most have also sued everyone in the chain linking their homes to the Chinese manufacturers, including suppliers, builders, contractors, and installers. As a result, CGL (commercial general liability) insurers of these defendants have been called upon to defend their insureds and to settle claims and pay any judgments against their insureds.

3. A resolution for homeowners insurers.

It is unknown whether any homeowners insurers have paid claims. Most homeowners insurers have strenuously voiced their contention that their policies do not cover the damage caused by Chinese Drywall for a number of reasons. The question of whether typical homeowners insurance policies cover these claims came to a head when Judge Fallon agreed to hear argument on ten motions to dismiss homeowners insurers of Louisiana residents. The motions, which were brought under Federal Rules 12(c) (judgment on the pleadings) and 12(b)(6) (failure to state a claim) asserted that the policies were never intended to provide coverage for these types of losses, and that alternatively, if there was coverage *ab initio*, a number of exclusions applied to place these losses outside the scope of the policies.

Judge Fallon answered these questions in a fifty-page opinion applying Louisiana law issued December 16, 2010.

First Judge Fallon addressed whether the insuring agreements of the policies offered coverage. Many of the insuring provisions required "direct physical loss or damage". Insurers argued that the drywall continued to function as drywall – a covering that defined the interior walls of each room – and that therefore there was no physical loss. Other policies required that the loss be sudden and accidental and insurers argued that this requirement of coverage was not met.

Judge Fallon rejected all of these arguments. He found a covered physical loss because the Chinese Drywall corroded and damaged various metals in the home and gases from the drywall had permeated the homes. He also found that one common meaning of "sudden and accidental" was merely an unexpected loss. Thus, the insuring agreements provided coverage at the outset.

Judge Fallon then turned to the question of whether any of the exclusions applied to bar coverage. The following exclusions were considered:

- Latent defect – Judge Fallon found that although this was a close call, under Louisiana law the latent defect exclusion did not apply. In so doing he disagreed with *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), which found the latent defect exclusion applicable under Virginia law
- Pollution and contamination exclusions – Judge Fallon found these exclusions, which were similar to the exclusions found in CGL policies to be inapplicable under Louisiana law. Louisiana falls within that group of states that applies the pollution exclusion only to industrial environmental pollution.

- Dampness or temperature exclusion – one insurer argued that because hot wet conditions are required before Chinese Drywall releases its gases, this exclusion applied. Judge Fallon rejected this argument.
- Faulty materials exclusion – this provision excludes damage caused by faulty materials used in construction or repair. Although Louisiana law and the policies provided no definition of this term, Judge Fallon decided it applied given the commonly-understood meaning of the words "faulty materials." In so doing he disagreed with one trial court ruling out of the Orleans Parish Civil District Court, *Finger v. Audubon Ins. Co.*, No. 09-8071, Reasons for Judgment (Mar. 22, 2010) (Judge Lloyd Medley), and held in favor of the insurers. In Judge Fallon's opinion, Chinese Drywall constitutes "faulty materials" and loss caused by it is not covered.
- Corrosion exclusion – Judge Fallon also held in favor of the insurers on this exclusion. Although not defined in the policy or in Louisiana law, the allegations of the lawsuits contend that Chinese Drywall emits gases which corrode metal and electrical components of homes. Judge Fallon rejected the plaintiffs argument that the corrosion exclusion applies only to naturally occurring corrosion. He agreed with the insurers that the corrosion exclusion also applied to chemically induced corrosion.

Although these motions were brought only under those policies that were governed by Louisiana law, the Plaintiff Steering Committee appeared to recognize that it would be an uphill battle to overturn Judge Fallon's opinion in the Fifth Circuit. The Plaintiff Steering Committee has publicly stated that not only will it not appeal this decision, but it will ask all of the plaintiff attorneys in the MDL as well as those they have connections with in state courts to dismiss the claims against homeowners insurers with prejudice. Although many individual plaintiff

attorneys will abide by this recommendation, some may attempt to dismiss their cases in the MDL without prejudice and refile in state courts on the hopes of a different outcome.

Assuming that most plaintiff attorneys fall in line with the recommendation of the Plaintiff Steering Committee, this will essentially eliminate the homeowners insurers from the MDL and may eliminate many of the state court cases as well.

4. Many issues remain facing CGL insurers

Whether CGL policies apply to the Chinese Drywall claims in the MDL and in state courts remains largely in doubt. An initial hurdle exists as to whether CGL insurers belong in the MDL to begin with. What law applies to the interpretation of the CGL policies? Significant questions remain concerning whether damage caused by Chinese Drywall constitutes a covered occurrence, and if it does, as to when coverage is triggered Additionally, the CGL insurers have invoked many standard exclusions, including importantly the pollution exclusion and business risk exclusions. The remainder of this paper will outline these issues, which have not been resolved at the time of this writing.

5. Is the MDL an appropriate home for the CGL insurer issues?

A number of CGL carriers brought declaratory judgment actions seeking to prove that there is no coverage for homebuilders under their policies. With the exception of suits filed concerning Louisiana insureds, which were within Judge Fallon's original venue and jurisdiction, these declaratory judgment actions have been filed either in state courts or in other federal courts around the country on grounds of diversity jurisdiction.

The homebuilder insureds and the homeowner plaintiffs have sought to have the declaratory judgment actions filed in other federal courts transferred to the MDL. This was a very active issue for many months in 2010. Under MDL procedure, once an MDL is formed,

anyone can have a case conditionally transferred to the MDL by informing the clerk of the Judicial Panel on Multidistrict Litigation that the case is related to the MDL. It is then up to any party who objects to the transfer to file an objection and explain the grounds for the objection to the Judicial Panel. Many insurers believe that insurance coverage issues should not be included in the MDL, but instead should be decided by courts sitting in their home districts. This position is opposed by plaintiffs. Indeed, Judge Fallon himself has publicly stated on several occasions that he believed it would be helpful to the MDL settlement process if the insurers were included in the MDL.

In the first two transfer requests, the Judicial Panel reached opposite conclusions about the viability of the MDL as the locale for insurance coverage disputes. One declaratory judgment action originally filed by AutoOwners Insurance company against a homebuilder, The Mitchell Company, in the Middle District of Georgia was conditionally transferred to Judge Fallon's MDL. The insurer asked the judicial panel to move the case back to the Middle District of Georgia. The judicial panel heard oral argument and also spoke to Judge Fallon about the issue. The Judicial Panel decided the case should remain in the MDL stating:

> After considering the argument of counsel, along with our consultation with the transferee judge, we conclude that inclusion of this action in MDL No. 2047 is prudent to streamline the litigation. The claims in this insurance declaratory judgment action are related to products liability claims in an action that the Panel transferred to MDL No. 2047 with its original transfer order in this docket. In addition, a part to the present action, which is also the plaintiff in the underlying products liability lawsuit [The Mitchell Company], urges transfer of the action before us.

Thus, the panel did confirm transfer of this case to the MDL in April, 2010.

However, just two months later in June 2010, the Judicial Panel refused to transfer three declaratory judgment actions by insurers to the MDL. The Panel reversed course from its conclusion in the *Mitchell Company* case, citing several reasons for the different outcome:

- The cases had the common factual backdrop involving Chinese Drywall and the damage it allegedly caused. However, the three declaratory judgment actions seemed to present strictly legal questions which required little or no centralized discovery.
- While the declaratory judgment actions presented some similar legal issues, Section 1407 does not empower the Panel to transfer cases solely due to the similarity of legal issues. The insurance companies opposed transfer and similarity of legal issues was not enough to justify transfer.
- Last, the Panel acknowledged that transfer of the insurance actions could provide the transferee court with greater leverage in settlement discussions. But settlement is a by-product of an MDL, not the rationale underlying the MDL statute. Settlement could proceed without the transfer of the insurance actions.

Since that June, 2010 decision, the Panel has consistently refused to transfer insurance declaratory judgment actions to the MDL.

The coup de grace came with a remand order from the panel just a few weeks ago in the *Mitchell Company* case. Order remanding Owners Insurance Co. v. The Mitchell Co., Inc., J.P.M.L. (Feb. 9, 2011). The Panel observed that the *Mitchell Company* case was the only declaratory judgment action by an insurer that had been transferred to the MDL. "Based on these [other] decisions, the transferee judge granted the plaintiffs' motion for a suggestion of remand of this action 'in order to maintain consistency with the Panel's other orders denying transfer … in similar declaratory judgment cases involving insurance coverage for Chinese drywall-related damages." *Id.* The case was remanded from the Eastern District of Louisiana to the Middle District of Georgia.

6. The pollution exclusion in CGL policies and choice of law.

Since the mid-1980s a well-defined divide has developed between states which apply the typical pollution exclusion only to "environmental pollution" and those which apply the typical pollution exclusion more broadly. Louisiana exemplifies the former view. In *Doerr v. Mobil Oil Corp.*, 2000-0947 (La. 12/19/00), 774 So. 2d 119, 127, *corrected on rehearing*, 2000-0947 (La. 3/16/01), 782 So. 2d 573, the Supreme Court of Louisiana specifically commented on the absolute pollution exclusion stating:

> Importantly, there is no history in the development of this exclusion to suggest that it was ever intended to apply to anyone other than an active polluter of the environment. Consequently, the intent of this pollution exclusion was not to apply unambiguously "regardless … of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution." [Citation omitted.] In fact, to give the pollution exclusion the broad reading found in [an earlier case that the Supreme Court overruled] would contravene the very purpose of a CGL policy, without regard to the realities which precipitated the need for the pollution exclusion – the federal government's war on active polluters.

The *Doerr* court established a three part test for determining the applicability of the pollution exclusion in any particular case:

> 1) Is the insured a "polluter" within the meaning of the exclusion?
>
> 2) Is the injury-causing substance a "pollutant" within the meaning of the exclusion?
>
> 3) Was there a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the exclusion?

In Judge Fallon's December 16, 2010 ruling on the Louisiana homeowners insurance policies, Judge Fallon relied on the *Doerr* decision to hold that the pollution/contamination exclusions of the homeowners policies did not operate to exclude coverage for Chinese Drywall damage. Although the *Doerr* decision involved a pollution exclusion in a CGL policy, he found the exclusions in the homeowners policies were sufficiently similar to fall within the *Doerr*

rubric. Answering the *Doerr* questions, he concluded that the homeowner-insureds were certainly not polluters; Chinese Drywall was not a typical pollutant although the elemental sulfur it releases might be a pollutant; and the sulfur fumes are released by the Chinese Drywall itself, but not through the actions of a polluter. Judge Fallon decided that the pollution/contamination exclusions were inapplicable because Chinese Drywall falls outside the ambit of environmental pollution which, according to the *Doerr* court, is the focus of the pollution exclusion.

It is likely that Judge Fallon will apply a similar analysis under Louisiana law if he is faced with deciding the applicability of the pollution exclusion to the defendants' CGL policies in the MDL. But not all cases in the MDL are subject to Louisiana law. The states of Florida, Virginia, Georgia, Mississippi, and Alabama all take a much broader view of the scope of the pollution exclusion. In *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), Judge Robert Dumar held that a pollution exclusion in a homeowners insurance policy applied to exclude coverage for damage done by fumes released by Chinese Drywall. Judge Doumar stated that Virginia appears to fall into the camp of states that make no distinction between traditional environmental pollution and injuries arising from normal business operations. Judge Doumar cited the Virginia Supreme Court case of *City of Chesapeake v. States Self-Insurers Risk Retention Group. Inc.*, 628 S.E.2d 539 (Va. 2006) and two subsequent cases, *Firemans Ins. Co. v. Kline & Son Cement Repair*, 474 F. Supp. 2d 779 (E.D. Va. 2007) and *West American Ins. Co. v. Johns Bros. Inc.*, 435 F. Supp. 2d 511 (E.D. Va. 2006), both of which applied the rule of *City of Chespeake* to the release of household pollutants.

In *Scottsdale Ins. Co. v. American Safety Indem. Co.*, No. 10-445 (S.D. Ala. Nov. 10, 2010), Judge William Steele found that under either Alabama or Georgia law, a CGL insurer's pollution exclusion did *not* bar coverage for Chinese Drywall damages, but only because the

language of the particular pollution exclusion limited its applicability to pollution occurring during on-going operations of the insured. Judge Steele noted that the releases of fumes from the Chinese Drywall did not occur contemporaneously with the insured's operations, but rather occurred years after the operations were concluded. Had this limiting language concerning ongoing operations not appeared in the policy, Judge Steele would have reverted to the cases of *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90 (Ga. 2008) and *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789 (Ala. 2002) both of which applied the pollution exclusion to household releases (carbon monoxide and lead paint respectively). Thus, Judge Steele's opinion points to application of typical pollution exclusions when either Alabama or Georgia law is applied.

As a result of the divide between states that limit application of the pollution exclusion to environmental scenarios and those who do not, choice of law becomes a critical turning point as to whether plaintiffs can succeed in overcoming pollution exclusions in CGL policies. Defendants who built homes in states like Florida, Virginia, Mississippi, Alabama and Georgia – states which do not limit the application of the pollution exclusion to environmental pollution – seek to have the law of a different state applied to CGL policies. In one such case, *American Home Assur. Co. v. Peninsula II Developers, Inc.*, No. 09-23691 (S.D. Fla. Oct. 19, 2010), Judge Patricia A. Seitz decided choice-of-law motions under Florida's *lex loci contractus* rule. There, the underlying claim involved a condominium development in Florida and the three insureds were Florida business entities. Nevertheless, Judge Seitz determined that California law applied because that was where the insureds' agent negotiated the insurance policy and that was where the binder and original policy forms were issued. Although Judge Seitz did not directly address the pollution exclusion in her opinion, her choice of law ruling was a significant win for the

insured in that case because California law limits the scope of the pollution exclusion, whereas Florida law applies the pollution exclusion to all varieties of pollution.

The picture becomes even more complicated considering the fact that a court must apply the choice of law rules of the state in which it sits. Not all states apply *lex loci contractus*. Louisiana, for example, applies an interests analysis. Had the *American Home* case been filed in Louisiana, it is possible that Judge Fallon might have found that Florida had the greater interest in applying its law to the case, because the property was located in Florida and all of the insureds resided in Florida.

At the time of this writing, plaintiffs in the MDL have begun filing motions seeking a declaration that pollution exclusions in CGL policies do not apply to Chinese Drywall damage. In so doing, they argue that under Louisiana's interests analysis, the laws of states like Florida (where homes containing Chinese Drywall are actually located) do not apply. Instead, they argue for application of the law of the states where the insurers are primarily located – states which for the most part apply a limited interpretation of the pollution exclusion.

7. Has there been an occurrence and, if so, what triggers coverage?

States also vary as to a construction defect constitutes an occurrence. Some hold that as long as the damage that results in unexpected and unintended there has been an "occurrence." *See e.g.*, *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 239 S.W.3d 236 (Tex. 2007). Others hold that defective construction work breaches the insured's construction contract, is foreseeable and is therefore not an occurrence. *See e.g.*, *United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, No. 06-37, 2010 WL 420046 (D.Colo. Feb 1, 2010), *aff'd*, No. 10-1056. ___ F.3d ____, 2011 WL 240520 (10th Cir. Jan 27, 2011) (applying Colorado law). The former is currently the majority view.

Assuming that damage from Chinese Drywall is caused by an occurrence, this begs the question of when the occurrence "occurs." Or, in insurance terminology, what is the "trigger" of coverage? Again, state laws vary on trigger theories and even within a single state the trigger for a bodily injury claim may be different from the trigger for a property damage claim. Since the current wave of Chinese Drywall cases focus mainly on property damage, this section of this paper will be limited to a discussion of triggers for property damage claims.

Trigger theories are used to determine when coverage attaches in the case of property damage which occurs gradually over time and may not be immediately apparent. In the case of Chinese Drywall, the trigger is particularly important because in the case of different insurers covering a single insured in different years, it is critical to determine which policy or policies are in contention to respond to the loss. The three most popular trigger theories for property damage are exposure, manifestation, and continuous.

Under the exposure theory, any policy in effect when exposure to the harmful substance occurs is triggered, regardless of the plaintiff's knowledge of the exposure. Under the manifestation theory, the policy in effect when the damage manifests itself is triggered. Under the continuous theory, all policies are triggered both during time of exposure and manifestation. Continuous trigger may also reach back to the time the allegedly negligent act occurred, even if the damage did not occur at that time.

The Louisiana Supreme Court has not spoken on whether exposure or manifestation is the correct trigger in property damage cases. (In bodily injury cases, exposure is the trigger. *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1993).) However, the weight of authority is that manifestation is the trigger. *See e.g.*, *Rando v. Top Notch Properties, L.L.C.*, 879 So. 2d 821 (La. App. 4 Cir. 2004) (faulty pilings with damage appearing after sale to plaintiff); *Oxner v.*

Montgomery, 794 So. 2d 86 (La. App. 2 Cir. 2001), *writ denied*, 803 So. 2d 36 (La. 2001) ("We find that the manifestation theory is properly applied in the case sub judice. ….[U]nder the exposure theory, an insurer would arguably remain a guarantor of its insured's actions forever. We reject such an inequitable result."); *Alberti v. WELCO Mfg. of Texas*, 560 So. 2d 964 (La. App. 4 Cir. 1990), *writ denied*, 565 So. 2d 945 (La. 1990) (sheetrock mud caused discoloration which appeared after the policy expired).

Nevertheless, Chinese Drywall cases wending their way through Louisiana state courts have seen different results. In *Finger v. Interior Exterior Building Supply, L.P.*, No. 09-7004, Civil Dist. Ct. Parish of Orleans, Louisiana, CGL insurer Rockhill Insurance Company moved for partial summary judgment on property damage contending that discovery had revealed that no property damage manifested itself during the Rockhill policy period. Trial court judge Piper Griffin denied the motion stating that she could not decide which was the correct test under the circumstances. Rockhill sought review from Louisiana's Fourth Circuit Court of Appeals. The Fourth Circuit denied Rockhill's writ application, stating, "We find no error in the trial court's applying the exposure theory [which the trial court had not done] and denying the relator's motion for summary judgment."

On the other hand in *Niemann v. Crosby Development Co.*, No. 10-13403, 22nd Judicial Dist. Ct. Parish of St. Tammany, Louisiana, Judge William Knight found that manifestation was clearly the rule in a Chinese Drywall property damage case and granted summary judgment for the CGL insurer of the builder on the ground that the damage did not manifest itself during the insurer's policy period. In giving oral reasons for his ruling he stated, "There's no question that damage was occurring during the course of these policy periods, but it did not manifest itself. And that's the reason for the ruling….. And when the little dark spot pops up in this house, the

appropriate carrier will in fact be responsible during the manifestation period." Oral Argument transcript, Jan. 26, 2011.

Applying Florida law, Judge Marra of the United States District Court of the Southern District of Florida has held that manifestation applies to Chinese Drywall property damage claims. *Amerisure Ins. Co. v. Albanese Popkin The Oaks Development Group, L.P.*, No. 09-81213, S.D. Fla. In that case, homeowners Alan and Annette Goddard sued builder Albanese-Popkin for Chinese Drywall damage. Albanese-Popkin's insurer, Amerisure, filed a declaratory judgment action asserting that it had no duty to defend Albanese-Popkin against the Goddard's suit, because the Goddard's petition alleged that the Chinese Drywall problem first manifested itself before the inception of Amerisure's policy period.

In *Amerisure*, the underlying petition alleged that "Plaintiffs initially discovered damage to the air conditioning coils in one of the seven air handling units ("AHUs") in the Building and first began to notice a periodic sulfur odor in the Building as early as December, 2006. The periodic sulfur odor continued unabated." The petition went on to say that various problems continued to occur over the following years including air-conditioning failures in 2008 and damage to wiring, metals, and plumbing fixtures discovered in 2009. The Goddards claimed to have finally discovered in the summer of 2009 that the source of these problems was Chinese Drywall.

Amerisure's policies began in 2008. Judge Marra noted that the Goddards admitted that they first noticed an offensive odor before Amerisure's policy period, even if they did not know its cause.

> Based on the allegations of the Goddards' complaint in the underlying case, the damages occurred prior to the policy period. The fact that the damage was continuous in nature is irrelevant to

> the Court's analysis. Therefore, there is no coverage or duty to defend….

Amerisure Mut. Ins. Co. v. Albanese Popkin The Oaks Development Group, L.P., No. 09-81213, 2010 WL 4942972, *7 (S.D. Fla. Nov. 30, 2010).

Selection of the appropriate trigger of coverage continues to be an active issue in the Chinese Drywall Litigation.

8. Business risk exclusions remain murky

Most standard CGL policies contain what are commonly referred to as "business risk exclusions." These exclusions are designed to prevent a CGL insurance policy from becoming a performance bond. They include exclusions for "damage to property" (property being work in progress by the insured or property that must be restored because the insured's work was improperly performed upon it), "damage to 'your product'", "damage to 'your work'" and the "impaired property" exclusion (property not physically injured). At this time there appear to be no significant decisions interpreting these exclusions in the context of a Chinese Drywall case. Undoubtedly this will become a major battleground in cases where the policy period is correct and the pollution exclusion does not bar coverage. The Louisiana Supreme Court has spoken to some of these exclusions in *Supreme Services & Specialty Co., Inc. v. Sonny Greer, Inc.*, 958 So. 2d 634 (La. 5/22/07), but the decision leaves many questions unanswered. A good starting point for understanding how Georgia courts look at the business risk exclusions is the case of *SawHorse, Inc. v. Southern Guaranty Ins. Co. of Ga.*, 604 S.E.2d 541 (Ga. Ct. App. 2004). *See also Carl E. Woodward, LLC v. Acceptance Indem. Co.*, 2011 WL 98404 (S.D. Miss. Jan. 12, 2011) (Mississippi law); *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008) (Florida law).

9. Conclusion

At the time of this writing it appears that the major issues of coverage in the arena of homeowners insurance have been resolved in favor of insurers due to Judge Fallon's December 16, 2010 opinion in the MDL. CGL coverage decisions remain scarce, scattered, and variable.

Judge Fallon has set a schedule for filing of procedural motions by the CGL insurers. Motions on substantive policy issues will follow, if procedural obstacles can be overcome. In the meantime, state courts and other federal courts will continue to wend their way towards resolving insurance coverage issues in Chinese Drywall suits that have not been sent to the MDL.