DEVELOPMENT OF INSURANCE ISSUES IN THE CHINESE DRYWALL LITIGATION

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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 offered a ready source of drywall needed to build new homes and to restore flood-damaged homes. Therefore, U.S. suppliers imported the drywall their customers demanded. When received in the United States, the drywall exhibited no obvious defects and, in some instances, was affirmatively represented by the manufacturers to comply with U.S. standards. Home builders and renovators eagerly snapped up the newly available drywall and incorporated it into new and repaired homes.

Unfortunately, with the passage of time, home owners 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, people living in the homes noticed a noxious odor that permeated clothing, carpeting, and curtains. People who were exposed to the odors experienced burning eyes, headaches, and other irritant symptoms.

The Consumer Product Safety Commission issued written guidance for consumers concerning the replacement of problem drywall and building components for which drywall-induced corrosion might cause a health or safety problem. To date, the commission has found no scientific evidence linking drywall to long-term health effects.

Insurer Involvement in Chinese Drywall Litigation

Plaintiff attorneys began filing suits in state and federal courts, naming as defendants Chinese drywall manufacturers, importers, suppliers, home builders, contractors, and installers. On June 15, 2009, the Judicial Panel on Multidistrict Litigation issued an order forming multi-district litigation (MDL) No. 2047 titled ***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.

Home owners who could afford it undertook the cost of remediating their homes themselves. A handful of builders with sufficient means voluntarily remediated homes they built. Other home owners simply moved out of their homes or lived with the problem.

Some home owners sued their homeowners insurers seeking recompense. Many sued others in the chain linking their homes to the Chinese manufacturers, including suppliers, builders, contractors, and installers. As a result, commercial general liability (CGL) insurers of these defendants were asked upon to defend their insureds and to settle claims and pay any judgments against their insureds.

A Resolution for Homeowners Insurers

It is unknown whether any homeowners insurers have paid claims. Most homeowners insurers strenuously asserted 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 entertain 10 motions to dismiss homeowners insurers of Louisiana residents. On December 16, 2010, Judge Fallon issued a 50-page opinion applying Louisiana law and dismissing claims against the homeowners insurers in ***In re Chinese Manufactured Drywall Prods. Liab. Litig.,*** 759 F. Supp. 2d 822 (E.D. La. 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." Judge Fallon rejected arguments that there was no loss or that the loss was not sudden and accidental. 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 policies would provide coverage unless an exclusion applied.

Next Judge Fallon considered certain exclusions:

- **Latent defect exclusion**—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 that the latent defect exclusion applied under Virginia law.
- **Pollution and contamination exclusions**—Judge Fallon found that these exclusions, which were similar to the exclusions found in CGL policies, were inapplicable under Louisiana law.
- **Dampness or temperature exclusion**—Even though many experts assert that Chinese drywall only releases gases under hot wet conditions, Judge Fallon found this exclusion inapplicable.
- **Faulty materials exclusion**—Although Louisiana law and the policies provided no definition of this term, Judge Fallon decided that the exclusion did apply given the commonly understood meaning of the words "faulty materials." In so doing, he disagreed with one trial court ruling from the Orleans Parish Civil District Court, ***Finger v. Audubon Ins. Co.,*** No. 09–8071, Reasons for Judgment (Mar. 22, 2010) (Judge Lloyd Medley).
- **Corrosion exclusion**—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.

The plaintiff steering committee agreed not to appeal this decision and asked all of the plaintiff attorneys in the MDL as well as plaintiff attorneys in state courts to dismiss their claims against homeowners insurers with prejudice. Most plaintiff attorneys fell in line with the recommendation of the steering committee and dismissed claims against homeowners insurers, even in states other than Louisiana, but a few did not and continue to pursue their claims in other jurisdictions.

Many Issues Remain Facing CGL Insurers

Whether CGL insurance policies apply to the Chinese drywall claims remains in doubt. Significant questions exist 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.

Is the MDL an Appropriate Place for the CGL Insurer Issues?

A number of CGL insurers brought declaratory judgment actions seeking to prove that there was no coverage for home builders under their policies. With the exception of a few 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 home builder insureds and the home owner plaintiffs sought to have the declaratory judgment actions filed in other federal courts transferred to the MDL. 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 believed that insurance coverage issues should not be included in the MDL, but instead should be decided by courts sitting in their home districts. After some initial wobbliness on the issue, the Judicial Panel determined that it would no longer transfer insurance declaratory judgment actions to the MDL and, in 2011, remanded the one and only case in which it had earlier granted a transfer, finding "insufficient commonality between the insurance coverage issues and the underlying products liability claims." Remand Order, MDL No. 09–2047, ***In Re: Chinese-Manufactured Drywall Prods. Liab. Litig.*** (J.P.M.L. Feb. 2, 2011) (remanding ***Owners Ins. Co. v. Mitchell Co.*** to the Middle District of Georgia).

In part due to the segregation of insurance declaratory judgment actions affected by the Judicial Panel's transfer

rulings, all significant decisions concerning CGL issues have thus far been issued in state and federal courts outside the MDL.

The Pollution Exclusion in CGL Policies

Since the mid-1980s, a well-defined divide has developed between states that apply the typical pollution exclusion only to "environmental pollution" and those that apply the typical pollution exclusion more broadly. Louisiana exemplifies the former view. In ***Doerr v. Mobil Oil Corp.,*** 774 So. 2d 119 (La. 2000), *corrected on rehearing,* 782 So. 2d 573 (2001), 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 homeowners policies did not 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 sufficiently similar to fall within the ***Doerr*** rationale. Answering the ***Doerr*** questions, Judge Fallon concluded that:

1. The home owner insureds were certainly not polluters.

2. Chinese drywall was not a typical pollutant, although the elemental sulfur it releases might be a pollutant.

3. 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 possible that Judge Fallon would apply a similar analysis under Louisiana law if he were 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, and most cases confronting CGL insurance issues are pending outside the MDL. The states of Virginia, Alabama, Georgia, Florida, and Mississippi all take a much broader view of the scope of the pollution exclusion.

Virginia

In ***Travco Ins. Co. v. Ward,*** 715 F. Supp. 2d 699 (E.D. Va. 2010), Judge Robert Doumar 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 Am. Ins. Co. v. Johns Bros. Inc.,*** 435 F. Supp. 2d 511 (E.D. Va. 2006), both of which applied the rule of ***City of Chesapeake*** to the release of household pollutants.

After an unsuccessful run at getting the Virginia Supreme Court to look at the pollution exclusion, Judge Mark Davis of the Eastern District of Virginia walked through the door that the ***Travco*** decision opened in ***Nationwide Mut. Ins. Co. v. Overlook, LLC,*** 785 F. Supp. 2d 502 (E.D. Va. 2011). In a 77-page opinion, Judge Davis concluded that the pollution exclusion in CGL insurance policies generally bars coverage for Chinese drywall cases under Virginia law. He applied a straightforward analysis relying on the fact that, in all the terms of the CGL policy he was considering, the term "environmental" was never used in connection with the pollution exclusion.

However, on the same day he decided the ***Nationwide*** case, Judge Davis found that the pollution exclusion did not bar coverage for Chinese drywall damages under the terms of a somewhat unusual pollution exclusion in ***Builders Mut. Ins. Co. v. Parallel Design & Dev., LLC,*** 785 F. Supp. 2d 535 (E.D. Va. 2011). In that policy, the definition of "pollutant" had been removed, leaving a potential ambiguity as to its meaning. Absent any definition, Judge Davis found that at least one reasonable meaning of the word "pollutant" was an environmental pollutant. That being the definition that favored the policyholder, Judge Davis found that the insurer had a duty to defend. The insurer has appealed this decision.

Two other judges in the Eastern District of Virginia have recently followed Judge Davis's lead, holding that the pollution exclusion bars coverage for the cost of remediating Chinese drywall: ***Dragas Mgmt. Corp. v. Hanover Ins. Co.,*** 2011 U.S. Dist. LEXIS 87132 (E.D. Va. Aug. 8, 2011), and ***Evanston Ins. Co. v. Harbor Walk Dev., LLC,*** 2011 U.S. Dist. LEXIS 109807 (E.D. Va. Sept. 9, 2011).

Alabama/Georgia

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 in the case limited its applicability to pollution occurring during ongoing operations of the insured. Judge Steele noted that the release 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 about 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 enforcement of more typical pollution exclusions when either Alabama or Georgia law is applied.

Florida

The first significant decision in Florida to address the pollution exclusion was ***General Fid. Ins. Co. v. Foster,*** 2011 U.S. Dist. LEXIS 103618 (S.D. Fla. Mar. 24, 2011). Judge K. Michael Moore enforced the total pollution exclusion, finding that the underlying allegations of damage from excessive sulfur and strontium in the Chinese drywall MDL fell within the plain meaning of "irritant" or "contaminant" as used to define "pollutant." Because these substances met the definition of "pollutant," General Fidelity had no duty to defend or indemnify its insured, a developer that built homes using Chinese drywall.

In reaching this holding, Judge Moore rejected several policyholder arguments. First, he rejected the argument that naturally occurring substances could not be pollutants. Second, he rejected the contention that "nonhazardous" substances could not be pollutants. Third, he dismissed the assertion that the scope of the pollution exclusion was limited to "environmental or industrial pollution."

Since the ***Foster*** decision, other Florida federal and state courts have reached the same conclusion. See:

- ***CDC Builders, Inc. v. Amerisure Mut. Ins. Co.,*** 2011 U.S. Dist. LEXIS 114509 (S.D. Fla. Aug. 16, 2011)
- ***FCCI Commercial Ins. Co. v. Al Bros., Inc.,*** No. 10–CA–002840 (Fla. Cir. Ct. Lee County Apr. 19, 2011)
- ***FCCI Advantage Ins. Co. v. Gulfcoast Eng'g, LLC,*** No. 10–2862 (Fla. Cir. Ct. Lee County Aug. 1, 2011)
- ***FCCI Commercial Ins. Co. v. Shirley Constr. & Drywall, Inc.,*** No. 102979–CA (Fla. Cir. Ct. Lee County Aug. 1, 2011)
- ***FCCI Ins. Co. v. S3 Enters., Inc.,*** No. 10–2850 (Fla. Cir. Ct. Lee County Sept. 13, 2011)

On the other hand, in ***Auto-Owners Ins. Co. v. American Bldg. Materials, Inc.,*** 2011 U.S. Dist. LEXIS 52837 (M.D. Fla. May 17, 2011), Judge Bucklew held that a version of the pollution exclusion limited to pollution arising from ongoing operations (as in ***Scottsdale,*** *supra*) did not excuse an insurer from its duty to defend its insured drywall supplier. The undisputed facts were that the property damage allegedly caused by the drywall occurred *after* the insured had supplied drywall to the homes in question.

Additionally, in ***American Home Assur. Co. v. Peninsula II Developers, Inc.,*** No. 09–23691 (S.D. Fla. Oct. 19, 2010), the insureds avoided application of Florida law on the pollution exclusion even though the underlying claim involved a condominium development in Florida and the three insureds were Florida business entities. Judge Patricia A. Seitz decided choice-of-law motions under Florida's *lex loci contractus* rule and 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 insureds in that case because California law limits the scope of the pollution exclusion to environmental pollution, in contrast to increasingly clear precedent in Florida that applies the pollution exclusion to Chinese drywall claims. *See* ***National Union Fire Ins. Co. v. Beta Constr., LLC,*** No. 10–1541 (M.D. Fla. Sept. 13, 2011).

Louisiana

At the time of this writing, there are no appellate court cases in Louisiana addressing the applicability of the pollution exclusion to Chinese drywall cases under CGL policies. However, one case, ***Ross v. C. Adams Constr. & Design, LLC,*** 2011 La. App. LEXIS 769 (La. App. 5th Cir. June 14, 2011), addressed a similar exclusion in a homeowners policy. In contrast to Judge Fallon's opinion of December 2010, ***Ross*** found that the pollution exclusion barred coverage because the sulfuric gas emitted by the drywall in the plaintiffs' home qualified as a pollutant under the policy definition. The ***Ross*** decision did not discuss the previous Louisiana Supreme Court decision in the ***Doerr*** case, which limited pollution exclusions in CGL policies to traditional environmental pollution.

Has There Been an Occurrence?
What Triggers Coverage?

States also vary as to whether a construction defect constitutes an occurrence. Some hold that, as long as the damage that results is 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); ***American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.,*** 707 S.E.2d 369 (Ga. 2011). 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,*** 2010 U.S. Dist. LEXIS 14257 (D. Colo. Feb. 1, 2010), *aff'd,* 633 F.2d 951 (10th Cir. 2011) (applying Colorado law). The former is currently the majority view. In ***Dragas Mgmt. Corp. v. Hanover Ins. Co.,*** *supra,* Judge Rebecca Beach Smith held that the existence of Chinese drywall in a building is not an occurrence even if it must be replaced, but damage the drywall causes to other components of the building is an occurrence.

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? Trigger theories are used to determine when coverage attaches in the case of property damage that occurs gradually over time and may not be immediately apparent. In the case of Chinese drywall, the trigger is particularly important because, where different insurers cover 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 during time of both 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. *See* ***Cole v. Celotex Corp.,*** 599 So. 2d

1058 (La. 1993).) However, the weight of authority is that manifestation is the trigger. *See, e.g.:*

- ***Alberti v. WELCO Mfg. of Tex.,*** 560 So. 2d 964 (La. App. 4th Cir. 1990), *writ denied,* 565 So. 2d 945 (La. 1990) (Sheetrock mud caused discoloration, which appeared after the policy expired).
- ***Oxner v. Montgomery,*** 794 So. 2d 86 (La. App. 2d 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.")
- ***Rando v. Top Notch Props., LLC,*** 879 So. 2d 821 (La. App. 4th Cir. 2004) (faulty pilings with damage appearing after sale to plaintiff)

Nevertheless, Chinese drywall cases wending their way through Louisiana state courts have seen varying results. In ***Finger v. Interior Exterior Bldg. Supply, LP,*** No. 09–7004, Civil Dist. Ct. Parish of Orleans, Louisiana, CGL insurer Rockhill Insurance 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 Dev. Co.,*** No. 10–13403, 22d 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 Kenneth H. Marra of the U.S. District Court of the Southern District of Florida has held that manifestation applies to Chinese drywall property damage claims. ***Amerisure Mut. Ins. Co. v. Albanese Popkin the Oaks Dev. Grp., LP,*** 2010 U.S. Dist. LEXIS 125918 (S.D. Fla. Nov. 30, 2010). There, the underlying petition alleged that the plaintiffs initially discovered damage to the air-conditioning coils in one of the seven air-handling units in the building and first began to notice a periodic sulfur odor there 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....

This case illustrates how selection of the appropriate trigger of coverage continues to be an active issue in the Chinese drywall litigation.

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).

The Louisiana Supreme Court has spoken to some of these exclusions in ***Supreme Servs. & Specialty Co., Inc. v. Sonny Greer, Inc.,*** 958 So. 2d 634 (La. 2007), 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 Guar. Ins. Co. of Ga.,*** 604 S.E.2d 541 (Ga. Ct. App. 2004). *See also* **Carl E. Woodward, LLC *v. Acceptance Indem. Co.,*** 2011 U.S. Dist. LEXIS 3121 (S.D. Miss. Jan. 12, 2011) (Mississippi law); and ***Auto-Owners Ins. Co. v. Pozzi Window Co.,*** 984 So. 2d 1241 (Fla. 2008) (Florida law).

At this time, there appear to be few significant decisions interpreting these exclusions in the context of a Chinese drywall case. One federal court case interpreting Virginia law, ***Dragas,*** *supra,* has held that the "your work" exclusion is inapplicable when a subcontractor installed the drywall. On the other hand, an insurer of drywall installers has been successful in asserting the "your work" and "your product" exclusions in a Florida trial court in ***FCCI Commercial Ins. Co. v. Shirley Constr.,*** *supra.* Undoubtedly, this will become a major battleground in cases where the policy period is correct, and the pollution exclusion does not bar coverage.

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 insurance coverage decisions remain scattered and variable.

Just as they did for asbestos and mold, CGL insurers are beginning to incorporate in their policies specifically crafted exclusions for property damage and bodily injury caused by Chinese drywall. Those exclusions will have little effect on the current litigation but may provide an easier resolution to complex insurance issues in the event of future claims. It is hoped that home owners and landlords will be able to remediate Chinese drywall where they find it and thus prevent continuing damage and subsequent litigation.

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