

Strategy needed to deal with Chinese drywall claims

By Jason S. Mazer

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South Florida businesses, especially those with ties to residential construction, are acutely aware of the exposure caused by the sale or use of Chinese drywall. A federal judge recently ruled, for example, that repair of homes damaged by Chinese drywall should include removal of all such drywall, all items that suffered damage from the gases given off by the drywall, and all items that might suffer damage during the removal process.



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That ruling, while important, is merely the tip of the iceberg. How developers (and claimants) ultimately resolve the many instances of property damage will depend greatly upon the amount of insurance coverage available to satisfy claims. Litigation over insurance coverage for loss due to Chinese drywall, however, is in its early stages. While rulings from other jurisdictions may offer some guidance, the availability of coverage will depend upon the specific policy language, as interpreted by the appropriate state's law.

What's at stake?

The competing interests of the various parties are obvious. Claimants want to recover the full value of their

damages. Corporate and municipal policyholders defending against defective drywall claims want the language of their policies construed to maximize the coverage available to pay claims, thereby minimizing their out-of-pocket expenses. And insurance carriers will advocate the interpretation that most limits their exposure. The battle lines are now being drawn.

Does a CGL policy provide any coverage?

One of the most common forms of coverage held by developers and contractors is the commercial general liability (CGL) policy. CGL policies often have "per occurrence" and "aggregate" limits that cap an insurance carrier's exposure.

Typically, CGL policies provide coverage for "property damage" caused by an "occurrence" taking place within the policy period. An "occurrence" is generally defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in property damage neither expected nor intended from the standpoint of the insured.

After a period of relative uncertainty, Florida law now recognizes that a standard CGL policy covers the costs to repair or replace property damaged by a defective or improperly installed product (i.e., Chinese drywall), but not

the cost to repair or replace the defective product itself.

Let's consider the plight of a developer or general contractor who, through a subcontractor, installed Chinese drywall into numerous homes in a residential development and has been sued by the community for resulting damage to the homes. The contractor determines that remediation of the damage caused by drywall will cost \$300,000 per home. The developer or contractor has a commercial general liability policy with a \$5 million "per occurrence" limit, a \$20 million "aggregate" limit, and a \$500,000 deductible.

The insurance carrier knows that the developer/contractor will likely be able to establish a claim for "property damage" caused by an "occurrence." Appreciating that it has sold a policy with a \$500,000 deductible, however, the carrier may try to limit its exposure by arguing that the installation of drywall in each home constitutes a separate occurrence. Thus, the carrier's policy limits are not implicated, as the amount of damage per home is well within the deductible.

If, however, the insured contractor can demonstrate that all of the damages had a single cause (incorporation of the drywall into the homes), only one \$500,000 deductible applies and the balance of the remediation costs are

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borne by the insurance company.

Unfortunately for many policyholders, the path to coverage for Chinese drywall claims is laden with obstacles. Insurers will attempt to apply several common policy exclusions to partially limit or completely avoid coverage for drywall-related damage. One such exclusion bars coverage for loss caused by the "discharge, dispersal, seepage, migration, release or escape" of a "pollutant."

Some variation of this "pollution exclusion" is found in virtually every standard-issue commercial general liability policy in effect today. Whether this exclusion bars coverage for drywall claims, however, depends upon the precise policy language employed and the particular state's law interpreting that language.

Under Florida law, the insurance carrier bears the burden of proving the applicability of an exclusion. And unlike provisions granting coverage, exclusions are to be read narrowly, with any ambiguities construed against the insurer that drafted the policy. Even though Florida law recognizes the enforceability of an "absolute" pollution exclusion, skillful practitioners can find coverage from nuance in policy language.

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Recently, moreover, a Louisiana state court determined that the pollution exclusion in a residential property policy was never intended to bar coverage for a homeowner's claim for damages caused by substandard building materials (Chinese drywall).

The bottom line

A company faced with liability for damages caused by the sale or use of Chinese drywall will benefit greatly from a comprehensive strategy designed to maximize the coverage available to pay claims. Careful attention to the actual language of the policies at issue, as well as the precise nature of the claims asserted, must drive that strategy.

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Matthew B. Weaver, an associate with the firm, helped with this column.

the top 25% of similar facilities nationwide for energy efficiency may qualify for Energy Star certification. This is Adler's fifth commercial property in Doral to receive this distinction in the past three months.