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August 2011: Insurance Litigation Update

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Claims Arising from Defective Drywall Are Excluded Under Most CGL Policies: During the housing boom in the mid-2000s, domestically manufactured drywall was in short supply, so hundreds of millions of pounds of drywall manufactured by a Chinese subsidiary of German manufacturer Knauf GIPS KG were imported into the United States and installed in homes, primarily in the Southeast. Consumers who bought homes containing Knauf's drywall claim that a sulfur-containing gas released by the drywall has an unpleasant smell and causes damage to wiring and electrical appliances. Knauf and other foreign manufacturers have admitted that their drywall was defective, but they contest whether any court in the United States can force them to pay for the damages they caused, arguing that they are not subject to jurisdiction here. Homeowners have therefore resorted to suing the homebuilders, installers and distributors who purchased and resold Knauf's defective products. Thousands of lawsuits seeking damages from those American companies and their insurers have been consolidated in a multi-district litigation before the Honorable Eldon Fallon in the Eastern District of Louisiana. *In re Chinese Mfd. Drywall Prods. Liab. Litig.*, (MDL No. 2047) (E.D. La. 2010).

Insurance companies have claimed that the total pollution exclusion found in most comprehensive general liability policies excludes coverage for claims arising from defective drywall. A typical total pollution exclusion bars coverage for "bodily injury" or "property damage" that would not have occurred in whole or in part but for "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." Such exclusions may define "pollution" as an "emission, discharge, release or escape of pollutants into or upon land, the atmosphere or any watercourse or body of water provided that such emission, discharge, release or escape results in environmental damage." The exclusion may also state that pollutants include "any solid, liquid gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

State courts in Florida and many federal courts have agreed with the insurers that the drywall claims are excluded. A Virginia district court recently granted summary judgment to an insurer on a drywall-related claim, concluding that the sulfide gases released by the defective drywall "unambiguously qualify" as pollutants within the plain meaning of the pollution exclusion. Accordingly, the insurer had no duty to defend its insured in the underlying lawsuit. See *Nationwide Mut. Ins. Co. v. Overlook, LLC*, 4:10CV69, 2011 WL 1988396 (E.D. Va. May 13, 2011). See also *Dragas Management Corp. v. The Hanover Insurance Co.* No. 2:10-cv-00547 (E.D. Va. Aug. 8, 2011). Earlier federal court decisions also reached that result, finding that pollution exclusions are unambiguous, *General Fid. Ins. Co. v. Foster*, No. 9:09-cv-80743 (S.D. Fla. Mar. 24, 2011), and are not limited to "traditional environmental pollution," *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010). Both courts granted summary judgment in favor of the insurer.

The courts have almost uniformly found the pollution exclusions to be unambiguous, and have held that it is irrelevant that the fumes emitted by the Chinese drywall are not akin to traditional environmental pollutants. Several state courts in Florida, persuaded by the reasoning of *General Fidelity* and *Travco*, have recently reached the same conclusions. *FCCI v. Gulfcoast Engineering, LLO.*, No. 10-CA-002862 (Fla. Cir. Ct. Aug. 8, 2011); *FCCI Commercial Ins. Co. v. MDW Drywall, Inc.*, No. 10-CA-007389 NC (Fla. Cir. Ct. Jul. 6, 2011); *FCCI Commercial Ins. Co. v. Ocean Const. Inc.*, No. 10-CA-2841 (Fla. Cir. Ct. June 6, 2011); *FCCI Commercial Ins. Co. v. AL Bros., Inc.*, No. 10-CA-002840 (Fla. Cir. Ct. Apr. 19, 2011).

However, a court in Louisiana reached the opposite result, concluding that the pollution exclusion is inapplicable because the gases released by the defective drywall did not "cause environmental pollution by its presence in the Plaintiffs' homes." *In re Chinese Mfd. Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822 (E.D. La. 2010).

Several pending cases will also test the applicability of the pollution exclusion to Chinese drywall claims. Motions for summary judgment are pending in several cases in Florida district courts (see, e.g., *Granite State Ins. Co. v. Am. Bldg. Materials, Inc.*, No. 8:10-cv-01542 (M.D. Fla. Apr. 27, 2011), *Granite State Ins. Co. v. Probuild Holdings, Inc.*, No. 10-cv-60246-JEM (S.D. Fla. Jul. 6, 2010), *Nat'l Union Fire Ins. Co. v. F. Vicino Drywall, Inc.*, No. 0:10-cv-60273-ASG (S.D. Fla. Jun. 21, 2010), *Chartis Specialty Ins. Co. v. Banner Supply Co.*, No. 8:10-cv-00339-JSM-EAJ (M.D. Fla. Mar. 30, 2010), *Amerisure Ins. Co. v. Albanese Popkin the Oaks Dev. Grp., L.P.*, 2010 WL 2321474 (S.D. Fla. Mar. 23, 2010)) testing the applicability of the pollution exclusion to underlying suits for damages arising from defective drywall.

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These recent decisions from state and federal courts suggest that many American companies involved in the Chinese drywall mess are not insured, increasing the urgency to obtain jurisdiction over Knauf and the other Chinese manufacturers to obtain judgments to compensate victims for the damages their products have caused.

Quinn Emanuel is representing certain insurers in the Chinese drywall MDL proceedings.