

## [Chinese Drywall Remediation Redux](#)



Earlier here at Musings, I opined that sometimes the old saw about [no good deed goes unpunished](#) applies to construction. The subject of that post was litigation in the [Eastern District of Virginia](#) federal court between a contractor who reached an informal settlement with certain homeowners relating to Chinese drywall damages. On March 24, 2010, the Virginia court dismissed a counterclaim by the builder seeking to have the

insurer pay its remediation costs with leave for the builder to amend its counterclaim. In the earlier opinion, the Court cited a lack of factual support for any litigation or threatened litigation that would show that the builder was under a legal obligation to pay damages in a way that would put it under the insuring agreement.

Well, the builder did just that and added certain language to the amended counterclaim that, this time, survived dismissal. In [Dragas II](#), Judge Smith cited certain amendments, among them the factual allegation that the settlement was in response to four lawsuits by owners. Judge Smith determined that this allegation of threatened litigation was enough to survive a motion to dismiss. Judge Smith then went on to consider other defenses of the insurers, including the "voluntary payments" provision of the policy, and rejected those arguments as well.

I highly recommend this opinion and Judge Smith's prior opinion to any [lawyer](#) or contractor who is faced with the situation of trying to be reimbursed by an insurance company for its pro-active stance toward remediation of potential defects. These two opinions outline the pleading requirements in stark contrast because of the differing results (though Judge Smith is careful to point out that she makes no ruling on the ability of Dragas to *prove* its factual allegations).

In sum, while the prior Dragas opinion seems to work against the "good Samaritan" who seeks to act proactively, this latest opinion seems to remove contractors from the Gordian knot (hat tip to Tim Hughes (@vaconstruction)) of either fixing a problem and potentially losing coverage, or waiting to get sued. Of course, a careful reading of these opinions and the advice of a [Virginia construction attorney](#) prior to taking action will go a long way toward determining if your circumstances are such that the proactive approach is the legally sound one.

*UPDATE:* For more good analysis on this case, check out my friend Tim Hughes' [discussion](#) from his blog.

Image via [stock.xchng](#).

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.