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Chinese Drywall Personal Injury Claims: Lessons From Prior Mass Torts

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A new mass tort faces America's residential builders, their underwriters and others with an interest in the construction industry: Personal injury claims resulting from chronic exposure to the alleged off-gassing of sulfur fumes from imported Chinese drywall. This issue has now been the subject of numerous features on network television and articles in newspapers. Several lawsuits have been filed in Florida and attorneys have begun advertising in multiple jurisdictions for clients allegedly injured due to this exposure. It appears that it will only be a matter of time until claims spread across the Country.

This is a potentially large scale problem. Although there is no precise count of the homes in which Chinese drywall has been installed, most estimates are that more than 60,000 homes have been built with this material within the last five years. According to the United States Census, as of 2000 the average American household consisted of 2.59 persons, a number that is likely higher for single family residences. The possibility of substantially more than 100,000 personal injury claims resulting from exposure to Chinese drywall certainly exists.

The addition of personal injury claims to construction defect actions based on the use of Chinese drywall significantly changes the dynamics of these lawsuits. Damages in construction defect cases are generally limited to the cost of repair or the diminution in value of the property involved. These costs are somewhat fixed and easy to calculate. Per-

sonal injury damages can be open-ended, include general damages for pain and suffering, are inherently subjective and can include the possibility of punitive damages. The potential for a "run away" jury is much higher in personal injury cases, particularly those involving children.

In planning a response, potential defendants and their insurers should be guided by past experience. Prior mass torts have included claims based on exposure to asbestos, silica, mold and refinery emissions, injuries due to defective products and medical devices, as well as single incidents, such as airplane crashes and building collapses. To date, it appears that the personal injury claims related to Chinese drywall involve large numbers of individuals alleging that long term exposure to sulfur fumes have caused a variety of chronic, subjective medical conditions, including respiratory distress, red, watery eyes and other symptoms of upper respiratory irritation. The most analogous prior mass torts are mold claims, which also largely arise from alleged construction defects, and refinery and other industrial emission cases, in which residents allege that long term, chronic exposure to hazardous fumes have caused a variety of health issues.

There are few established facts at this point regarding Chinese drywall personal injury claims. But decisions regarding the handling of early cases may have a significant impact on whether or not this potential mass tort can be effectively managed. We believe that

past experience dealing with mass torts should guide the response to the current problems raised by Chinese drywall claims.

Demand Individualized Proof.

Courts faced with thousands of claims will insist on specialized management. Some cases will be filed as putative class actions, despite the fact that personal injury claims cannot, by definition, be proven on a class basis. Whatever procedures are put into place, defendants cannot allow their right to demand individualized proof of exposure, causation and injury to be taken away, even if plaintiffs are not alleging serious injuries. Allowing this to occur plays into the hands of plaintiffs' attorneys, who want to take the easiest, cheapest route to obtaining a settlement. Every plaintiff has a unique health history and vulnerability to injury. The duration, level and circumstances of each plaintiffs' alleged exposure is particular to that individual. It is each plaintiff's burden to produce evidence on each of these points. If the cost to obtain such proof exceeds the potential recovery, the claims will end. However, if defendants allow claims to be made and settled easily, on a mass basis, the claims will certainly continue.

A Temporal Association Is Not Causation.

When thousands of claims are made, some plaintiffs will have pre-existing health conditions. In addition, in any large population, a certain percentage can be expected to develop specific diseases every year. The fact that these individuals lived in a home where sulfur fumes were present does not mean the fumes caused their health conditions or disease. In both mold cases and refinery emissions claims, plaintiffs' attorneys have taken advantage of the fact that one or more individuals who had a serious disease happened to live in a location where exposure occurred. From the defense perspective, these types of cases need to be identified as early as possible and special attention paid to medical causation in each. There is no evidence that residential mold exposure causes

brain damage or cognitive injuries, yet a failure to adequately address medical causation has resulted in defendants paying millions of dollars on such claims. As early as possible defendants want to demonstrate that fumes from Chinese drywall result in minor irritation, if that.

Don't Believe The Hype.

Plaintiffs and their attorneys have an advantage in the early stages of every mass tort. The media interest in residents "being poisoned in their homes" is much greater than in the results of a study showing that no serious health effects are occurring. In retrospect, prior mass torts such as mold, breast implant litigation and multiple chemical sensitivity all became more manageable or faded away as more scientific information became available. The same will likely be true with the Chinese drywall claims. The lesson is that there should be no rush to settlement and that proof of exposure, causation and injury must be demanded in every case.

In Transferring Risk, Don't Increase It.

More so than in most types of litigation, construction defect claims often focus on risk transfer. General contractors seek indemnity from numerous subcontractors and material suppliers, all defendants tender the claims to their insurance carriers. There is nothing wrong in seeking indemnification or a defense pursuant to contract or under the terms of an insurance policy. But in doing so, parties need to keep in mind their common opponent. Until risk transfer issues are resolved, claims need to be vigorously defended, particularly in the fast moving environment of a new mass tort. Plaintiffs' attorneys will take advantage of a distracted or divided defense. If litigation results from indemnity claims, the focus needs to remain on contract terms and their interpretation, not on underlying liability issues. The job of proving liability shouldn't be done for the plaintiffs or their attorneys as part of an indemnity dispute.

Don't Settle The Small Ones.

Particularly in a situation in which there are numerous minor personal injury claims, there will be a temptation to settle on a mass basis at a moderate per person cost, without requiring proof of injury. Before doing so, defendants need to determine the effect on future claims. Setting a "floor" for the value of personal injury claims regardless of merit will guarantee that every claimant in a home with Chinese drywall will make such a claim and expect at least that much. Such settlements also encourage plaintiffs' attorneys to recruit more clients, knowing that their money is "guaranteed." Plaintiffs' attorneys will become frustrated with the cost and effort required to litigate numerous small personal injury claims if settlements are not quick and easy. That is the defendant's leverage and a means to end the cycle of new claims filing. And keep in mind that if any "good" cases exist, experienced plaintiffs' counsel will hold them back from any mass settlement.

These Are Hybrid Cases.

The Chinese drywall cases involve alleged construction defects in newly built homes. The defendants are builders, general contractors and material suppliers. Many of the issues are common to less exotic types of construction defect litigation, including cost of repair and identifying the parties who selected and installed the allegedly defective components. But ignoring the personal injury aspects of these claims is not prudent. Many of the bigger verdicts and settlements in mold litigation have been the result of cases being handled solely as construction disputes by the defense, while plaintiffs quietly gathered expert witnesses and "evidence" to prove that serious injuries existed. Personal injury claims are more expensive and difficult for plaintiffs' counsel to prove in court than construction defects. The case management techniques that have been adopted in many jurisdictions to handle defect litigation are not appropriate for personal injury cases. By handling these

matters as the hybrid cases they are, defendants can force plaintiffs' counsel to the task of proving far more than is required in the average residential construction defect case. That in turn will cause plaintiff's counsel to question the value of filing further bodily injury claims. That is what has occurred with mold cases. The vast majority of current construction defect cases, even those involving water damage, have no mold bodily injury component. Plaintiffs' counsel have decided it's not worth the effort to file personal injury claims in construction cases and that they prefer to stick to the familiar territory of property damage.

Conclusion

There appears to be an organized attempt by plaintiffs' attorneys and "consumer" advocacy groups to move Chinese drywall litigation from Florida to the West Coast. Publicity regarding other allegedly defective Chinese products, a large pool of willing claimants seeking to blame others for the decline in the value of their homes and exaggerated health claims make this an attractive issue for plaintiffs' counsel. For potential defendants, past experience should be a guide to how to handle these claims. One basic lesson is that this a mass tort. One early decision can effect thousands of future claims. Those early decisions must therefore be made with all the care that implies.



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