

## Chinese Drywall And Homeowners Insurance: An Update

by Robert L. Cherry, Jr. and John P. Geary

### Introduction

The controversy surrounding the problems created for homeowners by Chinese drywall that began in 2008 has not abated. New information has revealed that the drywall problem is broader and more pervasive than thought. ProPublica and the *Sarasota Herald-Tribune* began investigating drywall complaints in May 2010 to determine if anything was being done to help affected homeowners and tenants.<sup>1</sup> What was discovered was that in spite of an investigation by the Consumer Product Safety Commission (CPSC) during 2009 most of the problems remain unresolved; some of the builders and suppliers had some prior knowledge of the drywall problems but used it anyway; there were health and structural complaints from inhabitants of Habitat for Humanity homes containing the drywall; and Lowe's Companies, Inc. had increased its drywall settlement offer from \$4,500 up to \$100,000 per victim.<sup>2</sup>

On December 6, 2011, at a hearing in Washington, D.C., lawmakers questioned product safety and health regulators concerning their three-year investigation into Chinese drywall.<sup>3</sup> It was revealed in testimony that nearly 7,000 homes were built with defective drywall nationwide and that there was enough Chinese drywall imported into the United States to build at least 100,000 homes. According to recent court filings, the number of homes constructed using Chinese drywall has increased to over 10,000.<sup>4</sup> In addition, there was testimony about the effects of sulphur gas exposure, conflicting government regulations, efforts to remediate homes, and whether drywall produced in the U.S. contained similar defects. There was disagreement as to how to best remediate the homes. The CPSC now maintains that the home wiring need not necessarily be removed. This conflicts with guidelines issued by a federal court in New Orleans and the Virginia Housing Board.<sup>5</sup>

Lawsuits against builders, suppliers, manufacturers, and their insurance companies over Chinese drywall issues continue to increase. Recent cases, for example, include *QBE Insurance Corp. v. Estes Heating & Air Conditioning, Inc.*, 2012 U.S. Dist. LEXIS 16159 (S.D. Ala. February 8, 2012), involving a motion for summary judgment concerning commercial general liability coverage issued to Estes Heating & Air and potential liability for installing HVAC units where there was Chinese drywall. Another recent case is *Granite State Insurance Co. and New Hampshire Insurance Co. v. American Building Materials, Inc.*, 2012 U.S. Dist. LEXIS 7730 (M.D. Fla. January 24, 2012), an action to determine if the insurer had a duty to defend or indemnify its named insured, ABM, in lawsuits and pre-suit claims in which it is alleged that ABM supplied defective drywall imported from China to KB Home and that KB Home constructed homes using this drywall. The Chinese drywall was alleged to have caused damage to real and personal property, and in some cases, caused physical injuries to persons.

### Abstract

*Litigation concerning the damages to homes caused by the installation of Chinese drywall continues. Homeowners suffering from sulfur fumes and methane gas from the sheetrock that damaged their HVAC units, electrical wiring, and plumbing fixtures, and caused physical injury persist in trying to find someone to hold responsible and help in repairing these damages. As a follow-up to the article, "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," this article looks at the ongoing claims by homeowners against their homeowner insurance carriers for damages from Chinese drywall. Since the previous article, a couple more cases have arisen. Of major importance are two appeals to the appellate court in Virginia by the homeowner and in Florida by the insurance company. These appeals could have major repercussions on the homeowner insurance liability dispute. This article analyzes the information available so far on these appeals.*

Questions remain concerning homeowners insurance coverage as well as commercial general liability coverage. Since the publication of our October 2011 article “Chinese Drywall and Homeowners’ Insurance: Recent Court Decisions,”<sup>6</sup> there have been a few important changes that should be explored. Following is a brief review of the homeowners insurance cases and an update on this evolving area of the Chinese drywall litigation arena.

## Homeowners Insurance Cases Reviewed

The cases so far that have addressed the issue of homeowners and their coverage for loss due to Chinese drywall problems under their homeowners insurance policies have now reached a total of eight court proceedings. However, the *In Re: Chinese Manufactured Drywall Products Liability Litigation* case<sup>7</sup> noted below was a consolidated proceeding of ten cases involving nine insurance companies. Therefore, the actual total number of cases heard is seventeen.

The first case was a state court case in Louisiana decided March, 2010, *Finger v. Audubon Insurance Company*, No. 09-8071, 2010 WL 1222273 (La. Civ. Dist. Ct. Mar. 22, 2010). The second was a Virginia case in the U.S. District Court, *Travco Insurance Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) decided June 3, 2010, and the third was part of the U.S. District Court consolidation of multi-district litigation (MDL) in Louisiana, *In Re: Chinese Manufactured Drywall Products Liability Litigation; Cases: 09-6072, 09-7393, 10-688, 10-792, 10-930, 10-931, 10-1420, 10-1693, 10-1828*, 2010 U.S. Dist. LEXIS 133497 decided December 16, 2010. The next was a Florida state court case, *Walker v. Teachers Insurance Co.*, Case No. 09-17303, Cir. Ct. Thirteenth Judicial Cir. State of Florida, March 9, 2011. In June of 2011, the Federal Court in Mississippi decided two cases, *Bishop v. Alpha Mutual Insurance Co.*, 2011 U. S. Dist. LEXIS 64149 ( S.D. Miss. June 16, 2011), *Lopez v. Shelter Ins. Co.*, 2011 U.S. Dist. LEXIS 63948 (S.D. Miss. June 17, 2011), and the Fifth Circuit Louisiana Court of Appeals decided *Ross v. C. Adams Construction & Design, L.L.C., State Farm Insurance Co. and Louisiana Citizens Property Insurance Co.*, 10-852 (La. App. 5 Cir. 06/14/11) 2011 La. App. LEXIS 769. The most recent decision is another Federal Court case, *Dupuy v. USAA Casualty Ins. Co.*, 2012 U.S. Dist. LEXIS 31890 (M.D. La. March 9, 2012). All of these cases and their results are set out in Exhibit I.

## Opposing Case Decisions On Homeowners Insurance Coverage

As can be seen in Exhibit I, only two cases were favorable to the homeowners, *Finger* and *Walker*.<sup>8</sup> These two cases were heard and decided in state courts in Louisiana and Florida, respectively. Five of the other six cases were decided in various Federal District Courts in Virginia, Louisiana, and Mississippi. The sixth case, *Ross v. C. Adams Construction & Design, L.L.C., State Farm Insurance Co. and Louisiana Citizens Property Insurance Co.*, 10-852 (La. App. 5 Cir. 06/14/11) 2011 La. App. LEXIS 76, was decided in a state court in Louisiana and heard by the Louisiana Fifth Circuit Court of Appeals. This decision by the Fifth Circuit Court of Appeals of Louisiana is in conflict with the decision by the Civil District Court for the Parish of New Orleans in *Finger v. Audubon Insurance Company*. The state court system in Louisiana not only divides up the trial court jurisdiction into different circuits but also divides the appellate process into different circuits. The *Finger* case was decided in a trial court that comes under the jurisdiction of the Fourth Circuit Court of Appeals for Louisiana. The *Finger* decision was not appealed, so now we have a conflict in the Louisiana state court system. In all eight cases, state common law or case law had to be applied to the interpretation of the contract language of the homeowners policy.

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## Exhibit I

### Policy Exclusions, Ensuing Loss And Court Decisions

| <b>Exclusions:</b>   | <b>Latent Defects</b>           | <b>Corrosion</b>                | <b>Pollution</b>                | <b>Faulty Materials</b>         | <b>Ensuing Loss</b>     |
|--|---------------------------------|---------------------------------|---------------------------------|---------------------------------|-------------------------|
| Louisiana: <i>Finger v. Audubon Insurance Co.</i>  | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES NOT</b> Apply | N/A                     |
| Virginia: <i>Travco v. Ward</i>  | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | <b>No Coverage</b>      |
| Louisiana: <i>In Re: Chinese Manufactured Drywall Products Liability Litigation</i>  | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES</b> Apply     | <b>No Coverage</b>      |
| Florida: <i>Walker v. Teachers Insurance Co.</i>   | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES NOT</b> Apply | Not Addressed                   | Not Addressed                   | <b>Coverage Applies</b> |
| Mississippi: <i>Bishop v. Alpha Mutual Insurance Co.</i>   | Exclusion <b>DOES NOT</b> Apply | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | <b>No Coverage</b>      |
| Mississippi: <i>Lopez v. Shelter Ins. Co.</i>  | Exclusion <b>DOES NOT</b> Apply | Not Addressed                   | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Not Addressed           |
| Louisiana: <i>Ross v. C. Adams Construction &amp; Design, L.L.C., State Farm Insurance Co. and Louisiana Citizens Property Insurance Co.</i> | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Exclusion <b>DOES</b> Apply     | Not Addressed           |
| Louisiana: <i>Dupuy v. USAA Casualty Ins. Co.</i>  | Not Addressed                   | Exclusion <b>DOES</b> Apply     | Not Addressed                   | Exclusion <b>DOES</b> Apply     | Not Addressed           |

Our previous paper, “Chinese Drywall and Homeowners’ Insurance: Recent Court Decisions,”<sup>9</sup> published in October, 2011, in the *CPCU eJournal*, analyzed in detail six of these court decisions. The two cases not analyzed in that paper, *Lopez* and *Dupuy*,<sup>10</sup> followed the reasoning of the other Federal Court cases. The five U.S. District Court cases and the one Louisiana state court case, using their interpretation of state case law and their reading of the contract language in the policies, denied coverage based on the common exclusionary language in the policies dealing with these:

- Inherent vice, latent defect, or mechanical breakdown
- Release, discharge, or dispersal of contaminants or pollutants
- Losses caused by smog, rust, dry rot, or other corrosion
- Faulty planning, zoning, construction, and materials

It should be pointed out that when a U.S. District Court decides a case dealing with a state issue, such as contract interpretation, the court is required to use the law of the state, in which the action resides under the landmark U.S. Supreme Court case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). As our previous examination of the cases indicated, the U. S. District Courts attempted to do this but in many instances relied extensively on the *Travco Insurance Co. v. Ward*<sup>11</sup> case from Virginia for authority, even though the cases were in Louisiana and Mississippi. See these examples:

1. Judge Fallon again looked at the result and reasoning in the *Finger* and *Travco* cases:

Because *Finger* failed to provide an explanation as to how it came to define faulty materials, only citing conclusions reached in the plaintiff's own memorandum and testimony, and the testimony of the insurer's corporate representative, the Court is not able to follow this approach. The Eastern District of Virginia in *Travco*, 715 F. Supp. 2d 699, 2010 WL 2222244, declined to follow *Finger* on a similar basis, see 715 F. Supp. 2d 699, Id. at 12-13, and reached the opposite conclusion—the faulty materials exclusion did apply to the Chinese drywall damage in plaintiff's home. The court, looking to the dictionary definition of the terms and applicable case law, reasoned that a material may be faulty even when it is serving its intended purpose. 715 F. Supp. 2d 699, Id. at 13.<sup>12</sup>

2. In *Bishop v. Alfa Mutual Insurance Co.*, the United States District Court for the Southern District of Mississippi, on June 16, 2011 heard a motion for summary judgment by the insurer who claimed the insured plaintiffs were not entitled to homeowners' insurance coverage for damages from installed Chinese drywall. The homeowners' insurance policy excluded coverage for latent defects, contamination (pollution), corrosion, and faulty materials. Relying very heavily on the *Travco* case from Virginia and very little on Mississippi law, the federal court in Mississippi granted the insurance company's motion for summary judgment finding that the contamination exclusion, the corrosion exclusion and the faulty materials exclusion barred recovery by the homeowner. Also, the court using the *Travco* case from Virginia, since "...there are no Mississippi cases addressing an "ensuing loss" provision," denied the Bishops coverage for ensuing loss from the Chinese drywall damages.<sup>13</sup>

Even the most recent U.S. District Court case, *Dupuy v. USAA Casualty Insurance Co.*,<sup>14</sup> a Louisiana case, uses the Virginia *Travco* case as authority to uphold the faulty materials exclusion and the corrosion exclusion in the policy. To muddy the waters even further, this Louisiana U. S. District Court cites to *Bishop* and *Lopez*, two Mississippi cases that also used the *Travco* case for authority in ruling in favor of the insurance company in its application of the exclusions for latent defect, faulty materials, and pollution.<sup>15</sup>

Therefore, the U.S. District Courts are riding the coattails of a Virginia case, which should have no persuasive authority in the states of Louisiana and Mississippi, rather than follow the *Erie* doctrine. To compound this breach of jurisprudence in the federal courts, in the state court case, *Ross v. C. Adams Construction & Design, L.L.C., State Farm Insurance Co. and Louisiana Citizens Property Insurance Co.*, the Louisiana appellate court upheld the four exclusions of faulty materials, latent defect, corrosion, and pollution to bar recovery by the homeowner. The Louisiana appellate court offered almost no legal reasoning for their decisions on these exclusions but did cite to *Travco* as authority for applying the faulty materials exclusion even though this was a Louisiana case.<sup>16</sup>

A major decision, which may put any future cases in jeopardy and cast doubt on the use of *Travco* in these previous cases, is on the horizon in the form of an appeal by the homeowner in *Travco v. Ward*. The *Travco* case was appealed to the U.S. Court of Appeals for the Fourth Circuit by Defendant insured, Larry Ward.<sup>17</sup> The briefs written by the Appellant and the Appellee are to be found as Documents 23 and 36 of Case Number

10-1710 in the records of the Fourth Circuit. The National Association of Home Builders filed as an Amicus (friend of the court) supporting the Appellant insured. The National Association of Mutual Insurance Companies and the American Insurance Association filed as an Amicus supporting the Appellee insurance company.<sup>18</sup>

### Appeal of Travco v. Ward Case

On March 1, 2012, the U.S. Court of Appeals for the Fourth Circuit in handling the appeal by the insured, Larry Ward, in the *Travco v. Ward* case, decided to do this:

...certify the following question of Virginia law to the Supreme Court of Virginia:

1. For purposes of interpreting an “all risk” homeowners insurance policy, is any damage resulting from this drywall unambiguously excluded from coverage under the policy because it is loss caused by:
  - (a) “mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage itself”;
  - (b) “faulty, inadequate, or defective materials”;
  - (c) “rust or other corrosion”; or
  - (d) “pollutants,” where pollutant is defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”<sup>19</sup>

So, the U.S. Court of Appeals has decided that because this is a state contract language interpretation issue, it should be the state appellate court that decides these questions. A decision by the Virginia Supreme Court for the homeowner would have a profound effect on the other federal or state cases dealing with Chinese drywall and homeowners insurance. This “Unpublished Order of Certification”<sup>20</sup> by the Fourth Circuit lays out in concise language the decision by the U.S. District Court and the insured, Larry Ward’s, arguments for overturning this decision for allowing these four exclusions to prevent recovery from his homeowner insurer, Travco.

The U.S. District Court’s reasoning for granting Travco Insurance Company’s declaratory judgment action denying coverage due to the policy exclusions was handled in the *CPCU eJournal* article, “Chinese Drywall and Homeowners Insurance: Recent Court Decisions,” last October.<sup>21</sup> Now that the case has been referred to the Virginia Supreme Court by the U.S. Court of Appeals, and there is a possibility that the lower court’s decision will be overturned, the insured’s, Larry Ward’s, legal arguments need to be addressed. The U.S. Court of Appeals states that:

Ward ... continues to contend on appeal that Travco failed to meet its burden of establishing that the exclusions apply. See *Allstate Ins. Co. v. Gauthier*, 641 S.E.2d 101, 104 (Va. 2007) (noting the burden is on insurer to prove applicability of exclusion). In particular, Ward argues the language in each of the exclusions at issue in Travco’s policy is not clearly or unambiguously defined, and the broad, expansive interpretations ascribed to those exclusions by Travco and the district court are therefore unreasonable. Moreover, Ward argues his claimed losses were unexpected, fortuitous, and extraneous, and are the very types of events for which a reasonable homeowner would purchase insurance coverage.<sup>22</sup>

Further, Ward makes specific arguments regarding each exclusion. “With regard to the latent defect exclusion, Ward argues that “latent defect” is susceptible to multiple meanings, as illustrated both on the face of the Policy and in case law.”<sup>23</sup> First, the term “latent defect” is qualified in the Policy by the modifier that causes it to damage or destroy itself. Thus, Ward argues the term must mean something more than merely a defect that



is undetectable or undiscoverable.<sup>24</sup> Ward argues the latent defect exclusion is inapplicable here because the drywall is not structurally inferior, has not deteriorated or destroyed or damaged itself, and has not failed to serve its intended purpose.<sup>25</sup>

With regard to the faulty materials exclusion, Ward argues the term “faulty material” is ambiguous, and that the exclusion is inapplicable here because of the unique nature of the “defect” in the drywall. For example, even while the drywall emits sulfuric gasses that destroy other components of the residence, it continues to serve its intended purpose as a wall and divider and does not deteriorate or breakdown. In other words, the drywall is not subject to the faulty material exception because it continues to serve its normal function and intended purpose as a structural element of the residence and has not caused damage to itself.<sup>26</sup> With regard to the corrosion exclusion, Ward argues that his loss is the actual corrosion of the metals caused by the sulfuric gases rather than any subsequent damage to any other part of the Residence otherwise resulting from this corrosion. He argues that the loss is not caused by another house component which damaged the house after it had been corroded; rather, the damage is the corrosion itself. Ward contends that corrosion exclusions in insurance policies are generally intended to apply to maintenance related problems, such as the expected and natural occurrence of corrosion which causes damage to property over time.<sup>27</sup> Finally, with regard to the pollution exclusion, Ward argues the meaning of “pollutant” is ambiguous under Virginia law. Ward argues the pollution exclusion was not intended to apply to product liability claims but was intended to limit or exclude coverage for past environmental contamination. Ward argues that because the gases emitted from the drywall are not considered traditional environmental pollutants, the exclusion is inapplicable to a compound originating in and remaining within the Residence.<sup>28</sup>

The U.S. Court of Appeals for the Fourth Circuit in this Unpublished Order of Certification concludes:

Several factors justify certification. Considering these arguments and with this legal background, we find no clear controlling Virginia precedent to guide our decision. There are no disputed fact issues, and the questions presented are pure questions of state law which have not been squarely addressed by the Supreme Court of Virginia. In addition, we recognize the importance of allowing the Supreme Court of Virginia to decide questions of state law and policy with such far-reaching impact. The question of how to interpret these standard exclusions, in light of the increasing number of insured homeowners who are seeking to recover under their first-party property insurance policies for losses resulting from the drywall, is a matter of exceptional importance for state insurers and insureds. **In short, we are uncertain whether the Supreme Court of Virginia would conclude that each of these four exclusions is unambiguous and reasonable in its form, scope, and application in light of the unusual nature of the losses involved** (emphasis added), and the answer to this question is sufficiently unsettled and dispositive that certification is warranted.<sup>29</sup>

This certification to the Virginia Supreme Court opens the door for a reversal on the exclusionary language relied on by the homeowner carriers and is the basis for insurers winning six of the eight cases that have been heard in the lower courts so far. If the Virginia Supreme Court overrules the lower court, it would have a far reaching effect, even outside of Virginia.

### Appeal of Walker v. Teachers Insurance Company Case

One of the two state cases that were favorable to the homeowner, *Walker v. Teachers Insurance Co.*,<sup>30</sup> a Florida state court case, has been appealed also. Judge Robert Foster of the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida in Hillsborough County ruled that the insured’s residence suffered a direct physical loss within the meaning of the homeowner policy and that the exclusionary in the policy language of

“wear and tear”; “errors, omissions, and defects”, “corrosion”, and “latent defect” did not apply. The court stated that, “...the policy at issue provides coverage under Parts A and C for damages caused by the off-gassing of the drywall in the home.”<sup>31</sup>

This decision was filed for appeal by the insurance company with the Florida Second District Court of Appeal on February 17, 2012. The case identification number is 2D12-821. There is no other information on this appeal at this time. However, it is obvious that the insurance company is spending the money and time to appeal this case in hopes of having this decision overturned. They very likely will spend as much or more on the appeal as they would have had to pay to the insured homeowner. The insurance company (and probably the industry) does not want this type of precedent to continue. As with most appellate cases, this appeal could take a year or longer for a final decision.

### Settlement of Knauf Class Action

For some homeowners and occupants who filed lawsuits against builders, suppliers, real estate brokers, importers, and exporters in federal courts alleging damage from Chinese drywall, there appears to be a settlement in the works. Because of the similarity of facts in the lawsuits, the cases were designated as Multi District Litigation and on June 15, 2009, transferred to the U.S. District for the Eastern District of Louisiana for coordinated proceedings. After a pilot remediation program and two settlement agreements, a global preliminary Settlement Agreement was reached on December 20, 2011, with Knauf Plasterboard (KPT), manufacturer of the drywall installed in properties in the U.S.<sup>32</sup> This will affect about 5,200 homeowners. The Settlement Agreement defines KPT Chinese Drywall as “any and all drywall products manufactured, sold, marketed, distributed and/or supplied by KPT and which are alleged to be defective.” Class is defined as “All persons or entities who, as of December 9, 2011, filed a lawsuit in the litigation as a named plaintiff (i.e. not an absent class member) asserting claims arising from, or otherwise related to, KPT Chinese Drywall, whether or not the Knauf Defendants are named parties to the lawsuit.”<sup>33</sup>

The agreement creates two types of funds: the remediation fund and the other loss fund. The remediation fund contains three options which homeowners can utilize to fix their homes. The first option allows homeowners to use a named approved contractor to repair their homes; the second option allows the homeowner to choose a contractor to improve the property; the final choice is the cash out option which permits the homeowner to receive a lump sum cash payment with no obligation to repair the property. As part of the other loss fund, plaintiffs will be compensated for economic loss associated with the defective drywall, including a short sale or foreclosure.<sup>34</sup> Tenants and owners may seek compensation for bodily injury relating to the defective drywall. The agreement provides for \$160 million in attorney’s fees which is separate from compensation to the class members.<sup>35</sup> The remediation includes the removal and replacement of the defective drywall, electrical wiring, fire and smoke alarms, and built in appliances.

The repair fund is uncapped and Russ Herman, the lead attorney in the drywall case, “estimated that the total value of the settlement could be 800 million to \$1 billion.” This amount is disputed by the KPT attorneys. The second fund dealing with economic loss is capped at \$30 million. It is estimated that there are thousands of homes not covered by the settlement. Herman, and other plaintiff’s attorneys, has expressed their intent to pursue other manufacturers.<sup>36</sup>

### Conclusion

With the homeowner in the *Travco* case and the insurance company in the *Walker* case willing to spend thousands of dollars to appeal the respective lower court rulings,

the issue of homeowner insurance coverage for damage from Chinese drywall is far from settled. Decisions by the state appellate courts in these two cases could have a far reaching effect on the insurance industry as to homeowners insurance. If the Virginia Supreme Court were to overrule the U.S. District Court judgment and/or the Florida District Court of Appeal were to uphold the Florida trial court conclusion, the homeowner insurance industry would suffer a dramatic hit.

The industry has reacted to the Chinese drywall liability issue by adding further exclusionary language noted in the paper, *Chinese Drywall and Homeowners' Insurance: Recent Court Decisions*:

A copy of a policy endorsement obtained recently from Lexington Insurance Company entitled "Specific Building Materials Exclusion" adds this language to the homeowners policy:

This endorsement modifies insurance provided by the policy:

With respect to **Coverage A Dwelling, Coverage B Other Structures, Coverage C Personal Property, and Coverage D Loss of Use**, we do not cover direct or indirect loss or damage, loss of use, or any ensuing loss or resulting damage arising out of or caused by: (i) any material in or the composition of the "specific building material(s)", (ii) the deterioration of "specific building material(s)" or (iii) the presence, existence, discharge, dispersal, seepage, migration, release, or escape of any solid, liquid, or gaseous material from "specific building material(s)" which results in loss or damage to such "specific building material(s)" or any dwelling, other structures, personal property, or property of others....

As used herein, "specific building material(s)" means drywall, plasterboard, wallboard, gypsum board, sheetrock, blue board, or greenboard and includes the outer paper or other covering which forms a part of such aforementioned building materials.<sup>37</sup>

Now, it is a matter of waiting to see what these two appellate courts will do. While the likely settlement by Knauf Plasterboard (KPT) could resolve several thousand homeowner claims, there is the possibility for several thousand more still out there. "According to recent court filings, that number has since increased to more than 10,000."<sup>38</sup> The potential for legal actions for some time to come is very likely.

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## Endnotes

1. Paul Steiger, "Story so Far: Tainted Drywall," ProPublica, April 4, 2011, [www.propublica.org/article/story-so-far-tainted-drywall](http://www.propublica.org/article/story-so-far-tainted-drywall) ).
2. Id.
3. Joaquin Sapient, "Senate Subcommittee Grills CPSC On Drywall," ProPublica Dec. 7, 2011, [www.propublica.org/article/senate-subcommittee-grills-cpsc-on-drywall](http://www.propublica.org/article/senate-subcommittee-grills-cpsc-on-drywall).
4. Id.
5. Id.
6. "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," *CPCU eJournal*, October 2011, Vol. 64 No. 10, pp. 1-24.
7. The following cases were heard by Judge Fallon of the United States District Court for the Eastern District of Louisiana in In Re: Chinese Manufactured Drywall Products Liability Litigation; Cases: 09-6072, 09-7393, 10-688, 10-792, 10-930, 10-931, 10-1420, 10-1693, 10-1828, 2010 U.S. Dist. LEXIS 133497 decided December 16, 2010:
  1. American Guarantee & Liability Insurance Co.'s ("American") Motion to Dismiss for Failure to Join Necessary and Indispensable Parties in Pate v. American International Specialty Lines Insurance Co., No. 09-7791 (E.D. La. filed Dec. 23, 2009), consolidated with, No. 09-md-2047 (E.D. La. filed June 15, 2009) (R. Doc. 2641);



2. Amerisure Mutual Insurance Co. and Amerisure Insurance Co.'s ("Amerisure") Motion to Dismiss First Amended Complaint for Failure to Join Requested Parties in Pate, Case No. 09-7791 (R. Doc. 2174);
3. Chartis Specialty Insurance Co.'s ("Chartis") 1 Motion to Dismiss Complaint for Failure to Join a Requested Party in Centerline Homes Construction, Inc. v. Mid-Continent Casualty Co., No. 10-178 (E.D. La. filed Jan. 26, 2010), consolidated with, No. 09-md-2047 (R. Doc. 2567);
4. FCCI Commercial Insurance Co. and FCCI Insurance Co.'s (collectively referred to as "FCCI") Motion to Dismiss Plaintiff's First Amended Complaint for Failure to Join Indispensable Parties in Pate, Case No. 09-7791 (R. Doc. 2148);
5. Landmark American Insurance Co.'s ("Landmark") Motion to Dismiss in Pate, Case No. 09-7791 (R. Doc. 2150);
6. Mid-Continent Casualty Company's ("MCC") Motion to Dismiss in Pate, No. 09-779 (R. Doc. 2156);
7. MCC's Motion to Dismiss in Centerline, No. 10-178 (R. Doc. 2282);
8. MCC's Motion to Dismiss in Northstar Holdings, Inc. v. General Fidelity Insurance Co., No. 10-384 (E.D. La. filed Feb. 12, 2010), consolidated with, No. 09-md-2047 (R. Doc. 2843);
9. National Union Insurance Co. of Pittsburgh's ("National Union") Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(7) for Failure to Join a Party Under Rule 19 in Pate, Case No. 09-7791 (R. Doc. 2155); and
10. NGM Insurance Co.'s ("NGM") Motion to Dismiss in Pate, No. 09-7791 (R. Doc. Doc. 3174).
8. *Finger v. Audubon Insurance Company*, No. 09-8071, 2010 WL 1222273 (La. Civ. Dist. Ct. Mar. 22, 2010); *Walker v. Teachers Insurance Co.*, Case No. 09-17303, Cir. Ct. 13th Judicial Cir. State of Florida, Book 20399, p. 817, March 9, 2011.
9. "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," pp. 1-24.
10. *Lopez v. Shelter Ins. Co.*, Civil Action No. 4:10CV55TSL-LRA, 2011 U.S. Dist. LEXIS 63948 (S.D. Miss. June 17, 2011); *Dupuy v. USAA Casualty Ins. Co.*, Civil Action No. 11-336-JJB (M.D. La. March 9, 2012).
11. *Travco Insurance Co. v. Ward*, 715 F. Supp. 2d 699, 718 (E.D. Va. 2010).
12. "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," *CPCU eJournal*, October 2011, Vol. 64 No. 10, pp. 1-24, p. 13 analysis of *In Re: Chinese Manufactured Drywall Products Liability Litigation; Cases: 09-6072, 09-7393, 10-688, 10-792, 10-930, 10-931, 10-1420, 10-1693, 10-1828*, 2010 U.S. Dist. LEXIS 133497 decided December 16, 2010.
13. "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," p.16.
14. 2012 U.S. Dist. LEXIS 31890 (M.D. La. March 9, 2012), \*11 and \*12.
15. *Bishop v. Alpha Mutual Insurance Co.*, 2011 U. S. Dist. LEXIS 64149 (S.D. Miss. June 16, 2011), at \*11, \*20, \*23, and \*28, *Lopez v. Shelter Ins. Co.*, 2011 U.S. Dist. LEXIS 63948 (S.D. Miss. June 17, 2011), at \*11, \*17, and \*22.
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17. *Travco Insurance Company v. Larry Ward*, Case No. 10-1710 (U.S. Ct. App. 4th Cir., 2010).
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19. *Travco Insurance Company v. Larry Ward*, Case No. 10-1710 (U.S. Ct. App. 4th Cir., 2010), Unpublished Order of Certification of a question of law to the Supreme Court of Virginia, March 1, 2012, p. 3.
20. *Id.*
21. "Chinese Drywall and Homeowners' Insurance: Recent Court Decisions," p.16.
22. *Travco Insurance Company v. Larry Ward*, Case No. 10-1710 (U.S. Ct. App. 4th Cir., 2010), Unpublished Order of Certification of a question of law to the Supreme Court of Virginia, March 1, 2012, p. 12.
23. *Id.* at p. 12.
24. *Id.* at p. 12.

- 25. Id at p. 13.
- 26. Id at p. 14.
- 27. Id at p. 15.
- 28. Id at p. 17.
- 29. Id at pp. 17-18.
- 30. *Walker v. Teachers Insurance Co.*, Case No. 09-17303, Cir. Ct. 13th Judicial Cir. State of Florida, Book 20399, p. 817, March 9, 2011.
- 31. Id.
- 32. *Notice of Pendency and Proposed Settlement of Knauf Class Action*, MDL No. 2047 Section: L, Filed December 20, 2011, U.S. District Court, Eastern District of Louisiana.
- 33. Id at pp. 5-6.
- 34. Id at pp. 6-7.
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- 36. Joaquin Sapien, "Drywall Manufacturer Agrees to Settlement" ProPublica, Dec. 15, 2011, [www.propublica.org/article/drywall-manufacturer-agrees-to-settlement](http://www.propublica.org/article/drywall-manufacturer-agrees-to-settlement) .
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- 38. Joaquin Sapien, "Drywall Manufacturer Agrees to Settlement" ProPublica, Dec. 15, 2011, [www.propublica.org/article/drywall-manufacturer-agrees-to-settlement](http://www.propublica.org/article/drywall-manufacturer-agrees-to-settlement).