



RISK BULLETIN

Defective Drywall-An Emerging Liability

INTRODUCTION

Defective building materials are the source of costly liabilities, litigation, and insurance claims for contractors and building owners. Use of defective building materials has led to claims associated with construction defects, property damage, replacement costs, remediation expense, bodily injury, and potentially professional, pollution, legal, and general liabilities. This bulletin addresses the emerging liabilities associated with defective

Chinese drywall, how use of such a product may impact your business, and steps to proactively manage the exposure. Although more information on defective drywall continues to become available, it is important to have a baseline understanding of the issues associated with the subject. This bulletin includes background on drywall manufacturing and use, followed by

a focused review of problems, investigations and litigation associated with Chinese-made drywall. This paper concludes with a review of prudent risk management protocols to minimize your firm's liabilities.

BACKGROUND ON DRYWALL

Drywall is a construction material consisting of thin panels of gypsum board sandwiched between two layers of special paper. A standard-sized US manufactured drywall panel is 4 feet by 8 feet. The

thickness of drywall may vary from 0.25" to nearly an inch depending upon the intended usage. In most cases, the thickness of drywall used in the United States tends to be 0.62" or 0.5" thick. Often the thickness of the drywall utilized will be dependent upon local building codes, specific building requirements, or fire ratings. Drywall panels are widely used in modern construction worldwide due to ease of installation as well as the fire protection the drywall provides the buildings where it is installed.

Gypsum is a naturally occurring mineral mined worldwide in countries that include China and the United States. Gypsum is an extremely versatile and useful mineral found in many consumer products including toothpaste, cosmetics, fertilizer, and bread. Mined gypsum contains a high volume of water, 21% by weight, as well as calcium sulfate, and this high moisture content imparts to drywall its fire protection capabilities. When exposed to fire, the moisture in the drywall vaporizes keeping the panel temperature constant thereby protecting the underlying substructure while the gypsum itself does not burn.

While drywall products are essentially gypsum wrapped in paper, problems can result if there are impurities in the core gypsum material. These "impurities" may be naturally occurring or man-made and can include added fiber, plasticizers, foaming agents, fly ash, contaminated water, and other ingredients to inhibit the growth of mold and increase fire resistance.



In addition, although the gypsum in drywall usually comes from mining operations, an increasing amount of drywall is being made from synthetic gypsum created from a chemical process using lime or limestone and gas from coal-fired power plants. This process, called flue gas desulfurization (FGD), utilizes various scrubber systems to remove sulfur oxides from the plant's flue gas. The capture and removal of the sulfur gases is accomplished by combining the sulfur gases with calcium-containing sorbents. The chemical reaction produces calcium sulfate or gypsum. Flawed desulfurization methods can result in impurities in synthetic gypsum.

It has been estimated that up to 30–40% of the gypsum used to manufacture drywall originates as recycled waste, generated either through FGD at electric power plants or from recycling waste drywall from construction sites. Gypsum produced as a byproduct of the FGD process provides an economical, environmentally sound raw material for making high-quality gypsum board. While wallboard waste is generally disposed of in landfills, recycling these materials is increasing due to the expense of disposing large volumes of drywall waste that can result from construction.

Drywall manufacturers in the United States include American Gypsum, Celotex (BPB), Georgia Pacific, National Gypsum, Pabco Gypsum, Temple Inland and United States Gypsum (USG).

BACKGROUND ON CHINESE DRYWALL

Chinese drywall was first introduced to the United States in 2000 or early 2001. Several years later (2004-05), a shortage of domestically produced drywall, which was brought about by the construction boom and several devastating hurricanes, drastically increased the importing and use of this material. As the epicenter for both of these issues, Florida was the state impacted first and hardest by the shortage. It is estimated that nearly 60% of the drywall imported during 2004-05 entered through Florida ports with Miami receiving more than 100 million pounds, Port Everglades 80 million, and Tampa 50 million pounds. Shipping records show that, since 2006, at least 550 million pounds of Chinese made drywall (enough to build 60,000 average-size homes) was offloaded at vari-

ous United States ports. In addition to Florida ports, drywall from China was received at the ports of New York, New Orleans, Houston, Long Beach, Oakland, Seattle, Tacoma, and Vancouver, BC. While Chinese made drywall may still be imported into the United States, various municipalities such as Virginia Beach and Norfolk have recently banned its use and the federal government is considering at least a temporary ban pending the outcome of testing being conducted by the Consumer Products Safety Commission (CPSC).

In addition to Florida, suspect Chinese drywall has now been found in Arizona, California, Ohio, Texas, Louisiana, Nevada, North Carolina, South Carolina, Virginia,

Port officials have reported that much of the Chinese drywall did not have the documentation required to confirm compliance with international standards.

Georgia, Mississippi, New Mexico, Texas, Washington, Wyoming, New York, Wisconsin, Alabama, Tennessee, Kentucky, New Jersey, and the District of Columbia with more expected to follow. While the vast majority of the Chinese drywall was installed in single-family residential units, it was also utilized in several high-rise condominium projects in Florida (230 units at Peninsula II in Aventura and The Whitney in West Palm Beach). Clearly, the potential for Chinese drywall usage to surface both in additional multi-family residential as well as commercial buildings is substantial although there have been few claims to date and it is nearly impossible to estimate the extent of exposure due to a lack of manufacturing source/distribution documentation.

According to The Gypsum Association, there is no way to determine whether any particular thickness of gypsum was imported because the Dept. of Commerce documentation only shows the country of origin and the square meters of product imported. As a result, it is entirely possible that both the 0.5" as well as 0.62" thick drywall could have been imported from China, but it would be impossible to verify the exact quantities without

a visual examination of the products upon delivery. Some of this drywall was required to meet international fire standards for a 1-hour rating. In the United States, the American Society for Testing and Materials (ASTM) standard ASTM C1396 mandates a domestic standard for drywall and encompasses fire resistance characteristics, moisture resistance, and board strength (among other issues). Port officials have reported that much of the Chinese drywall did not have the documentation required to confirm compliance with international standards. In addition, some of the drywall was mislabeled (typo) with a designation of ASTM C36.

In addition to differences in chemical composition, which are discussed in subsequent detail, visible differences in Chinese drywall have been noted including:

- Most Chinese drywall is 12' in length while most US drywall used in residential construction is 8' in length;
- Chinese drywall may be marked "Knauf", "C & K", or "Taishan Gypsum Ltd";
- Chinese drywall has no markings on edge tape, US drywall usually is labeled "Made in USA"; and
- Chinese drywall may be mislabeled as ASTM C36



As a result of these uncertainties, contractors purchasing and installing drywall products cannot rely on visible inspection alone to determine if it is a Chinese-made product or otherwise defective.

PROBLEMS ASSOCIATED WITH CHINESE DRYWALL

Besides the documentation issues, problems with Chinese drywall were noted as early as 2001, surfacing as an indoor air quality problem with occupants complaining of odors in their homes; however, the drywall's origin was not identified as the issue until sometime in

2008. At present, the exact problem with Chinese-made drywall remains unclear, and a multitude of factors may be contributing to the issue. Possible factors identified include flawed desulfurization in synthetic gypsum, impurities (such as sulfur) in the water used to mix the gypsum, fly ash used in the gypsum manufacturing process, the gypsum mining process itself, and manufacturing/mining site contamination. To date, producers of the problematic drywall in China have been identified as Knauf Tianjin Plasterboard Co. Ltd. (Knauf Tianjin) and Taishan Gypsum (China). Knauf is a German owned company (Knauf Gips KG) with operations in China. It is similarly important to understand that not all Chinese drywall manufacturers have been implicated in these problems.

Residents in homes with Chinese drywall complain of a range of odors from rotting eggs to burnt match type smells to no odors at all. In addition, homes containing problematic drywall have purportedly sustained other impacts including:

- Copper corrosion (indicated by a black, sooty coating) of non-insulated copper pipe leading to the air-handling unit;
- Premature copper corrosion on non-insulated copper wires and/or air conditioner evaporator coils (inside the air-handling unit);
- Failure of the evaporator coil located inside the air conditioning unit;
- Metal pitting on decorative fixtures such as bath faucets, drawer handles, and bath stoppers;
- Blackening of silver cutlery, serving pieces, and jewelry;
- Alleged failure of alarm systems;
- Alleged failure of mirror backing;
- Alleged appliance failure including refrigerators, dishwashers, ceiling fans, washing machines;
- Alleged arcing of electrical devices;
- Alleged failure of smoke detectors, fire sprinklers;
- Alleged degradation of nails and fasteners; and,
- Alleged absorption of sulfur compounds by porous items in the home.

The following alleged bodily injury complaints have been attributed to the problematic drywall:

- Respiratory issues
- Headaches
- Nose bleeds
- Skin rashes
- Dizziness
- Breathing difficulty
- Sore throat
- Coronary heart damage
- Sinus problems
- Sleep apnea
- Fatigue
- Eye irritation
- Body aches
- Mental anguish
- Death of family pet

Research continues to be performed to determine if there are definitive links between the Chinese drywall and the aforementioned property damage and bodily injury issues; there is still uncertainty associated with exposures, effects, and causation.

CHINESE DRYWALL TESTING

Testing of the Chinese drywall itself and of the air in the homes where it was used is complex, and there is little agreement on testing methodologies, analysis, or the interpretation of test results. As a result, bodily injury allegations remain speculative until and unless some standard testing methodology is established.

Knauf performed the first testing of the alleged defective Chinese drywall in 2006 and found the drywall contained iron disulfide, a naturally occurring mineral in their Chinese mine (which they claim they no longer use). The iron disulfide is the source of other sulfur-containing compounds (including sulfur dioxide) which may be responsible for the odors and corrosion. In the presence of high humidity (such as that occurring in Florida), water vapor may react with the sulfur dioxide and form highly corrosive sulfuric acid. Knauf also found levels of carbonyl sulfide and carbon disulfide in the drywall it tested.

The Florida Department of Health (DOH) also performed testing on the alleged defective Chinese drywall and

compared its composition to US made drywall. Florida DOH found the following:

- Chinese drywall contained strontium sulfide, US drywall did not;
- Chinese drywall contained over 5% organic compounds, US drywall had trace amounts only;
- Chinese drywall contained hydrogen sulfide, carbonyl sulfide, and carbon disulfide which were emitted when exposed to a humid environment (all of which could be responsible for odor), US products did not;
- Samples gave off a “sulfur odor” when heated, US products did not; and
- A sulfur source could not be identified.

The EPA has also performed testing on the alleged defective Chinese drywall and compared its composition

to the US made product. EPA found the following:

- Chinese drywall contained sulfur, US drywall did not;
- Chinese drywall contained more strontium than US drywall;
- Chinese drywall contained more iron than US drywall; and
- Chinese drywall contained organic compounds typically found in acrylic paints, US drywall did not.

Testing of the air in homes where alleged defective Chinese drywall was used has also been performed; however, to date,

the levels of carbon disulfide (5 parts per billion [ppb] at the highest), have never even approached the established minimal risk level (MRL) of 300 ppb for chronic exposure, and the levels of hydrogen sulfide detected indoors have not exceeded the outside ambient levels. In addition, adverse health effects are not necessarily indicated even with exposures to these compounds at levels above the MRL; however, their low odor thresholds can create an annoyance.

In April 2009, the EPA and the CDC’s Agency for Toxic Substances and Disease Registry agreed that the

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Consumer Products Safety Commission (CPSC) would take the lead role in future testing of the Chinese drywall including import investigations, field measurements in homes, chamber and corrosion studies, and lab analysis. To that end, the CPSC is pursuing three major tracks to evaluate the relationship between the Chinese drywall emissions and the reported consumer health effects. The results of these studies were not scheduled to be available until the end of August 2009 but will reportedly include the following analyses:

- Elemental analysis to characterize the components of domestic vs. imported drywall;
- Chamber studies to evaluate the chemical emissions of the drywall;
- Indoor air sampling of houses with Chinese drywall vs. homes without Chinese drywall; and
- Engineering analysis to determine the effects of the Chinese drywall emissions on electrical/gas/HVAC components and fire safety equipment.

The most recent allegations concerning Chinese drywall are that the product has been made with radioactive phosphogypsum, a product that was banned in consumer and building products in the United States in 1989. Phosphogypsum is a waste product that comes from the manufacture of phosphorous-based fertilizer; however, it has not been confirmed that it has been used in drywall manufacturing. The source of the phosphorous comes from open pit mining, which may contain both radium and uranium. Radium and uranium are both radioactive substances. When radium decays, it produces radon, a cancer-causing radioactive gas. Reportedly, radioactive phosphogypsum is a common product in China because of its abundance and low cost.

According to the Los Angeles Times, no single authority is responsible to ensure that imported drywall meets US standards and there are no testing requirements imposed on imported drywall. The Times claims that four Chinese drywall manufacturers/trading firms have admitted that phosphogypsum-containing drywall came into the United States and that Taishan Gypsum (a named party in lawsuits) is a known large producer of this product. To date, no testing has shown elevated levels of radium in US drywall although the amount of testing has been very limited.

The National Home Builders Association has developed general guidance materials for members and is reported to be collaborating on an industry standard on remediating impacted homes.

REMEDICATION AND REPAIR

There are no established remediation/repair protocols for structures that have been impacted by the effects of the Chinese drywall. One of the country's largest and earliest impacted homebuilders, along with several others, is "gutting" homes that contained Chinese drywall. The "gutting" consists of removing all drywall (both Chinese and non-Chinese) as well as carpeting, as odors emitted from the drywall may be absorbed into other porous building materials. In most cases, the only wallboard left in place is the cement board in bathrooms. In addition, all impacted corroded metals are removed, including wiring, HVAC/plumbing piping, impacted appliances, sprinkler systems, door knobs, fixtures, smoke detectors, and other components. Personal items impacted by the effects of the Chinese drywall are cleaned, where possible, or discarded, and residents are relocated to other housing during remediation. Remediation costs vary and have in instances amounted to one-third or more of the home's value. Other builders, taking a more cautious "wait and see" approach, are looking for direction from state or federal agencies with respect to repairing impacted homes. The National Home Builders Association has developed general guidance materials for members and is reported to be collaborating on an industry standard on remediating impacted homes.

CHINESE DRYWALL

LITIGATION/COVERAGE ISSUES

Class action lawsuits have been filed alleging that Chinese drywall contains excessive amounts of sulfur that, when subjected to the right environmental conditions, emits gases that corrode structural and mechani-

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cal systems and result in bodily injuries to occupants. Entities in the lawsuits to date include the following manufacturers- Knauf GIPS KG (Germany), Knauf Plasterboard Co., Ltd (China), Taishan Gypsum Co., Ltd. (China), and Rothchilt International Ltd. (China). Distributors and suppliers include USG, L & W Supply, Banner Supply, Interior & Exterior Building Supply, Rightway Drywall, La Suprema Trading, Inc, and Black Bear Gypsum Supply Inc. Builders and contractors include Taylor Morrison, Inc., South Kendall Construction, Corp., WCI Communities, Inc., and Lennar Corp.

The causes of action asserted by the plaintiffs in these class actions include product liability claims based on negligence, strict liability, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and violation of the Florida Deceptive and Unfair Trade Practices Act. It is likely that these claims will be made not only against the manufacturers, distributors, homebuilders, and developers but also against the general contractors, drywall installation subcontractors, architects, engineers, plumbing, electrical, HVAC contractors/distributors, and design and inspection teams.

Whether there was knowledge that the drywall was defective and whether there was compliance with project product specifications will be key issues in this area. Allegations of knowledge have been based upon odors detected, weight of the drywall and its tendency to break easily. In general (although interpretation may vary by state), under the Uniform Commercial Code (UCC), the buyer has all rights to reject goods. Once the buyer accepts the goods, the seller is off the hook unless the defects in the goods are material and latent (i.e., could not have been discovered upon inspection).

Insurance coverage issues also will need to be resolved. All potential parties to claims or litigation should provide notification to their general liability, pollution liability, professional liability, and additional insured coverage carriers with respect to the potential for exposure because coverage will be varied and may be available for some of these issues. Insurance litigation issues are likely to include questions about the applicable coverage periods, whether the pollution exclusion will include Chinese drywall emissions, whether the defective construction (business risk) exclusion will apply, whether there has been an “occurrence” under the policy to trigger coverage, whether there has been bodily injury or property damage, and other similar issues. The interpretation of many of these issues will often come down to individual state interpretation of the policy. For example, some states interpret the pollution exclusion to be only applicable to environmental hazards that exist or originate outdoors whereas the State of Florida has not adopted that view and is much more likely to deny coverage. Similarly, with respect to the occurrence issue, some jurisdictions do not deem an occurrence to have been triggered if a builder’s own defective work caused the problem (i.e., installing tainted drywall) while others consider defective work to be an “occurrence” and there are hybrid variations on these decisions as well.

REDUCING LIABILITY AND RISK FROM CHINESE DRYWALL

In all likelihood liability for any of the problems associated with Chinese drywall will not be established unless and until the cause of the problems associated with the product can be identified. Until that time, it is critical to develop a prevention and response program moving forward.

As a first step, rather than rushing to perform expensive inspections, a contractor should determine if it was

involved in any projects that used Chinese drywall. Suggested activities include the following:

- Identify if any formal complaints have been received.
- If so, could any other factors account for any problems reported, such as the presence of high-sulfur content, shallow water wells?
- Determine if the drywall suppliers have received any complaints.
- Review warranty calls/call-back records for reports of problems that could be attributed to Chinese drywall.
- Obtain and review any documentation (such as bills of lading, purchase orders, etc) that could reveal the origin of the drywall utilized, especially for projects that occurred between 2003 and 2007.
- Review specifications of projects during that time, along with company documentation of compliance with those specifications.

If it is determined that Chinese drywall may have been used, a contractor may consider taking steps to mitigate damage, which may include the following:

- Alert property owners and other impacted parties;
- Notify all insurance carriers;
- Review applicable warranty laws to investigate your company’s responsibility to repair damaged items;
- Develop company strategy with respect to response/remediation/repair protocols; and
- Consult with an attorney to determine your obligation to mitigate losses and to initiate legal action against others, if appropriate.

RISK MANAGEMENT PROTOCOLS

New imports of drywall from China have decreased dramatically to a very low volume and the Customs and Border Patrol is notifying CPSC if any new materials are presented for clearance. However, it is prudent to develop standardized risk management procedures to address exposures and manage risks. The development of a written program is an important step in managing this exposure. The program may specify that the contractor will use only US-manufactured products, screen manufacturers, suppliers and distributors, and include a verification and implementation process for documents. The following elements should be considered when developing your firm’s drywall program:

– Material Safety Data Sheets

Obtain the drywall MSDS from the supplier and maintain on file. They should specify that the product can contain no corrosive, contaminated, or potentially harmful materials. Specify the composition of the drywall materials to be used.

– Recycled Material Use

Specify that no recycled materials be used to protect against the use of recycled Chinese drywall. Specify that no recycled materials be used or, if used, that they contain no corrosive, contaminated, or potentially harmful products. Random testing and verification can also be required of the supplier or manufacturer.

– Relabeling

Specify that the products used cannot have been relabeled as to their origins, manufacturer, or ASTM compliance

– Inspection

Once drywall is delivered to the project, a visual inspection should be conducted to verify that it meets project and drywall policy specifications. The inspection may be conducted internally or as a part of a 3rd party QA/QC protocol, and documentation maintained within the project file.

– Post-construction Protocol

Develop a post-construction program/protocol that includes providing education to occupants and an annual inspection (during the warranty period) to check for signs of corrosion/odor.

– Contractual Protection

Add contractual language which requires testing/composition verification, and delineates penalties for failure to comply with specifications to agreements with drywall suppliers/manufacturers.

– Remediation

If remediation is to be performed, a post-remediation verification program must be created that will document conditions upon completion and ensure that the problem will not recur upon repair. The program should address, at a minimum, the following:

- Document/videotape all items removed/repaired during the process.
- Dispose of removed drywall in an approved landfill; currently, new requirements are being enacted in many locations due to the high sulfur content of the drywall.
- Test for any other hazardous substances such as asbestos, radium, etc. which could potentially be present in the drywall prior to removal.
- Verify removal of impacted materials by a 3rd party QA/QC inspection.

CONCLUSION

There are more questions than answers with respect to the issue of Chinese made drywall. The investigation continues as to the cause of the problem and the source of the contamination. The chemistry behind the corrosion of the metals or whether there are potential bodily injury exposures is still unknown. Questions abound with respect to what types of sampling to perform, sampling methodologies, protocols, and post-remediation criteria. As of today, no legal decisions have been made regarding coverage, liability, damages, or applicable standards.

Therefore, it is prudent for all stakeholders to stay abreast of new Chinese made drywall developments, especially the CPSC sampling results and guidance. In the interim and going forward, it is important to manage the risks related to this issue by reviewing potential exposures for Chinese drywall and other defective drywall. In addition, it is critical that, until more information is known, all precautions be taken to avoid the use of any drywall for which the composition and/or supply source is unknown.

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