

Client Advisory

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CHINESE DRYWALL UPDATE NO. 4 MDL ALERT

To our Friends and Clients:

In our May 7, 2009 advisory we noted that the Federal Judicial Panel for multi-district litigation (MDL) was reviewing the litany of federal court actions which have been filed by various classes of plaintiffs (homeowners, developers and contractors) alleging damage claims associated with the use of defective Chinese Drywall. The purpose of the federal panel's review was to see if those claims might be appropriate for consolidation on discovery and other pre-trial issues before one Federal judge. The MDL allows cases which share a commonality of complex issues involving the same class of defendants to be litigated together for pre-trial purposes before returning to the "home" court where the case was originally filed for case specific issues and trial on the merits. Typically, the MDL will act to conserve resources both for the various Federal Courts as well as for the litigants. The MDL also allows a single Federal court to make uniform decisions on issues involved in each case, which avoids the hazards of piecemeal justice and inconsistent results on the same issues of law and discovery.

On Monday June 15, 2009, the MDL panel issued an order (MDL No. 2047) consolidating all the Chinese drywall product liability lawsuits before U.S. District Judge Eldon E. Fallon (New Orleans, LA). Judge Fallon's court will manage what one attorney estimated could be up to 1,000 homeowner lawsuits nationwide by people who bought homes built with Chinese drywall primarily since 2004/2005. Common to these cases is the Plaintiffs' attorneys allegation that drywall manufactured by [Knauf Plasterboard](#) in at least two of its Chinese plants emits sulphur gas that corrodes wiring and ruins appliances such as air conditioning units. Many homeowners claim that they have been forced to vacate their homes because of breathing difficulty, until such time as their homes have been remediated. (For its part, Knauf has said that there is no evidence that medical problems are caused by the drywall.)

Judge Fallon is an experienced jurist who recently shepherded through the settlement of the Vioxx consolidated class action. If the Chinese drywall matter follows the typical MDL path, then the next few months will be confined to organizational matters (transferring all of the files on all pending cases to New Orleans; organizational meetings with the judge; setting up the Plaintiffs' and Defendants' committees and establishing a schedule for discovery, motion practice and various pretrial activities. Thereafter, discovery will begin in earnest.

Although the live hearings will be held in New Orleans, the discovery will take place where the witness and evidence are located. For now at least it appears that the majority of the witnesses and evidence are located in Florida. This includes, in particular, the majority of Plaintiffs and the majority of the affected residences (which will be subjected to extensive testing).

Separately, it is not clear that the MDL ruling will have any application to pending state court litigation. This is true both with respect to existing cases (as well as to those cases that will be filed over the coming months). As it related to civil actions filed by affected homeowners, we would not be surprised to see a struggle between the Plaintiffs' bar and the Defendants' bar over Federal Court jurisdiction. To the extent that the cases can be successfully removed (and the removal sustained) then the MDL process will sweep these cases (so called "tagalong" actions) to New Orleans where they will be consolidated for pretrial purposes before Judge Fallon. To the extent that the cases cannot be removed to Federal Court (or to the extent that remand motions are successful) then the matters will find their way back to the state courts in which they were originally filed.

Far less certain is the path to be followed by the related insurance coverage actions which (in our view) will not be part of the MDL mandate. Even if these cases are filed and are successfully removed to Federal Court, it does not appear to us that insurance issues fall within the ambit of the MDL. Indeed, the caption of the June 15th order ("In re: Chinese-manufactured drywall products liability litigation") together with the text of the court's order (all actions share factual questions concerning drywall manufactured in China, imported to and distributed in the United States, and used in the construction of houses; Plaintiffs in all actions allege that the drywall emits smelly, corrosive gases") strongly suggests that the scope of the MDL order is limited to products liability actions and has no application to any of the insurance coverage cases that may be filed (whether first party claims by homeowners or those seeking defense and indemnity from the various liability actions that have been filed). We will certainly watch this latter aspect carefully and supplement our analysis in a forthcoming update.