

ALERT

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FLORIDA FEDERAL COURT FINDS NO COVERAGE FOR CHINESE DRYWALL CLAIMS AGAINST BUILDER UNDER CGL POLICY POLLUTION EXCLUSION

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On March 24, 2011, the U.S. District Court for the Southern District of Florida granted summary judgment in favor of insurer, General Fidelity Insurance Co., finding that it had no duty to defend or indemnify its insured-homebuilder for Chinese drywall claims pursuant to the pollution exclusion contained in its commercial general liability policies. *General Fidelity Ins. Co. v. Katherine L. Foster, et al.*, Case No. 09-80743-CIV-MOORE/SIMONTON (S.D. Fla. March 24, 2011). In *General Fidelity Ins. Co.*, General Fidelity filed a declaratory judgment action against Katherine L. Foster and its insured-homebuilder, seeking a declaration that personal injury and property damage claims arising from defective Chinese drywall installed in Foster's home were not covered under the commercial general liability policies General Fidelity issued to the homebuilder.

In the underlying action, Katherine L. Foster alleged that her home in Boynton Beach, Fla., was built using defective Chinese drywall. Foster specifically alleged that the defective drywall contains "excessive amounts of elemental sulfur and strontium and as a result caused damage and corrosion ... to home structure and mechanical systems" and that the excess sulfur causes a "rotten egg smell ... which is capable of ... causing health problems." Foster's action was initially filed in the Southern District of Florida, but was transferred to the Eastern District of Louisiana and consolidated with MDL-2047, *In re Chinese-Manufactured Drywall Prod. Liab. Litig.* (MDL Action).

The commercial general liability policies at issue in *General Fidelity* contained a total pollution exclusion, which provided:

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

General Fidelity asserted that it had no duty to defend the homebuilder in the action filed by Foster because the compounds and sulfide gases released from the defective drywall qualified as "pollutants" and the damages and injury caused were excluded from coverage by the pollution exclusion. The policies at issue defined pollutants as "any solid, liquid, gaseous, thermal, acoustic, electric, magnetic or electromagnetic irritant or contaminant." The policies did not define "irritant" or "contaminant." Looking to the definitions of "irritant" and "contaminant" in Webster's Dictionary to determine their plain meaning, the court held that the compounds released by the sulfur and strontium were pollutants within the meaning of the policy. The court stated:

The presence of the excessive amounts of sulfur and strontium obviously irritates and contaminates. It causes 'pitting and/or tarnishing.' In other words, their presence corrupts the metals. Foster's

description of bodily injuries, ‘respiratory problems, sinus problems, [and] eye problems,’ though vague, cannot escape the inference that the elements caused irritation or inflammation. Simply because the Amended Complaint did not use the specific words in the policy or relevant definitions does not change the analysis – using synonyms and broad terms will not circumvent the plain meaning of the language. *General Fidelity Ins. Co.*, at pp. 8-9.

Citing the Florida Supreme Court decision in *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998), the court found that the pollution exclusion at issue was unambiguous and did not exclude only environmental and industrial pollution. The court held that the injuries and damage sustained from the drywall were within the policies’ pollution exclusion and that General Fidelity had no duty to defend or indemnify its insured-homebuilder.

The *General Fidelity* decision is consistent with prior Florida case law, which has interpreted pollution exclusions broadly rather than restricting their application to traditional environmental and industrial pollution. *General Fidelity* is important as it is the first case to interpret the application of a pollution exclusion to Chinese drywall claims in the third-party context. This decision is of great significance to insurers handling Chinese drywall claims, particularly those with policies governed by Florida law.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact William P. Shelley, Chair of the Global Insurance Group, at wshelley@cozen.com or 215.665.4142, or Charles J. Jesuit, Jr. at cjesuit@cozen.com or 215.665.6967.