

Virginia Supreme Court Ends Chinese Drywall Debate

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We are pleased to report that the Virginia Supreme Court has tacked down – or, more appropriately, “drywall-ed in” – the issue of whether a pollution exclusion in a property insurance policy precludes coverage for Chinese drywall claims under Virginia law. In the recent *en banc* decision of *Travco Insurance Co. v. Larry Ward*, No. 120347 (Va. Nov. 7, 2012), the court held that sulfuric gas emitted from defective drywall constituted a “pollutant,” and, therefore, the pollution exclusion in a homeowners’ policy barred coverage for a claim for damages allegedly resulting from Chinese drywall.

The procedural history of the *Travco* case is crucial to understanding the import of the court’s decision. In May 2009, homeowner Larry Ward (Ward), began experiencing problems with his newly constructed Virginia Beach home and discovered that the home contained defective Chinese drywall. Ward filed a claim with his homeowners’ carrier, Travco Insurance Company (Travco), alleging that the drywall installed in his home emitted sulfide gases and toxic chemicals, which created noxious odors and caused health issues and property damage. Travco denied Ward’s claim and brought a declaratory judgment action in federal court in Virginia, in which it claimed the alleged damage was excluded from coverage by the terms of Ward’s homeowners’ policy, specifically, the policy exclusions for: (1) pollutants; (2) faulty, inadequate or defective materials; (3) latent defect; and (4) rust or other corrosion. In June 2010, the district court held that the policy did not provide coverage and granted Travco summary judgment. Ward promptly appealed the ruling to the U.S. Circuit Court of Appeals for the Fourth Circuit, arguing the exclusions in the policy were ambiguous and overbroad. With regard to the pollution exclusion, he argued it was inapplicable because the process by which elemental sulfur is emitted from the drywall does not constitute a “discharge” as that term is used in the pollution exclusion. The court of appeals, in turn, certified to the Virginia Supreme Court a question regarding whether each of the four exclusions was unambiguous and reasonable.

On November 1, 2012, the Virginia Supreme Court held all four of the policy exclusions were unambiguous and reasonable and precluded coverage for Ward’s claim. The court stated that “each of the four exclusions is unambiguous and reasonable in its form, scope and application and excludes damage resulting from the Chinese drywall from coverage.” With respect to the pollution exclusion, the court explained that Ward himself described the sulfuric gas as “toxic” and alleged that it caused “skin rashes,” “lesions,” “sinus congestion,” and “nosebleeds.” The court stated that “[t]hese properties plainly place the sulfuric gases from the residence within the definition of ‘irritant or contaminant’ contemplated by the policy and commonly understood.” Accordingly, the court held that the sulfuric gases at issue constituted a “pollutant” within the purview of the exclusion and that the exclusion precluded coverage for any damage resulting from the drywall’s gaseous emissions.

Although lower courts in other states have previously held the pollution exclusion bars coverage for Chinese drywall claims in the first-party context, Virginia is the first state to issue a supreme court ruling on this matter. Accordingly, the *Travco* decision not only sets a precedent for disposition of the many Chinese drywall-related lawsuits currently pending in Virginia, but also sets the tone for other states – most notably Florida – where lower state and federal courts have consistently ruled in the same manner as Virginia, but the Florida Supreme Court has yet to tackle the issue.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact:

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