

Pennsylvania Makes Its Mark on National Chinese Drywall Coverage Dispute with "One Occurrence" Decision

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On February 15, 2013 a Pennsylvania federal district court held that the shipment of defective drywall from China to the United States constituted one "occurrence" for purposes of insurance coverage, and the occurrence took place when the damage caused by the drywall manifested itself in the residences or buildings of the underlying plaintiffs. With this ruling, Pennsylvania joins Virginia as one of the few states to opine regarding the number of occurrences in the Chinese drywall context.

Devon International, Devon International Industries, and Devon International Group (collectively, Devon), imported a single order of drywall from China to Pensacola, Fla. Unbeknownst to Devon, the drywall was defective, as it contained an inordinately high amount of sulfur, and a few years after selling the drywall to distributors in the United States, Devon was hit with a multitude of Chinese drywall lawsuits in various jurisdictions.

As is common with Chinese drywall cases, the plaintiffs in the underlying lawsuits generally alleged the sulfur emitted by the drywall damaged their real and personal property. Faced with these lawsuits, Devon turned to its liability insurer, Cincinnati Insurance Company (Cincinnati) to defend and indemnify it under the liability policies issued to it by Cincinnati for two consecutive policy periods. Although Cincinnati accepted Devon's tender, the parties disagreed as to whether the underlying claims against Devon arose out of a single occurrence or multiple occurrences. Litigation between Devon and Cincinnati ensued.

In *Cincinnati Ins. Co. v. Devon International, Inc.*, No. 11-5930 (E.D. Pa.), Judge Gene Pratter considered cross-motions for summary judgment filed by Devon and Cincinatti. The parties agreed that Pennsylvania law governed the coverage dispute. Accordingly, Judge Pratter discussed Pennsylvania's approach to determining the number of occurrences for purposes of insurance liability, and specifically, the decision in *Donegal Mutual Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007), in which the Pennsylvania Supreme Court tackled this issue for the first time. As Judge Pratter explained, the *Baumhammers* court noted there are two key competing approaches for determining the number of occurrences – the majority cause approach and the minority "effects" approach – and ultimately concluded that the cause approach was the proper method. Judge Pratter noted that, under the "cause" approach, if all the claims against Devon stem from one proximate cause, and Devon had some control over that cause, then there is a single occurrence.

After consideration of the facts, Judge Pratter held that "[h]ere, all the injuries to the underlying plaintiffs and claims against Devon originate from a common source: Devon's single purchase and shipment of defective drywall from Shandong, [China]. Moreover, Devon had some control over the cause of the injuries, in that it chose to purchase and distribute the defective drywall. Therefore, the Court finds that there is only one 'occurrence' for purposes of insurance coverage." Judge Pratter further held that since the effects of the imported drywall manifested themselves during the first policy period, the single occurrence took place during that policy period, even though for some claimants, no damage would have manifested until the second policy period.

The Eastern District of Pennsylvania's ruling in *Cincinnati Ins. Co. v. Devon International, Inc.* is significant because it provides rare guidance on the number of occurrences issue in the Chinese drywall context. To date, only one other court in the nation has considered the issue. (*Dragas Management Corp. v. Hanover Insurance Co.*, No. 2:10-cv-547 (E.D. Va., July 21, 2011)). The holding also provides guidance for Pennsylvania courts (and other courts that may need to interpret Pennsylvania law) regarding the number of occurrences issue in the liability context in general, which determines the amount of policy limits available to an insured, as well as the applicable deductibles.

The import of this decision in the Chinese drywall context is, however, limited for several reasons. First, the decision relies on Pennsylvania law and the majority of Chinese drywall coverage disputes involve insureds and damage located in other jurisdictions where Pennsylvania law will not likely apply. Second, the decision is factually limited because distinctions

may be drawn between the insured in *Devon International*, who had one single purchase and shipment of the defective drywall from China, and distributors further down the supply chain, as well as the drywall installers who have many such shipments. Third, the decision's overall impact is greatly limited by the recently approved global settlement in the Chinese Drywall Multi-District Litigation, which resolves the vast majority of third-party Chinese drywall cases. However, some plaintiffs have opted out of the global settlement, and to the extent those claimants bring suit in Pennsylvania or Pennsylvania has a strong nexus to their case, the *Devon International* decision may be critical to the disposition of those cases.

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 Andrea Cortland at acortland@cozen.com or 215.665.2751.