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CHINESE DRYWALL AND STATUTORY INDEMNITY: THE INTERSECTION OF CONSTRUCTION LAW AND PRODUCTS LIABILITY

Anyone who has paid attention to construction news in the last 6 months knows that one of the hot topics has been Chinese drywall. According to the reports, tainted drywall manufactured in China emits potentially toxic chemicals including carbon disulfide, carbonyl sulfide, and hydrogen sulfide. In larger amounts, these emissions may create a health risk and the defective drywall emits a sulfur-like odor. These toxic materials also may corrode metals within a building, damaging wires, pipes, air conditioners, electronic equipment, etc.

As a result of these defects, Chinese drywall problems have led to a flurry of litigation. If the drywall is in fact defective, the manufacturers may be faced with liability. However, when litigation arises, you can rest assured that the manufacturer will not be the only named defendant. At a minimum, the builder would likely be named as a co-defendant in the lawsuit. Suppliers would probably be included as defendants as well. In fact, more than likely, every party from the painters up the chain to the manufacturers would be named in a lawsuit.

What if your company had no idea it was dealing with defective drywall but still finds itself in the middle of litigation? What if your company didn't know it was supplying a bad product. What if you just installed the materials your long-time supplier provided? Is there any protection for you in this situation, or do you simply have to live with a big target on your company's back?

While there has certainly been an increase in tainted Chinese drywall litigation, the good news for builders and those in the construction industry is that there may be statutory indemnity available to pass along the costs of litigation to the manufacturers. In Texas, builders have Chapter 82 of the Texas Civil Practice & Remedies Code to lean on. In short, Chapter 82 (more specifically Section 82.002) requires a manufacturer to indemnify and hold harmless a seller against a loss arising out of a "products liability action," except for any loss caused by the seller's own negligence, intentional misconduct, or negligently modifying or altering the product.

For purposes of this provision, a "seller" is a person who is engaged in the business of distributing or otherwise placing into the stream of commerce a product or any component part. The term "seller" is not limited to the traditional role of wholesale distributor or retailer that you would typically associate with the term. A "products liability action" is any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product.

The statutory indemnity required by Chapter 82 of the Texas Civil Practice & Remedies Code applies regardless of the way in which the action is concluded and is in addition to any other duties to indemnity (such as a contractual duty). This indemnity also includes attorney's fees and court costs.

"Indemnity is great, but I still don't want a judgment against my company," you may say. You may still be in luck. Generally speaking, a seller that did not manufacture a product is not liable for damages sustained by a claimant related to that product unless the claimant proves:

1) that the seller participated in the design of the product;

2) that the seller altered or modified the product and the claimant's harm resulted from that alteration or modification;

3) that the seller installed the product, or had the product installed, on another product and the claimant's harm resulted from the product's installation onto the assembled product;

4) that:
   a) the seller actually knew of a defect to the product at the time the seller supplied the product; and
   b) the claimant's harm resulted from the defect;

5) that the manufacturer of the product is:
   a) insolvent; or
   b) not subject to the jurisdiction of the court

So how do these statutory provisions actually translate into indemnity or liability avoidance for tainted Chinese drywall claims?

If you're the builder and you've been sued because tainted drywall caused damage to a structure (or its components) or personal injury, you can probably seek indemnity from the drywall manufacturer (assuming the builder was not involved in the design or warnings on the product). Similarly, if you're a painter or sheetrocker who simply installed the materials without any material alteration, then you too would probably be able to seek indemnity from the manufacturer. In either situation, your company would probably not be liable if it did not know about the allegedly defective product (indemnity notwithstanding).

Product liability law takes into consideration the innocent seller and carves out protections for them so they are not liable for defective products they have no real hand in creating or warning about. But this indemnity is not automatic–it should be formally requested of the manufacturer within a reasonable time of the claim. Even then, the would-be indemnitor can deny the request, forcing the innocent seller to seek enforcement through litigation. The good news, however, is that attorneys' fees are typically recoverable when enforcing an indemnity request.

Even though products liability and construction law aren't typically though of together, the current Chinese drywall situation shows that there can be an overlap of these two areas of law. It is important to know your rights and obligations so you are not left liable for someone else's mistake.

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