



[Good Deeds Still Going Punished? \(Dragas Part III\)](#)



If you recall, a bit over a year ago [I posted](#) regarding the [Builders Mut. Ins. Co. v. Dragas Management Corp.](#) litigation in the [Eastern District of Virginia](#) federal court. Back in May of 2010, the Court dismissed a suit by a contractor that voluntarily created a remediation plan relating to [Chinese drywall](#) found in the homes it constructed. In that suit, the contractor, Dragas, sued its insurance carrier which

had denied it coverage. The Court reasoned that no evidence or factual support was shown that any litigation or threatened litigation preceded the voluntary remediation. In [Dragas II](#), the Court [denied the motion to dismiss](#) because the contractor plead enough facts to survive the motion to dismiss.

Just when you, as a contractor, may have thought that you could use the Dragas opinions as some protection should you decide to "do the right thing" and fix issues, think again. In [Dragas III](#), the court once again dismissed the contractor's case. The court reasoned that:

[t]he mere threat of litigation, without more, constitutes a "legal obligation to pay" under the insurance policies, and sums paid because of these "threats" cannot thereby constitute damages which the insurer must bear.

The Virginia court further stated that without a strict liability statute, settlement, final judgment or some other "coercive legal obligation," Dragas had no legal obligation to undertake remediation. Therefore, the CGL policies did not apply.

In short, the Court essentially reinstated the [Gordian Knot/catch-22](#) for builders seeking to give good customer service. As [discussed by Tim Hughes](#) (@timrhughes) relating to Dragas II, this decision puts Virginia contractors in the unenviable position of fixing a problem and risking their insurance coverage or waiting for a lawsuit (possibly friendly, possibly otherwise) before moving forward with any fix. While this seems to be a perverse result (i. e. a disincentive to correct problems), it is presently the law in the Eastern District of Virginia, and construction contractors and lawyers alike should review the opinion (linked above).

Because of decisions like this one, contractors and other construction professionals in Virginia would be wise to be sure that they understand their insurance coverage and that they consult with an [experienced construction lawyer](#) prior to undertaking any remedial actions.

Image via [Wikipedia](#)

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.