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Chinese-Drywall Cases And Their Impact On Liability-Insurance Carriers In Settling Multiple Claims In Good Faith Against Their Insureds In Certain State Courts

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Commentary

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I. Introduction

Many insurers that issued liability policies to home-builders in the southeast United States are receiving an influx of Chinese-drywall claims. Between 2004 and 2007, an estimated 100,000 homes in more than twenty states were built with defective drywall imported from China.[1] People who own homes with defective Chinese drywall are making claims and bringing lawsuits against manufacturers, suppliers, general contractors and subcontractors. In turn, those entities are forwarding those claims and lawsuits to their general liability insurers, asking for a defense and indemnity.

As of July 27, 2010, the U.S. Consumer Product Safety Commission ("CPSC") had received 3,482 incident reports related to drywall from thirty-seven states, the District of Columbia, Puerto Rico and American Samoa.[2] More than 90% of the reports are from five states — Florida (58%), Louisiana (19%), Mississippi (6%), Alabama (5%) and Virginia (4%).[3] In addition to the consumer reports on drywall received by the CPSC, its outreach efforts and investigations have secured information from many other sources, including state governors, county governments, importers, builders, distributors, installers and other parties in the drywall-distribution chain.[4] Combining the information from all sources and eliminating duplicates, the CPSC estimates the number of households that have registered drywall complaints at approximately 6,300.[5]

Defective Chinese drywall emits gases that reportedly corrode metals such as copper and silver.[6] This is alleged to adversely affect HVAC systems, kitchen appliances, computers and electrical wiring, among other things.[7] Most Chinese-drywall claimants allege property-damage claims. Some claimants are also alleging bodily injuries. The science of whether gases emitted from defective Chinese drywall cause any appreciable bodily injury is not fully understood yet.[8]

Where liability is clear and there is insurance coverage, insurers in the affected parts of the United States will probably face the task of settling multiple claims involving property damage, and possibly bodily injuries, that will exceed the policy limits. Two bellwether trials in federal Multidistrict Litigation ("the MDL") recently determined that full remediation of the affected homes was the only available option.[9] Full remediation pushes the value of each potential property-damage claim significantly higher. These

high-value potential claims make difficult issues for insurance carriers that have to settle them.

In the first MDL bellwether trial addressing property damage, the court endorsed a remediation plan that amounted to an average cost of $86 per square foot.[10] In the second MDL bellwether trial addressing property damage, the court endorsed a remediation plan that amounted to an average cost of $81 per square foot.[11] Accordingly, a 2,000-square-foot home could cost over $160,000 to remediate. This does not necessarily include damages to personal property, moving expenses or temporary living expenses, among other things.

Where a jurisdiction treats construction defects as an "occurrence" under a liability policy, many such policies have some type of pollution exclusion. A pollution exclusion may act as the primary obstacle to coverage. In the early 1970s, many general liability policies used the "sudden and accidental" pollution exclusion.[12] The pollution exclusion applied, by its own terms, only to discharges of pollutants "into or upon land, the atmosphere or any water course or body of water."[13] The insurance industry subsequently drafted the "absolute" pollution exclusion.[14] The "absolute" pollution exclusion was drafted to exclude liability for government-directed cleanup of damage to the natural environment.[15] In 1988, the insurance industry introduced the "total" pollution exclusion.[16] This eliminated products-completed operations coverage and certain off-site discharges.[17] Many liability policies today have modified versions of either the "absolute" pollution exclusion or the "total" pollution exclusion. These modified versions may contain certain exceptions to the exclusions.

Florida, Louisiana and Mississippi courts have all acknowledged that a construction defect can be an "occurrence" under a general liability policy.[18] Each of these jurisdictions treats pollution exclusions differently. The Supreme Court of Louisiana, for instance, has held that the total pollution exclusion applies only to traditional environmental pollution.[19] The Supreme Court of Florida has held that an absolute pollution exclusion is not limited to traditional environmental pollution and can apply in other settings, such as inside an office building.[20] State courts in Mississippi have not addressed pollution exclusions. One federal court applying Mississippi law, however, ruled that an "absolute" pollution exclusion is not limited to traditional environmental pollution so that it can apply to damages and injuries sustained indoors.[21]

II. Florida

Even though Florida courts will generally apply the plain language of a pollution exclusion, some pollution exclusions contain modified language that does not permit application of the pollution exclusion in certain settings. Thus, such modified exclusions may not apply to Chinese drywall claims. In scenarios where liability coverage is available, insurers may be faced with how to best settle multiple claims arising out of Chinese drywall where there are limited policy proceeds.

A. Interpleader Is Not An Option For A Liability Insurer Faced With Multiple Claims

At least one Florida state court has held that an interpleader action is not available to liability insurers faced with multiple claims from multiple claimants.[22] The court held this because an essential prerequisite to an interpleader is that the stakeholder "should actually be liable to only one of the claimants."[23]

The court reasoned that the individual having the liability (the insurer) may be convenienced, but the prospective claimants will be inconvenienced, depriving them of the right to pursue their own claims and forcing them into antagonistic positions with the other claimants.[24] If the claimants were all claiming the insurance proceeds of a single fund, and if liability could only exist as to only one of the claimants, an interpleader would be appropriate.[25]

A liability insurer's inability to interplead the proceeds into a court registry leaves insurers in Florida with the task of having to determine how to distribute the policy limits to multiple claimants, with bad-faith concerns always looming in the background.[26]

B. An Insurer's Duties And Obligations In Settling Multiple Claims

In Florida before 2003, insurers could generally settle in good faith with claimants as they came along. In *Harmon v. State Farm Mutual Automobile Insurance Co.*,[27] Florida's Second District Court of Appeal suggested that an insurer was free to settle claims in a

multiple-claim scenario on a first-come, first-served basis. Where multiple claims arose out of one accident or occurrence, the liability insurer had the right to enter reasonable settlements with some of those claimants, regardless of whether the settlements depleted or even exhausted the policy limits to the extent that one or more claimants were left without recourse against the insurance company.[28] Under this scenario, when faced with multiple claims, the insurer had the right to enter into reasonable settlements, assuming that the claims were not overpaid.

The Fifth District Court of Appeal followed *Harmon* in *Gathings v. West American Insurance Co.*[29] In *Gathings*, a named insured under an uninsured/underinsured motorist ("UM") policy brought a bad-faith suit against his UM carrier after the UM carrier paid the larger portion of the policy limits to the named insured's passengers. Of a $50,000 policy, the insurer paid $37,500 to the passengers and offered the remaining $12,500 to Gathings, who rejected the offer. Gathings attempted to distinguish *Harmon* by pointing out that Harmon's son, unlike Gathings, was not a named insured on the policy. Notwithstanding, the Fifth District found that the UM carrier's duty to its insureds was governed by the contract and that nothing in the contract required the insurer to notify the named insured before settling the claims of other "covered persons" under the contract.[30]

A Fourth District Court of Appeal decision, *Farinas v. Florida Farm Bureau General Insurance Co.*,[31] caused a split of authority among the Second, Fifth and Fourth District Courts of Appeal in Florida regarding an insurer's duties in settling multiple claims. The appeal arose from litigation regarding a February 23, 1996 car accident. Nicholas Copertino lost control of his car and crossed a median, hitting an oncoming car. The collision resulted in the deaths of five teenagers and severe injuries to another seven, including Copertino and a 14-year-old girl who was rendered a quadriplegic. Copertino's liability for those resulting injuries was not in question.

Copertino was covered by his father's Florida Farm Bureau General Insurance Company ("Farm Bureau") policy with bodily-injury limits of $100,000 per claim and $300,000 per accident. With the five death claims and seven significant bodily-injury claims, the policy limits were plainly inadequate.

Farm Bureau settled for the policy limits with Lisa Boccia, the driver of the other car, and the Rashidian and Cordes estates, two of the death claims, by March 8, 1996. After exhausting the limits, Farm Bureau filed a declaratory judgment action in July 1996 against the insureds, the Copertinos, to determine whether it had any further duty to defend the Copertinos after having paid the policy limits. The remaining claimants intervened and ultimately filed third-party bad-faith actions alleging that Farm Bureau entered into settlements without due regard for the interests of its insureds.

Farm Bureau moved for summary judgment against its insureds and the remaining claimants. The insureds cross-moved for summary judgment. The trial court granted summary judgment to Farm Bureau as to the insureds and remaining claimants and denied the Farinases' summary judgment. The insureds and the remaining claimants sought review of the summary judgment granted to Farm Bureau, and the Farinases also sought review of the denial of their summary judgment.

The *Farinas* court isolated the "reasonableness" component of *Harmon*, and held that the guidelines provided by both the *Harmon* case and the Supreme Court of Florida case of *Boston Old Colony Insurance Co. v. Gutierrez*[32] apply to multiple-claimant situations.[33] *Farinas* cited approvingly to a federal case, *Liberty Mutual Insurance Company v. Davis*.[34] In *Davis*, the Fifth Circuit, applying Florida law, held that an insurer should not exhaust available policy proceeds without an attempt to settle as many claims as possible.[35]

Boston Old Colony requires that the insured advise the insured of settlement opportunities, advise as to the probable outcome of the litigation, warn of the possibility of an excess judgment and advise the insured of any steps that she may take to avoid an excess judgment.[36] The insurer must also investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.[37]

The *Farinas* court extended the *Boston Old Colony* guidelines to a multiple-claimant situation by saying: "*Boston Old Colony* provides that an insurer must

conduct a full investigation of all competing claims arising out of an accident before endeavoring to settle any one individual claim, while keeping the insured informed at all junctures of the process."[38] *Boston Old Colony* did not address multiple, competing claims, however. Instead, *Boston Old Colony* only required the insurer, among other things, to "investigate the facts."

According to *Farinas*, an insurer must fully investigate all claims arising from a multiple-claim accident, keep the insured informed of the claim-resolution process and minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement. An insurer still has discretion in how it elects to settle claims, and may even choose to settle certain claims to the exclusion of others, provided this decision is reasonable and in keeping with its good-faith duty. Unfortunately, the court did not define what is "reasonable" or establish any standards that might affect that determination.

The Middle District of Florida applied the *Farinas* factors to a multiple-claimant situation under Florida law.[39] In *General Security National Insurance Co. v. Marsh*, the insurer settled a wrongful death claim, exhausting the policy limits even though there was a remaining serious injury claim. The evidence indicated that the injury claim was worth less than the wrongful-death claim. Under those circumstances, the insurer was entitled to summary judgment applying the standards announced in *Farinas*.[40] The court found that the insurer acted reasonably and in good faith when it settled with the deceased claimant's estate to the exclusion of the injured survivor.[41]

Given the split of authority that it created among the district courts of appeal in Florida regarding an insurer's duty to settle multiple claims, the *Farinas* court certified the following question to the Supreme Court of Florida:

> In an automobile accident scenario involving clear liability, multiple claims, and inadequate policy limits, does insurance good faith law require that an insurer reasonably investigate all claims prior to payment of any claim, keep the insured informed of the claims resolution process, and attempt to minimize the magnitude of possible excess judgments against the insured?[42]

The Supreme Court of Florida never addressed the certified question from the *Farinas* court. Although *Farinas* leaves many unanswered questions, it does demonstrate that even a liability policy with relatively high limits can be reduced to a low-limits policy in a multiple-claim situation.

III. Louisiana

In light of *Doerr v. Mobil Oil Corp.*,[43] a liability insurer may not be able to rely upon a pollution exclusion to preclude coverage under a general liability policy in Louisiana for damages arising out of Chinese drywall. Liability insurers that insure homebuilders in Louisiana may ultimately be faced with having to settle multiple claims with limited policy limits.

A. Interpleader Is A Limited Option For A Liability Insurer Faced With Multiple Claims

Louisiana has a concursus statute that allows a liability insurer to interplead the policy funds into the registry of the court. Louisiana's concursus statute provides:

> **Art. 4652. Claimants who may be impleaded**
>
> Persons having competing or conflicting claims may be impleaded in a concursus proceeding even though the person against whom the claims are asserted denies liability in whole or in part to any or all of the claimants, and whether or not their claims, or the titles on which the claims depend, have a common origin, or are identical or independent of each other.
>
> No claimant may be impleaded in a concursus proceeding whose claim has been prosecuted to judgment. No person claiming damages for wrongful death or for physical injuries may be impleaded in a concursus proceeding, except by a casualty insurer which admits liability for the full amount of the insurance coverage, and has deposited this sum into the registry of the court.[44]

The concursus statute has limited application, though. The Supreme Court of Louisiana observed that relief sought under the concursus statute applies only in cases of death or bodily injury.[45] The court specifically stated that the statute does not apply to property-damage cases.[46] In concursus actions involving cases of death or personal injury, the liability insurer must admit liability when depositing the insurance proceeds with the court.[47] In bodily-injury cases, a liability insurer may not want to admit liability because doing so might adversely affect the rights of the insured. Doing so might also adversely affect a carrier's rights of recovery against the liable parties under subrogation or indemnity principles.

B. An Insurer's Duties And Obligations In Settling Multiple Claims

In Louisiana, a liability insurer may settle multiple claims in good faith as they come along, exhausting the policy limits to the exclusion of other remaining claims.

In *Richard v. Southern Farm Bureau Casualty Insurance Co.*,[48] the Supreme Court of Louisiana held that where there are multiple claims arising out of an accident, the liability insurer, in entering compromise settlements may exhaust the entire fund. Thus one or more of the injured parties may find that they have little or no recourse against the insurer.[49] Such settlements must be made in good faith and be reasonable.[50]

The courts have not defined what "reasonable" means in the context of an insurer's settlement. The courts also have not addressed whether "reasonable" goes to the amount of the insurer's settlement. At least a couple of courts, however, have held that if the settlement was not the result of the insurer acting arbitrarily or capriciously toward its insured, there is no bad faith.[51] The determination of whether an insurer acted arbitrarily or capriciously is one of fact, which should not be disturbed on appeal unless it is manifestly erroneous.[52] Presumably, a reasonable settlement must be reasonable in amount and not an overpayment.

Louisiana courts have consistently followed *Richard*. The Supreme Court of Louisiana, on rehearing, expressly affirmed the holding of *Richard* in *Hotlzclaw v. Falco, Inc.*[53] *Holtzclaw* concerned a motor-vehicle accident involving a car and boat trailer that was struck by a petroleum truck while crossing an intersection. After colliding with the car, the petroleum truck hit a nearby Exxon service station, causing property damage. Oller was driving the car. Falco, Inc., owned the petroleum truck that Millican was driving.

The Hartford insured Oller. The Hartford's insurance policy provided a limit of $5,000 on coverage for property damage. Multiple claimants, including Holtzclaw, sustained property damages through the insured's negligence. The Hartford settled with all claimants except Holtzclaw, exhausting the $5,000 policy limits. The trial of Holtzclaw's claim resulted in a judgment for $4,500 against the insured and The Hartford.

The case presented the question of what remedy, if any, a claimant has against an alleged disproportionate disposition of the policy proceeds through settlements by the insurance company with other claimants.[54] The court observed that a sound approach to solving this problem requires that it be considered in relation to another: has the company any duty to the insured regarding settlement of multiple claims arising from a single accident?[55] The court said that if both questions are answered affirmatively, then the definition of the insured's rights against the company must be consistent; they must be such that it is possible for a company to select a course of action which will fulfill both obligations.[56]

The *Holtzclaw* court described that the insurance policy at issue contained a clause that gave the insurer the right to enter compromise settlements and, in doing so, to deplete and exhaust the insurance fund.[57] Specifically, the clause provided that "the company may make such investigation and settlement of any claim or suit as it deems expedient."[58] Louisiana is a direct-action jurisdiction governed by a direct-action statute that provides that a claimant's action shall be "within the terms and limits of the policy."[59] The court noted that there was no expression within the legislation or intention implicit in the underlying reasons for its enactment that requires the courts to regard the insurer's right to settle as anything other than a term or limit of the policy.[60] The court concluded that the direct-action statute does not give a plaintiff a right of action which is superior to the settlement clause of the insurance policy.[61]

The court rejected the argument that the direct-action statute grants to each injured person ownership of or

a privilege upon a pro-rata share in the insurance proceeds which become available after liability of the insured tort-feasor is established.[62] The court reaffirmed that the direct-action statute does not subordinate the insurer's right-to-settle clause to a claimant's right of action.[63] The court described that the remedial purpose of the statute was to remove obstacles to the claimant's recovery, not to create for him a privilege or an ownership interest in insurance proceeds.[64]

The court found that under the circumstances, there was insufficient evidence to support a finding that The Hartford acted unreasonably or without good faith with respect to Holtzclaw, the remaining claimant who was left out of the settlement.[65]

The lingering question after *Richard* and *Holtzclaw* is what constitutes acting "reasonably" and in "good faith" in negotiating settlements with multiple claimants under Louisiana law? Courts have not directly answered that question other than saying that one must look to the facts of the individual case.[66]

In Louisiana, it is generally accepted that an insurer must carefully consider the interests of its insured, instead of only its own self-interests, when handling and settling claims in order to protect the insured from exposure to excess liability. While the nature of the insurer's obligations toward the insured is not clearly defined, the courts have recognized that a liability insurer owes its insured a minimum duty to act in good faith and to deal fairly.[67] The courts have not defined what is meant by an insurer having to deal fairly toward its insured. The *Holtzclaw* court, for instance, noted that in deciding the case before it "a full delineation of the duty of a liability insurance company to its insured [was] not necessary."[68]

Post-*Holtzclaw* cases, like *Smith v. Audubon Insurance Co.*,[69] have reiterated that an insurer has a duty to act in good faith and to deal fairly when handling and settling claims in order to protect the insured from excess liability exposure. The *Smith* court, however, did not define what "deal fairly" means. Instead, the Supreme Court of Louisiana said that "the determination of whether the insurer acted in good faith turns on the facts and circumstances of each case."[70] Notably, the court did not address what goes into the determination of "dealing fairly." The court then discussed that the determination of good or bad faith in an insurer's decision to proceed to trial involves the weighing of several factors, including, but not limited to, the probability of the insured's liability, the extent of damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation and the openness of communications between the insurer and the insured.[71] The court then said that because the determination of a liability insurer's bad-faith failure to settle in excess-judgment cases "is so fact intensive, great deference must be accorded to the trier of fact."[72]

IV. Mississippi

According to the CPSC's latest report, Mississippi is third in the nation for reported claims of Chinese drywall.[73] While a federal court applying Mississippi law applied a standard "total" pollution exclusion indoors,[74] the state courts have not addressed the applicability of a pollution exclusion in a general liability policy. Aside from the unanswered coverage questions, it is likely that many insurers will be faced with multiple claims arising out of Chinese drywall.

A. Interpleader Is Available To A Liability Insurer Faced With Multiple Claims

Mississippi recognizes interpleader that allows a remedy to a liability insurer faced with multiple claims. [75] The relevant portion of the interpleader rule provides that "[p]ersons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."[76]

The comments to Rule 22 of the Mississippi Rules of Civil Procedure describe that interpleader can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund.[77] The comments further describe that this situation "frequently arises when an insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy."[78] The comments reason that if an insurance company is required to await reduction of claims to a judgment, the first claimant to obtain a judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before the other claimants establish their claims.[79] The comments conclude by saying: "The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy."[80]

B. A Timely-filed Interpleader Action May Insulate An Insurer From Bad Faith

Mississippi courts have followed the dictates of Rule 22 and its comments by allowing liability insurers to interplead funds into the registry of the court.[81] The Supreme Court of Mississippi held in *Stamps v. Estate of Watts* that an automobile insurer that filed an interpleader action rather than paying the insurance proceeds to the insured did not act in bad faith.[82]

In *Stamps*, on the night of March 4, 1984, the insured was driving a van on a highway in Mississippi when a car veered across the center line into the opposite lane of traffic and collided head-on with the insured's vehicle. The driver in the other vehicle and a passenger in his car were killed in the collision. There were fourteen passengers in the insured's van, members of a gospel choir returning from a singing engagement. Thirteen of the passengers received injuries. The insured suffered injuries to her right knee and right arm. She underwent surgery. Her medical bills exceeded $15,000.

The insured notified her insurance carrier, Travelers, about the accident on March 13, 1984, and she retained an attorney. She claimed entitlement to medical and property-loss payments. The policy also provided uninsured-motorist coverage in the amount of $10,000 per person and $20,000 per accident. It further provided that the amount of uninsured-motorist benefits payable would be the policy limits less any amount paid to the insured from any other policy.

The insured made a claim against the other driver's carrier, Thurston Fire & Casualty Insurance. The policy limits under the Thurston policy were $10,000 per person, $20,000 per accident for bodily-injury liability. The policy also covered $5,000 in property loss. Thurston indicated that it would pay the policy limits. No one disputed that the insured's injuries and damages exceeded the coverages in both the Travelers and Thurston policies. Twelve passengers in the insured's vehicle presented claims that amounted to $265,000.

The insured's policy with Travelers covered her van and another vehicle owned by her upon which a premium was paid, and she contended that she was entitled to "stack" the uninsured-motorist coverage on her claim, raising the policy limit to $20,000 per person and $40,000 per accident. The insured told Travelers that she would settle no part of the claim unless Travelers agreed to pay the "stacked" policy limit less the policy limit of decedent's insurance (that is, $40,000 minus $20,000), resulting in a net amount of $20,000.

Travelers retained an attorney to advise: (1) whether its insured was entitled to uninsured-motorist benefits, and (2) if so, how the benefits should be distributed among the several injured parties. Upon advice of counsel, Travelers filed an interpleader action in federal court, the Southern District of Mississippi.

The insured thereafter filed suit against Travelers in state court, alleging tortious breach of contract by bad faith refusal to pay proceeds, breach of fiduciary duties and fraud in the inducement. She sought $20,000 in uninsured-motorist payments, $500,000 in general damages, and $3,000,000 in punitive damages. The insured contended that she was entitled to submit the issue of bad-faith and punitive damages to the jury because of Travelers' refusal to pay the $1,000 medical benefit and because Travelers declined to pay her the $20,000 uninsured-motorist benefits.

Travelers moved for summary judgment against its insured in the state-court action. The insured filed a cross-motion for summary judgment against Travelers. The state court ruled that the insured was entitled to that portion of the uninsured-motorist proceeds to be determined by the federal court in the interpleader action, together with the policy limit of $1,000 in medical payments with interest and held that the Travelers acted reasonably and without bad faith in seeking a judicial determination by interpleader. Accordingly, the court entered summary judgment in favor of Travelers, dismissing with prejudice the counts of tortious breach, breach of fiduciary duties and fraud in the inducement.[83]

The court observed that where an insurance carrier denies or delays payment of a valid claim, punitive damages will not lie if the carrier has a reasonable cause for such denial or delay.[84] Thus, where the parties dispute the existence and legitimacy of the carrier's reason for delay or denial, these issues are ones of material fact, and the plaintiff is entitled to have a jury pass upon his claim for punitive damages if rea-

sonable minds could differ as to the legitimacy of the carrier's reason.[85] Determination of whether reasonable minds could differ on this issue is a question for the trial judge.[86]

In the case before it, the court found that there was no genuine issue of material fact that could be submitted to the jury on the general question of bad faith in the failure to pay the medical-benefits and uninsured-motorist coverage to the insured.[87] Therefore, the court affirmed the judgment of the lower court.[88] The court found that Travelers did not act in bad faith by interpleading the policy proceeds with the court.

In another case, the Supreme Court of Mississippi found that an insurer's delay in filing an interpleader action amounted to bad faith. In *Travelers Indemnity Co. v. Wetherbee*, the court held that a punitive-damages award was correctly granted against the insurer where coverage was not paid for eight unexplained months, even after the insurer was notified of the insured's financial suffering.[89] The insurance company in *Wetherbee* paid $6,000 into the court for contents loss eight months after the destruction occurred because it was company policy not to settle one claim without the settlement of all other claims. The court held that the tendering of the policy proceeds into court eight months later was bad faith.[90]

In Mississippi, a liability insurer may insulate itself from bad faith by filing an interpleader action when faced with multiple claims. An interpleader action alone, however, will not insulate the insurer from bad faith, particularly if the insurer unreasonably delays in instituting that action.

V. Conclusion

Many liability insurers that insure homebuilders, drywall subcontractors and others affiliated with Chinese drywall are more than likely facing numerous claims for property damage and bodily injury arising out of defective Chinese drywall. Where there is coverage under the liability policies, aside from any allocation and/or risk-transfer issues, it is likely that the liability insurers will ultimately have to settle multiple claims against one insured. The *Germano* and *Hernandez* bellwether trials in the MDL have set a high mark for remediating affected homes arising out of Chinese drywall. Given this, even a liability policy with seemingly high limits can be reduced to a low-limits policy in a multiple-claim situation involving just a handful of claims from different homeowners against an insured builder.

Different jurisdictions follow different approaches in settling multiple claims. Additionally, different jurisdictions have imposed different good-faith duties and obligations upon insurers in settling multiple claims. Most jurisdictions require the insurer to act "reasonably" and in "good faith," but most jurisdictions have not established any objective criteria on what constitutes reasonableness and good faith.

Assuming there is coverage under the policy, a good practice for a liability insurer to follow is to consider carefully the interests of its insured, instead of only its own self-interests; keep the insured informed as the claims progress; allow the insured an opportunity to contribute toward any settlements; and warn of any excess-exposure potential as soon as it appears likely that the policy limits will not be sufficient to settle all claims. Lastly, the liability insurer should ensure that it follows the applicable jurisdiction's accepted methods in settling multiple claims against its insured.

Endnotes

1. Greg Allen, Toxic Chinese Drywall Creates a Housing Disaster (Oct. 27, 2009), http://www.npr.org/templates/story/story.php?storyId=114182073.

2. Consumer Product Safety Commission, *Investigation of Imported Drywall Status Update* (July 2010) (available at http://www.cpsc.gov/info/drywall/jul2010status.pdf.).

3. *Id.*

4. *Id.*

5. *Id.*

6. Rich Phillips, Preliminary Reports Link Chinese Drywall, Corrosion in U.S. Homes (Nov. 23, 2009), http://www.cnn.com/2009/US/11/23/chinese.drywall/index.html.

7. Germano v. Taishan Gypsum Co., No. 09-6687, slip op. at 36-48 (E.D. La. April 8, 2010); Hernandez v. Knauf Gips KG, No. 09-6050, 2010 WL 1710434, slip op. at * 11-16 (E.D. La. April 27, 2010).

8. Imported Drywall and Health (Current as of September, 2009) — A Guide for Healthcare Providers (available at http://www.cdc.gov/nceh/drywall/docs/Drywall for Healthcare Providers.pdf).

9. *Germano*, slip op. at 26-27; *Hernandez*, 2010 WL 1710434, slip op. at *19.

10. *Germano*, slip op. at 106-08.

11. *Hernandez*, 2010 WL 1710434, slip op. at * 24.

12. John N. Ellison, et al., *Recent Developments in the law Regarding the "Absolute" and "Total" Pollution Exclusions, the "Sudden and Accidental" Pollution Exclusion and Treatment of the "Occurrence" Definition*, ALI-ABA Course of Study, May 8-9, 2008, at 5.

13. *Id.* at 34.

14. *Id.* at 16.

15. *Id.*

16. *Id.* at 21.

17. *Id.*

18. *See* U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 880 (Fla. 2007); Rando v. Top Notch Properties, L.L.C., 879 So. 2d 821, 833 (La. Ct. App. 2004); Architex Association, Inc. v. Scottsdale Ins. Co., 27 So. 3d 1148, 1162 (Miss. 2010).

19. *See* Doerr v. Mobil Oil Corp., 774 So. 2d 119, 136 (La. Ct. App. 2000). The court also noted that the applicability of a "total" pollution exclusion in any given case must turn on several considerations: (1) whether the insured is a "polluter" within the meaning of the exclusion; (2) whether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and (3) whether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy.

20. *See* Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1138 (Fla. 1998).

21. *See* American States Ins. Co. v. Nethery, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law) (absolute pollution exclusion precluded damages to plaintiff for injuries she sustained from paint and glue in her home).

22. Hernandez v. Travelers Ins. Co., 356 So. 2d 1342 (Fla. 3d DCA 1978).

23. *Id.* (quoting Paul v. Harold Davis, Inc., 155 Fla. 538, 20 So. 2d 795, 796 (1945)).

24. *Hernandez*, 356 So. 2d 1342.

25. *Id.*

26. This article does not address the extent to which interpleader is available in the federal Chinese-drywall litigation.

27. 232 So. 2d 206 (Fla. 2d DCA 2003).

28. *Id.* at 207-08.

29. 561 So. 2d 450 (Fla. 5th DCA 1990).

30. *Id*. at 450.

31. 850 So. 2d 555 (Fla. 4th DCA 2003).

32. 386 So. 2d 783 (Fla. 1980).

33. *Farinas*, 850 So. 2d at 561.

34. *Id.* at 559 (citing Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475, 480 (5th Cir. 1969)).

35. *Id.* (citing Davis, 412 F.2d at 481).

36. Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980).

37. *Id.*

38. *Farinas*, 850 So. 2d at 560.

39. General Security Nat'l Ins. Co. v. Marsh, 303 F.Supp.2d 1321 (M.D. Fla. 2004).

40. *Id.* at 1326.

41. *Id.*

42. *Id.* at 562.

43. 774 So. 2d 119 (La. 2000).

44. La. Civ. Code Ann. art. 4652 (2010).

45. Holtzclaw v. Falco, Inc., 355 So. 2d 1279, 1280 (La. 1978).

46. *Id.*

47. *Id.*

48. 223 So. 2d 858, 861 (La. 1969).

49. *Id.*

50. *Id.*

51. *See* Lantier v. Aetna Cas. & Surety Co., 614 So. 2d 1346, 1359 (La. Ct. App. 1993); *see also* Robin v. Allstate Ins. Co., 870 So. 2d 402, 409 (La. Ct. App. 2004).

52. *Robin*, 870 So. 2d at 410.

53. *Hotlzclaw*, 355 So. 2d at1287.

54. *Id.* at 1283.

55. *Id.*

56. *Id.*

57. *Id.* at 1286.

58. *Id. Contra* Shuster v. S. Broward Hosp. Dist. Physician's Prof. Liability Ins. Trust, 591 So. 2d 174, 177 (Fla. 1992) (Supreme Court of Florida explained that "deems expedient" language in a multiple claimant situation does not protect an insurer who, in bad faith, settles with one or more parties for the full policy limits, exposing the insured to an excess judgment from the remaining claimants).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1287.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g.,* Carter v. Safeco Ins. Co., 435 So. 2d 1076, 1080 (La. Ct. App. 1983).

67. *Hotlzclaw*, 355 So. 2d at 1284.

68. *Id.*

69. 679 So. 2d 372 (La. 1996).

70. *Id.* at 377.

71. *Id.*

72. *Id.*

73. Consumer Product Safety Commission, *Investigation of Imported Drywall Status Update* (July 2010) (available at http://www.cpsc.gov/info/drywall/jul2010status.pdf.). http://www.cpsc.gov/info/drywall/jul2010status.pdf.

74. *See Nethery*, 79 F.3d at 473.

75. Miss. Code Ann. § 22 (West 2010).

76. Miss. Code Ann. § 22 (West 2010) (comments).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.,* Allred v. Yarborough, 843 So. 2d 727, 728 (Miss. 2003).

82. 528 So. 2d 812 (Miss. 1988).

83. *Id.* at 814.

84. *Id.*

85. *Id.* at 814-15.

86. *Id.* at 815.

87. *Id.*

88. *Id.*

89. Travelers Indemnity Co. v. Wetherbee, 368 So. 2d 829, 835 (Miss. 1979).

90. *Id.* ■

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