

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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Holy Mau: Florida Federal Court Rejects Continuous Trigger for Chinese Drywall Claims

I am serious. And stop calling me Shirley.

Chinese drywall -- litigation over the smell of a rotten egg, uh, rolls on. For some insurers, Chinese drywall is a potentially large exposure. With that said, and since Chinese drywall coverage decisions have been few and far between, each one makes a much bigger splash than it otherwise would have if the litigation were more mature.

One thing's for sure about Chinese drywall – the damage projections (Towers Perrin: \$15 billion to \$25 billion) dwarf the amount available from the various funding sources for such claims. Therefore, yesterday's decision from the Southern District of Florida, in *Amerisure Insurance Co. v. Albanese Popkin the Oakes Development Group*, which rejected the continuous trigger, is significant. After all, when more insurance dollars are needed to satisfy claims, the continuous trigger has been the policyholders' St. Bernard.

Albanese Popkin involved the availability of commercial general liability coverage for a builder for a Chinese drywall claim filed against it by a homeowner. The relevant policies issued to the builder were on the risk from January 16, 2008 to January 16, 2010. The insurer argued that, because the homeowners first noticed damage and a sulfuric odor stemming from the Chinese drywall in 2006, prior to the inception of the policies, the insurer was not required to defend or indemnify the builder in the underlying lawsuit. The builder-insured argued that the damage was continuous and that its first manifestation is not the crucial trigger.

The insured's argument was not surprising as the continuous trigger has been, for policyholders, the insurance version of finding a million dollars in your jeans pocket.

Following a review of the various possible trigger theories, the court ruled that no coverage was owed to the builder under any policy issued to it after the time that the homeowners knew that they had a Chinese Drywall problem (when they smelled sulfur and noticed damage to coils in an air handling unit).

The court adopted the “manifestation trigger” theory and rejected the “continuous trigger” theory:

Trizec [Properties (11th Cir. 1985)] is distinguishable from the facts here because the Goddards' underlying complaint clearly alleged that the damage first occurred prior to the effective date of the insurance policy. Manifestation of the damage is relevant in this context because it establishes that the Goddards sustained actual damage before the policy in question became effective. Therefore, there was no "bodily injury" or "property damage" during the policy period.

Albanese Popkin at 11-12.

Albanese Popkin is not a shocking decision when you consider that the continuous trigger has always had its best success in claims that involve coverage for injury and damage that was taking place during the policy period – but nobody knew it. Here, the property damage arising from Chinese drywall was clearly known to exist prior to the policy periods. The more interesting trigger issue is what happens when the Chinese drywall manifested after the policies were off the risk?

But whether *Albanese Popkin* is a surprising decision or not, in general, the rejection of the continuous trigger, in any situation, will result in a reduction in the amount of insurance dollars otherwise available for Chinese drywall claims under general liability policies.

A copy of the Southern District of Florida's November 30 decision in *Amerisure Insurance Co. v. Albanese Popkin the Oakes Development Group* is attached.

Please let me know if you have any questions.

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