

Chinese Drywall, Additional Insureds and Priority Fights, Oh My! What's Hot in Construction Defects?

Jeffrey J. Vita, Esquire
Saxe Doernberger & Vita, P.C.

Marianne Boykin, Senior Technical Claims Specialist
Liberty Mutual Insurance

Kevin King, VP Claims & Legal Services
Turner Casualty & Surety

Ruth S. Kochenderfer, Esquire
Steptoe & Johnson LLP

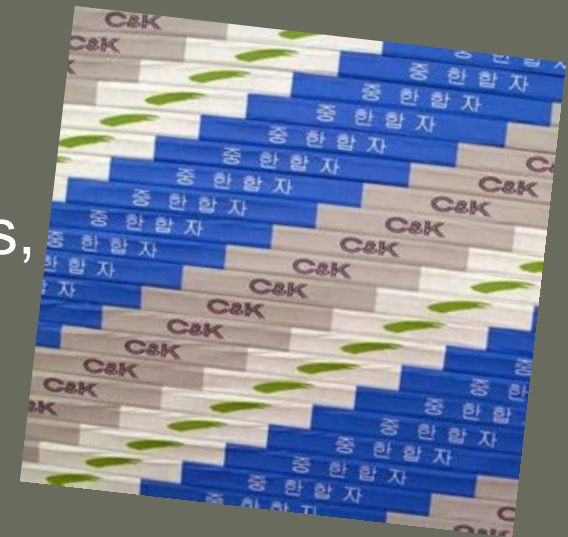
John B. Mumford, Jr., Esquire
Hancock, Daniel, Johnson & Nagle, P.C.

SCENARIO 1:

2006 and 2007 were banner years for “Suburban Bliss,” a developer/builder of exclusive “yuppified” communities in South Florida .



YLH built 4,500 homes during this time – sparing no expense, and using only the best materials such as Italian marble, French doors, Venetian blinds, and Chinese drywall

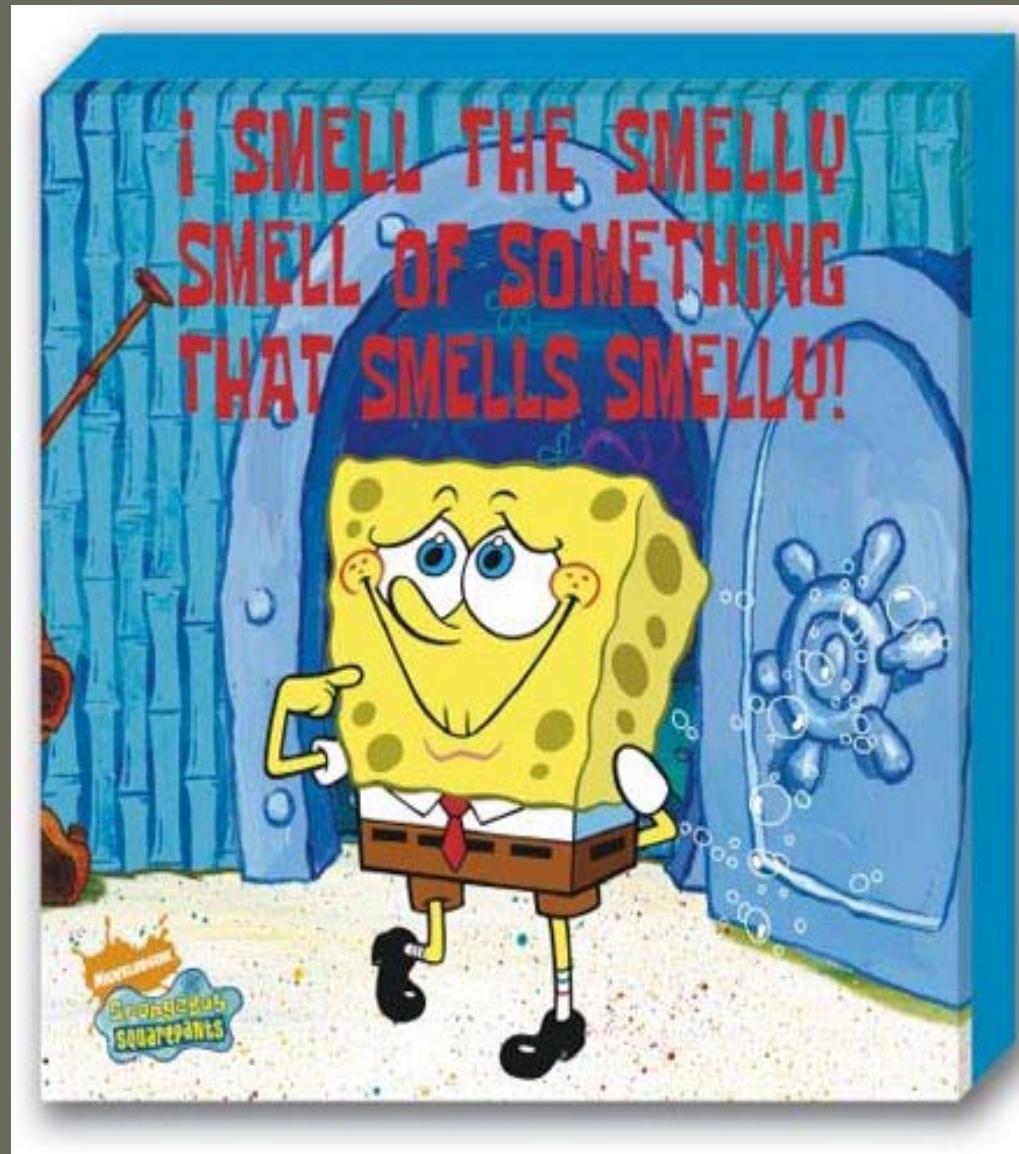


But flash forward to 2010 - and the homeowners are not happy.

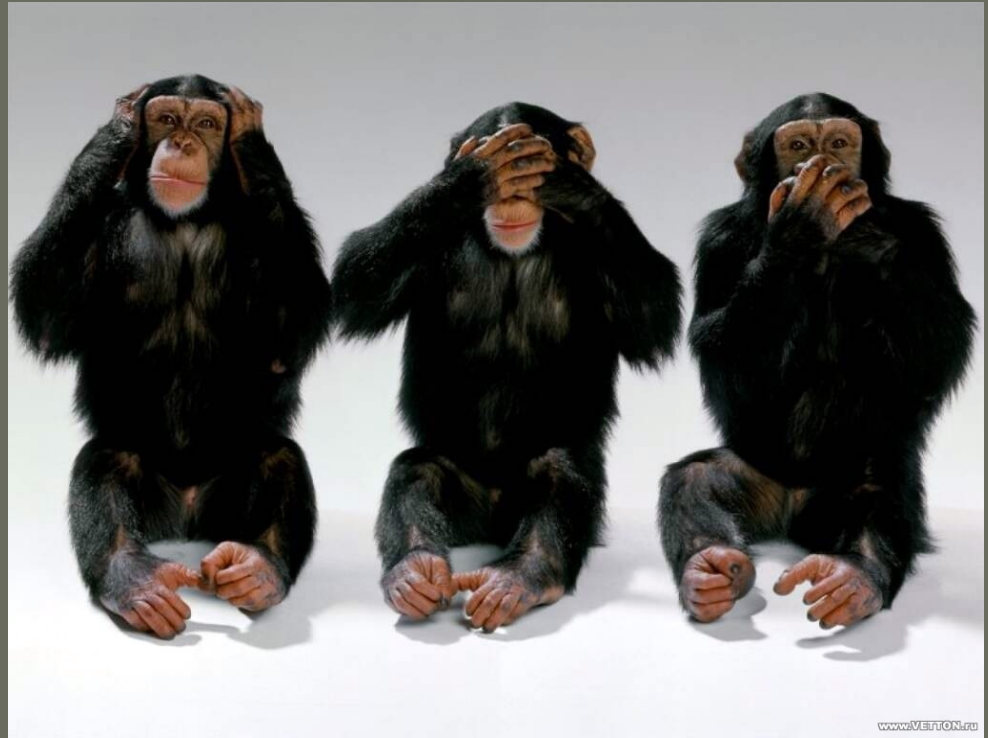


What was suspected at first to be defective “diaper genies” – turned out to be much worse.

The homebuyers claim that the imported drywall is off-gassing hydrogen sulfide which is corroding metal and wiring in the homes, causing the occupants respiratory problems, not to mention the funky egg smell.



Fearing bad publicity, lawsuits, and financial doom of biblical proportions, the Company has sought sage wisdom and guidance from a group of very powerful and knowledgeable insurance coverage lawyers.



The Company has the following questions:

Question 1

Can the Company commit to a remediation plan for the homeowners, begin work on the same, and then notify the insurers?



Question 1 - Answers

a. Yes

b. No

c. Maybe



Question 2

With respect to the Company's commercial general liability coverage, how many occurrences are presented by these Chinese drywall claims?

Question 2 - Answers

- a. None. Under typical definition of occurrence, there was no accident, and, therefore, no occurrence to trigger CGL coverage
- b. A single occurrence
- c. 4500 occurrences (each house is a separate occurrence)
- d. Depends on deductible amount and limits structure

Question 3

Assuming there was an occurrence, under which policy period did the property damage occur?

“This insurance applies to ... ‘property damage’ only if: . . . the ... ‘property damage’ occurs during the policy period.”

Question 3 - Answers

- a. Exposure
- b. Manifestation
- c. Injury-in-fact
- d. Continuous

Question 4

Assuming there was an occurrence, under which policy period did any bodily injury occur?

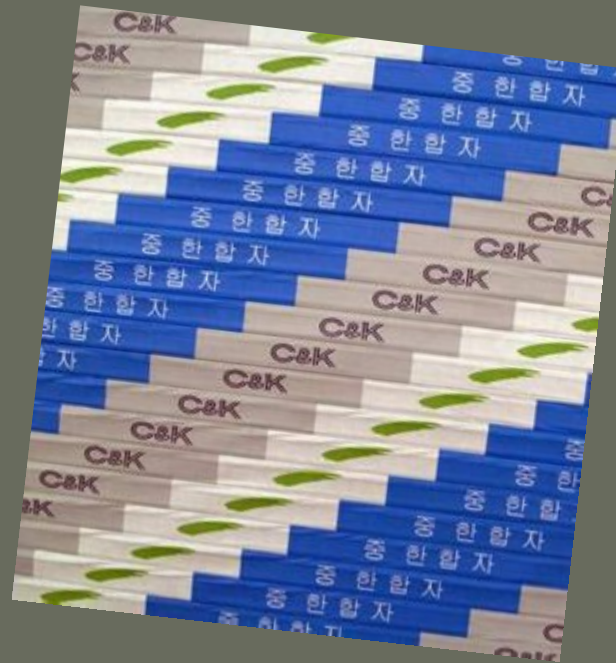
“This insurance applies to ‘bodily injury’ ... only if: . . . the ‘bodily injury’ ... occurs during the policy period.”

Question 4 - Answers

- a. Exposure
- b. Manifestation
- c. Injury-in-fact
- d. Continuous

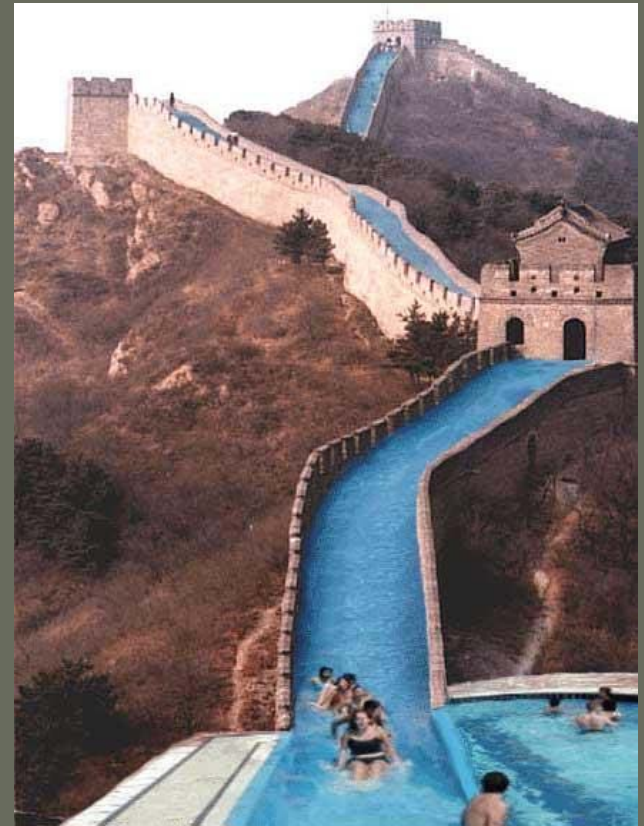
Question 5

Chinese drywall is:



Question 5 - Answers

- a. A pollutant
- b. Not a pollutant
- c. Is how locals refer to the Great Wall of China on a sunny day



Question 6

Which of the business risks exclusions may exclude coverage?

Question 6 - Answers

- a. Damage to your product
- b. Damage to your work
- c. Both of the above
- d. Neither of the above

Question 7

What about the damage to property exclusion?

Question 7 - Answers

- a. Applies if Company owned, rented or occupied the property
- b. Applies if the damage took place before Company completed its work
- c. Applies if Company sold, gave away, or abandoned the property
- d. Property damage – what property damage?

Question 8

What is the impaired property exclusion?

Question 8 - Answers

- a. An exclusion that bars coverage for Chinese drywall claims
- b. An exclusion too often ignored
- c. All of the above
- d. None of the above

Question 9

If Chinese drywall causes damage to other areas of a house, such as the electrical wiring, would that be covered?

Question 9 - Answers

- a. Never!
- b. Always!
- c. It depends

SCENARIO 2:

Natural Energy, LLC (“Natural Energy”) is the owner of an under-construction power plant in Reno, NV that will provide a major source of electricity for Northern Nevada.



The power plant was scheduled to be online by June 2010. However, towards the end of construction, a large explosion occurred during a routine purging of the gas lines, killing several workers and injuring dozens more.

Each of the relevant subcontractors as well as the general contractor was on site and working at the time of the blast. The majority of the power plant was destroyed by the explosion and ensuing fire.

The explosion has caused significant damage to surrounding homes and businesses. Total bodily injury and property damage costs could be in the hundreds of millions. It is estimated that the power plant will not be online until approximately one year later than anticipated.

Natural Energy and its general contractor are enrolled in a CCIP program. The project subcontractors are also enrolled in the CCIP, with the exception of the plumbing contractor that supplied and installed the gas lines.

The plumbing contractor is insured under its commercial general liability policy issued by Big State Mutual Insurance Company (“Big State”), which also affords coverage to Natural Energy and the general contractor as additional insureds.

Question 1

In a claim by the injured workers against the Owner and General Contractor, the following insurance should respond first:

Question 1 - Answers

- a. The Owner's general liability carrier
- b. The General Contractor's general liability carrier
- c. The CCIP primary general liability carrier
- d. It depends upon the "other insurance" provisions

Question 2

In the event that damages exceed the CCIP primary general liability limit, which insurance will respond next?

Question 2 - Answers

- a. The CCIP excess carrier
- b. The General Contractor's primary general liability carrier
- c. The Owner's primary general liability carrier
- d. It depends upon the choice of law and the language of the respective policies

Question 3

In the event the Builder's Risk CCIP insurer pays the property damage sustained to the project, it will be able to subrogate against:

Question 3 - Answers

- a. The subcontractor whose work caused the explosion
- b. The General Contractor who hired the at-fault subcontractor
- c. It depends on the waiver of claim language contained in the relevant contracts as well as the waiver of subrogation language contained in the Builder's Risk insurer's policy
- d. None of the above

Question 4

In response to a lawsuit from a group of nearby residents suffering structural damage to their homes, General Contractor tendered notice to Big State for “additional insured” coverage. The Big State policy:

Question 4 - Answers

- a. Should be primary on the risk, assuming the named insured plumber contractually agreed to indemnify General Contractor
- b. Should be secondary on the risk because the CCIP policies specifically insure the Project while the Big State policy is a general policy
- c. Should be secondary to the CCIP policy, but should pay ahead of the CCIP excess policy
- d. Should share pro-rata with the CCIP primary policy

Question 5

Assume that the Big State policy is deemed to be the primary insurer for General Contractor's liability from the residents' lawsuit, but that the Big State policy contains a \$250k SIR. How must the SIR be satisfied?

Question 5 - Answers

- a. It must be paid by the named insured before the coverage obligation takes effect
- b. It must be paid by the General Contractor before coverage takes effect
- c. It must be paid by an insured, but can either be paid by the General Contractor or the named insured
- d. It can be satisfied by payments from the CCIP primary carrier