

IN BRIEF

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WHO DO YOU SUE???

As global trade increases and more manufacturers conduct business outside the borders of the United States, the question of who to sue for perceived injuries may become more common. In the instance of Chinese drywall litigation, the case of Paul E. Seeman, et al. v. Oxfordshire, LLC, et. al. may shed some light on this question. In this case the Seemans purchased a “newly-constructed residential dwelling” from Oxfordshire on April 23, 2007. “Sometime after September 28, 2009, Seeman became aware that ‘Chinese drywall’ may have been used in the construction of the house”, this “was confirmed sometime after February 4, 2010.” Seeman filed suit alleging that the drywall emits toxic chemicals which damage systems within the home and cause personal injury to the inhabitants. Seeman named the builder, the real estate agency and the drywall supplier as defendants in the complaint. The builder brought in the drywall installer through a third-party complaint. The supplier also filed a third-party complaint bringing its broker into the case. The supplier and the real estate agency filed demurrers contending that Seeman failed to state claims upon which relief can be granted. This opinion deals with these demurrers.

The Court enumerates six specific allegations that the plaintiffs make against the defendants:

1. Misrepresentation as to the drywall;
2. Willful violation of the Virginia Consumer Protection Act;

3. Knowing, and thus willful, negligent and negligent *per se*, breach of express and implied warranties, private nuisance and unjust enrichment;
4. Refusal to repair;
5. Damages, including personal monetary, physical, mental and emotional, and property; economic loss; loss of use and enjoyment; and, treble damages; as well as attorneys' fees and revocation of licenses.

The Court first notes that the plaintiffs only directly contracted with the builder and the real estate agency, not with any other defendant. Lacking any direct contractual relationship with the supplier, the installer or the intermediary, the plaintiffs are at best incidental third-party beneficiaries of the contracts involving those parties.

Next the Court addresses the Virginia Consumer Protection Act (VCPA), Code of Virginia §§59.1-196 et seq. finding that it does not apply to the real estate agency. The VCPA refers to "selling, offering for sale, or using in the construction, remodeling, or repair of any residential dwelling"; actions in which the real estate agency did not partake and, therefore, the provision does not apply. The Court continued that the VCPA as amended would currently apply to the supplier. However, the construction and sale of the Seemans' house predated the amendment to VCPA which references Chinese drywall. Transactions involving Chinese drywall were beyond the scope of the VCPA as it was originally written and could only be considered relevant after the VCPA was amended in 2011 to specifically include Chinese drywall occurrences. Therefore, the Court finds that the VCPA does not apply to this case.

As to the allegation of misrepresentation concerning the drywall, the Court notes that the plaintiffs "neither pleaded facts nor otherwise addressed this issue in their complaint" and, therefore, the Court granted the demurrers to this claim. As to the allegation of "Knowing, and thus willful, negligent and negligent *per se*, breach of express and implied warranties, private nuisance and unjust enrichment", the Court found that the realty company had no specific statutory duties to the plaintiffs and no allegations were made in the complaint which could give rise to a claim of private nuisance. For the same reasons, lack of contractual relationship, no claims of breach of express warranties, and because the plaintiffs did not allege facts supporting a claim of unjust enrichment, the Court upheld both demurrers as to these allegations.

As to the allegation of breach of contract to provide a residence free of latent defects that the defendants knew of or should have known of and the allegation concerning Refusal to Repair, the Court upheld both demurrers on the grounds that neither party had any such duty to the plaintiffs.

Finally, regarding the allegation of "Damages, including personal monetary, physical, mental and emotional, and property; economic loss; loss of use and enjoyment; and, treble damages; as well as attorneys' fees and revocation of licenses, the Court stated that revocation of licenses is an administrative matter not within the jurisdiction of the Court and the remaining allegations should be decided at trial and not by demurrer.

The Court accordingly sustained the demurrers for the drywall supplier and the realty agency. This case demonstrates that the “shotgun” approach to drywall litigation may not work. The lack of any contractual obligations between the plaintiffs and the defendants was the key to this Court in sustaining the demurrers.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY ISSUES
October 31 – November 4, 2011 SESSION**

[101209](#) **Ruhlin v. Samaan** 11/04/2011 In a personal injury action arising from an automobile accident, the circuit court did not err under Code § 8.01-404 in permitting the use of a transcript of a recorded telephone conversation to refresh the recollection of the plaintiff as a witness, or in ruling that certain prior statements of plaintiff, allegedly made in the presence of his wife, that were consistent with his trial testimony were not admissible into evidence. The judgment is affirmed.

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