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Tort reform prevents Chinese drywall victims in Louisiana from making a full recovery

By Rebecca Mowbray, The Times-Picayune

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Back in 1996, the Louisiana Legislature passed one of the nation's most aggressive tort reform acts to fulfill a campaign promise of then-newly elected Gov. Mike Foster to improve Louisiana's business climate. The Times-Picayune Chinese drywall. But today, as an estimated 4,000 to 7,000 Louisiana households face financial ruin because tainted drywall from China is corroding people's homes and making them sick, critics say that the 1996 tort reform legislation will prevent local homeowners from making a full financial recovery.

"We took that away from the consumer. We say, 'Sorry, you're going to have to sue the manufacturer in China.' That puts people in Louisiana at a huge disadvantage," said state Sen. Julie Quinn, a Republican from Metairie. "We threw the consumer under the bus under the purview of 'Hey, this will attract business to Louisiana.' All we did was hurt the consumer."

Because so many people are in a jam, the Louisiana Recovery Authority on Tuesday set aside \$5 million to help homeowners recuperate their losses from Chinese drywall. The **national litigation over Chinese drywall, which has been consolidated in federal court in New Orleans before Judge Eldon Fallon**, who will preside over a hearing Thursday, is expected to make the litigation over Hurricane Katrina insurance claims look like child's play.

Residential insurers have so far been denying claims based on policy exclusions for pollution or "latent defects" in materials, forcing homeowners to pursue builders through the **Louisiana New Home Warranty Act**, or to file suit against suppliers who handled the wallboard. The most challenging factor of all is that the parties of ultimate responsibility, the Chinese manufacturers, may be beyond the reach of U.S. law, a circumstance some say is made worse by Louisiana's tort reform.

Under the old rules of litigation in Louisiana, even if a company only played a small role in harming the consumer, it could be held responsible for 100 percent of the damages, according to Alan Childress, a Tulane Law School professor. That means all the aggrieved homeowner would have to do is sue the party that installed their Chinese drywall. That party, in turn, would sue companies further up the chain.

While proponents of the 1996 tort reform said the old system was unfair, those working with consumers on Chinese drywall issues today say that that system would have had the advantage of getting consumers the money they need to rebuild, while leaving the companies above them to settle with each other. They further say it adds an incentive for companies to make sure they are selling safe products.

Under the post-1996 system, Childress said companies only have to pay the portion of fault assigned to them.

So if a court determines that manufacturers are responsible for 80 percent of the Chinese drywall problem, while the American companies that handled the product upon import are responsible for 20 percent, homeowners only stand a chance to collect 20 percent of their losses.

"If for some reason I can't collect money from there, I'm out of luck because I can't look to the other defendants to pick up the slack," Childress said. "This is a very pro-defendant, pro-corporate change in the law."

Chinese drywall victims from states such as Florida, where tort reform measures were less aggressive, could recuperate more of their losses.

When Quinn tried to amend the 1996 law last spring to give consumers more recourse over Chinese drywall, she ran into opposition from the state's business community, which viewed efforts to help drywall victims as an undoing of Gov. Foster's reforms.

"If we want to start making exceptions, we would probably be worse off than we were before," said Dan Juneau, president of the Louisiana Association of Business and Industry, which believes that the federal government needs to bail out homeowners since it allowed the product into the country.

Similarly, former Gov. Foster says he also does not believe the law should be changed to help drywall victims. "If people did not do anything wrong, or negligent, they shouldn't be held responsible," Foster said. "To me, that's very logical. Unfortunately, it may work to someone's disadvantage."

The biggest question in the litigation is whether foreign manufacturers can be forced to participate in the litigation — and forced to pay if they are found responsible.

Russ Herman, the New Orleans attorney who serves as plaintiffs' liaison counsel in Fallon's proceedings, vowed that the Chinese and German companies responsible for the product will be brought to justice.

A law is pending in Congress that would require foreign companies to participate in litigation if they sell products in the United States. But the best hope for Louisianians may be that state law allows for victims to take "direct action" against the insurers of the companies that harmed them, a tactic that worked when New Orleans attorneys including Herman collected from insurers when the Chinese-owned Brightfield ship slammed Riverwalk in 1997.

"I can't really talk strategy right now," Herman said.

Herman's counterpart, New Orleans attorney and defendants' liaison counsel Kerry Miller, said that so far, the German company Knauf and four related manufacturing plants in China that he represents are the only ones participating in the litigation, while there are about 20 other foreign drywall manufacturers with issues in the case.

But in a move that other attorneys see as a sign of things to come, Knauf Gips KG has challenged the jurisdiction of U.S. courts.

For anybody who bought a new home only to find that it was built with Chinese drywall, such as many people in St. Tammany and Tangipahoa parishes, pursuing the Louisiana New Home Warranty Act may be their best option. But the law sets out strict time lines that may have already expired, and attorneys caution that the law requires that homeowners send certified letters to builders with their complaints before taking other action — hurdles that may knock people out from collecting.

With such limited options, Childress said he expects plaintiff attorneys to try to prove that builders, distributors and importers figured out that the drywall was tainted and sold it anyway, because it would allow them to pursue American companies for fraud and bad faith.

Defense attorneys, Childress said, will mount the "empty chair defense," meaning that they'll heap as much blame as possible on the Chinese manufacturers who don't show up in court. And the more the American distributors and builders can demonize the Chinese, the less they'll have to pay homeowners.

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