

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: CHINESE-MANUFACTURED DRYWALL) MDL No. 2047
PRODUCTS LIABILITY LITIGATION)
) SECTION: L
)
) JUDGE FALLON
) MAG. JUDGE WILKINSON
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THIS DOCUMENT RELATES TO ALL CASES

PRE-TRIAL ORDER No. - PRESERVATION OF PHYSICAL EVIDENCE

Pursuant to the Court's duty to supervise pretrial proceedings in this case, including discovery, and pursuant to the Court's inherent power, the Court hereby modifies Paragraph 14 of Pretrial Order No. 1 to address the Court's expectations with respect to the preservation of physical evidence from properties that may be repaired by the parties during the course of this litigation. Those persons or entities who do not undertake to repair their properties are, by definition, preserving the physical evidence, so long as the drywall and any building components and contents that are believed to be affected by the allegedly defective drywall remain intact. This Order addresses preservation requirements for those persons or entities who (1) transferred to this Court by the Judicial Panel on Multidistrict Litigation, pursuant to its Order of June 15, 2009; (2) any tag-along actions subsequently transferred to this Court by the Judicial Panel on Multidistrict Litigation pursuant to Rule 7.4 of the Rules of Procedure of that Panel; (3) all related cases originally filed in this Court or transferred or removed to this Court; (4) those persons or entities who intend to or may seek recovery relating to Chinese-manufactured drywall, including putative members of any class actions; and (5) any subsidiaries and affiliates of all defendants in any such actions.

This Order, subject to any subsequent order regarding remediation and repair, does not preclude parties from disposing of drywall and other building components and contents in connection with these repairs, so long as they preserve the representative samples as set forth in paragraph A below.

A. From this date forward, all persons or entities responsible for making repairs to allegedly affected properties that intend to pursue a claim relating to Chinese-manufactured drywall shall preserve the following physical evidence at their own expense (subject to further order regarding cost allocation by the Court):

1. **Drywall** -- The parties shall maintain at least two samples at least 6"x12" in size of every different drywall brand or marking identified in an affected property. The sample should include as much of the identifiable marking as possible. If certain of the drywall found in the property is unmarked, similarly two samples at least 6"x12" in size should be taken as noted above. Parties also shall preserve at least one sample of each type of drywall endtape that is found in a property. These drywall and endtape samples shall be labeled with the date of collection, the room location and the specific wall that it was taken from. Two of each type of drywall samples and endtape samples shall be labeled and stored in double-bagged polyethylene zip-lock bags or equivalents. Samples should be placed in individual bags, not grouped in the same bag. Storage should be in reasonable climate controlled conditions. All samples should be stored free of visible water or moisture. In addition to the foregoing, a third drywall sample shall be collected, to be stored in a glass container with a sealed Teflon lined top in a temperature and humidity controlled environment, such as a laboratory sample refrigerator. This additional sample shall contain four (4) one inch by one inch samples of each type of

drywall (samples of different drywalls should not be mixed together). All storage arrangements should preserve chain of custody through appropriate identification.

In addition to taking these samples, the parties shall document the quantity of each drywall type, as well as markings contained on any types of drywall (if any), and its location throughout the property by photographing the backside of each full or partial board of drywall immediately after it is removed and documenting on a clearly marked floor plan, diagram of building, or other similar form of documentation, the location of the board in each photo that is taken.

All samples should be clearly labeled on the outside of the plastic bag or equivalent. The label shall include the name and address of the property from which the sample was taken, the date sampled, a sampler identification which identifies the type of item (drywall, copper wire, etc.), and where the item was taken from in the property.

2. ***HVAC coil*** -- The parties shall select and mark with some type of a labeled flag (*e.g.*, tape) and photograph all affected representative copper U-bends on each coil removed from an affected property. The parties shall select and photograph all affected sections of refrigerant line or other straight copper tubing associated with the coil or thermostatic expansion valve (TXV) for each HVAC system that is alleged to be affected. The serial number, make and model of each affected HVAC coil shall be recorded and photographically documented. Samples of corroded copper wire and samples of tubing shall be placed, each in their own, 250 ml glass jar with a Teflon brand top, for storage in a temperature and humidity controlled environmentally climate controlled condition.

All samples should be clearly labeled on the outside of the plastic bag or equivalent. The label shall include the name and address of the property from which the sample was taken, the date sampled, a sampler identification which identifies the type of item (drywall, copper wire, etc.), and where the item was taken from in the property.

3. ***Plumbing component samples*** –If multiple bathroom or kitchen fixtures are affected (e.g., chrome finished fixtures), one complete fixture shall be preserved. Photographs should be taken of all of the alleged affected plumbing components. Photographs should be taken of each sample intact before removing such sample from the corresponding location or fixture. These samples should be labeled, any sharp edges should be protected with tape and stored in double bagged polyethylene zip-lock bags or equivalents. Samples shall not be stored in wet conditions. If wet with condensation, the sample shall be allowed to dry before bag sealing and storage. All samples should be stored free of visible water or moisture. This includes pipes that may have held water.

All samples should be clearly labeled on the outside of the plastic bag or equivalent. The label shall include the name and address of the property from which the sample was taken, the date sampled, a sampler identification which identifies the type of item (drywall, copper wire, etc.), and where the item was taken from in the property.

4. ***Electrical component samples*** -- The parties shall select at least three affected receptacles and switches from walls with Chinese drywall and, if present, three receptacles and switches from walls that do not contain Chinese drywall. In the case of a property only containing Chinese drywall, that would require at least 3 sample devices and in a property with both Chinese and domestic drywall, at least 6 samples being preserved. If affected smoke detectors, carbon monoxide detectors, intruder alarm

devices or any similar life safety devices are present, the parties shall preserve at least two of each type from each floor, if available. Photographs of these selected samples should be taken prior to their removal and their location identified on a clearly marked floor plan, diagram of building, or other similar form of documentation. An appropriately trained electrician should cut off the affected receptacles, switches and other electrical fixtures, retaining at least 2” of each conductor. For affected smoke detectors and similar devices, the electrician should cut the wires where practical above any plug or similar connector. If other less common affected devices with copper wire connections are found, the parties should identify representative samples as described in this subparagraph 4. These samples should be labeled and stored in zip-lock bags. Copper samples shall not be grouped together in one bag. Samples shall not be stored in wet conditions. If wet with condensation, the sample must be allowed to dry before bag sealing and storage. All samples should be stored free of visible water or moisture.

All samples should be clearly labeled on the outside of the plastic bag or equivalent. The label shall include the name and address of the property from which the sample was taken, the date sampled, a sampler identification which identifies the type of item (drywall, copper wire, etc.), and where the item was taken from in the property.

5. This preservation requirement is not related to incidental damages such as the injury to cabinetry or other fixtures that have to be replaced in order to access the Chinese drywall or are necessarily and irreparably harmed in remediating the property. To the extent that emissions from Chinese drywall may or are claimed to have cross-contaminated domestic drywall or other building components, samples of that domestic drywall or other building component shall be collected from each room of the property in

which claims of cross contamination are being made. Samples of domestic drywall collected for this reason should be of the same size and collected in the same manner as set forth in paragraph A(1) from each room of the property.

All samples should be clearly labeled on the outside of the plastic bag or equivalent. The label shall include the name and address of the property from which the sample was taken, the date sampled, a sampler identification which identifies the type of item (drywall, copper wire, etc.), and where the item was taken from in the property.

B. Homeowners and renters shall preserve, at their own expense, any and all personal property items that they claim to be affected by the drywall for which they intend to pursue recovery.

C. This Order pertains only to preservation of physical evidence in properties being repaired, and it replaces the provisions of Paragraph 14 of Pretrial Order #1 that pertain to physical evidence other than documents. The mandate of Pre-Trial Order No. 1 applicable to documents shall remain in effect until further ordered.

D. Evidence or material not preserved in compliance with this Pre-Trial Order may be subject to exclusion for use in either discovery or trial of the matter and further, the party responsible for failing to preserve evidence may be subject to the claim or defense of spoliation.

E. To be certain that preservation of physical evidence is and can be effectively accomplished, this Order shall be imposed on an interim basis and subject to extension or modification. Accordingly, the effective period of this Order extends until the completion of the initial 30 property inspections being performed under the supervision of the Court appointed inspector, Crawford & Company contemplated by Pre-Trial Order No.13. When the initial Pre-

Trial Order No. 13 inspections conducted by Crawford are completed, this Order and matters regarding preservation of physical evidence may be revisited.

New Orleans, Louisiana, this ____ day of August, 2009.

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE