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Chinese Drywall: To Abate or Not to Abate?

"I know little of the law," remarks the intelligence agent and ship's surgeon Stephen Maturin in Patrick O'Brien's novel [The Surgeon's Mate](#) — "except that whenever a plain man comes into contact with it, he is likely to suffer extremely in his purse and his spirit, however sound his cause."

[The Surgeon's Mate](#), of course, is one of a long series of seafaring novels penned by the late Mr. O'Brien, recounting the adventures of British sea captain Jack Aubrey and his companion Stephen Maturin during the Napoleonic Wars, in the age of sail. Aubrey, a tactical genius at sea, nonetheless falls easy prey for charlatans and scam artists when on shore, and spends most of his life, between successful naval exploits, entangled in the legal troubles he encounters by land.

In a similar vein, I feel a lot of empathy these days for the builders, skillful as they may be, whose fortunes are now tangled up in the litigation around defective Chinese-made drywall. In the most recent issue of Coastal Connection, I mention one example — Florida builder Frank Mackle, who has the bad material in his own recently built home. Mackle has torn the stuff out, along with damaged components such as wiring and air conditioning coils, and plans to restore his house to new condition — an \$80,000 job (see the Miami Herald, "[Drywall woes spur Coral Gables builder to gut his own home](#)," by Nirvi Shah).

But a local attorney, David Durkee, told the Herald that it might be a bad idea to tear out the bad drywall — because you're destroying evidence. Durkee likens the situation to a person injured in a car accident, who intends to sue based on the claim that the car was defective. From the Herald:

"In this case, if the client were to perform repairs without giving the defendant an opportunity to inspect and test the car, the defendant could claim that there was destruction of the evidence and the plaintiff may lose the right to bring the action," Durkee said. "Remember - we have to prove that the home is defective because of Chinese drywall -- not that the home contains Chinese drywall."

Automobile analogies, of course, are a notorious pitfall for the unwary. And to my ear, at least, Durkee's comparison sounds like a false note. As builder Frank Mackle points out, the drywall continues to corrode metal in the house for as long as it stays in place. Look at it this way: If somebody stabs me, am I supposed to let the wound bleed while the cops try to catch this guy, so we'll have a better chance at convicting him? Or suppose my house is on fire — shall I leave it burning so I'll have a stronger insurance claim? Or even to maintain attorney Durkee's analogy — if my brakes fail and my car is in the process of crashing, am I giving up some legal advantage by continuing to use the steering and the clutch? You know — we got a situation here.

One attorney I spoke with said, "Maybe you can gather good evidence and still fix the house. Suppose you take pictures, have somebody test the material, get a professional inspection ... that ought to at least qualify you as a member of the class for purposes of a class action suit."

And he pointed out, "If the damage is ongoing, you also have some responsibility to abate that. If you wait, there's an argument that you share in the negligence — you are contributing to the ongoing damage."

Meanwhile, there is some sign that lawsuits around the drywall may proceed expeditiously. The Federal cases have been consolidated in the New Orleans courtroom of Judge Eldon Fallon, who successfully supervised litigation in recent years in a similar case, an international prescription drug liability class action. Reportedly, Judge Fallon is ready to light a fire under this drywall thing. The website [www.law.com](#) reports that the judge is "intent on fast-tracking a handful of cases for trial," and has instructed attorneys to pick five or ten of the 600 individual cases already enrolled in the class action and move them quickly to trial by as early as this December (see "[Federal Judge Puts Chinese Drywall Cases on 'Rocket Docket'](#)," by John Pacenti). Fallon is also said to be calling for inspections of all the homes involved in the class action.

So a legal resolution may come reasonably quickly — or at least not as slowly as might be feared. Perhaps that is some consolation to builders, and others, now struggling with drywall troubles. But as builders, we don't really want to spend much of our lives in court no matter what, or dealing with the headaches and uncertainties that a legal action entails. We could be forgiven, I suppose, for echoing the perennial lament of Captain Jack Aubrey: "I wish I was back at sea."