

Whistleblower

James L. Horton

Buildmore Materials is a major supplier of lumber, drywall, hardware and plumbing fixtures to the housing and construction industry. Buildmore has been in existence since 1932 and was family run for 60 years. Today, it is a public company (NASDAQ: BLDMOR), and it has operations in the Southeastern region of the US, especially Florida.

The 1990s were prosperous for Buildmore but since 2000, market turmoil has taken a toll. Buildmore has been the target of numerous law suits for selling Chinese drywall that emits toxic fumes in homes and makes them unlivable. According to the Consumer Product Safety Commission, there have been 3,905 reports of Chinese drywall outgassing since 2009 from residents in 42 states, the District of Columbia, American Samoa and Puerto Rico. The fumes corrode electrical appliances and fixtures and may cause health problems, although this has not been proven. Importers shipped in millions of sheets of the faulty drywall from China due to a domestic shortage caused by a housing boom and rebuilding after hurricanes. Most complaints about the Chinese drywall have come from Florida and Louisiana.

Buildmore is party to a \$55 million settlement that will not end the suits against the importer, Buildmore and construction companies. Buildmore has taken the position that it didn't know about the quality problems with Chinese drywall, and it had relied on the manufacturer and importer for quality control. Further Buildmore said when it took delivery of the Chinese drywall on the Miami docks, there was no indication it would emit toxic fumes.

Stuart Henshaw, the PR manager for Buildmore, works out of its headquarters in Atlanta. Henshaw has been coordinating with attorneys for the last two years in issuing press releases that exculpate Buildmore and position the company as a victim of a Chinese manufacturer.

Henshaw was concerned then when he picked up the phone and heard the general counsel. A whistleblower lawsuit had been filed in Federal court in Miami. The suit was from a former dock manager of Buildmore who had been responsible for transporting the drywall from Miami docks. If Buildmore lost the suit, the whistleblower and his attorney would split an award of millions.

“Are we going to respond?”

“We don't know the facts. We will acknowledge that the suit has been filed but make no comment.”

Henshaw received five calls from Atlanta media. He told each that Buildmore was aware of the suit but had no comment. The sixth call from a reporter at the Miami *Herald* was troublesome. The reporter had read the allegations of the suit in which the former dock manager had stated that Buildmore knew of the toxicity of the Chinese drywall because he had reported it to Buildmore's Atlanta headquarters. Nothing was done in Atlanta, and the dock manager was told to continue shipping the drywall. Further, the former dock manager claimed he had e-mails from 2004 that proved his allegations. Henshaw called the general counsel who said the text of the suit was being faxed to him from outside counsel in Miami.

Henshaw put out a release that afternoon that stated Buildmore was investigating the suit's allegations and would have no further comment. It would take days to find the e-mail traffic from 2004 to substantiate or challenge the former dock manager, if Buildmore still had the communications in its back-up files. It would take weeks for depositions and months before the case went to court. Meanwhile, Buildmore was in a position of holding its ground the best it could.

Two months later, Henshaw received a call from ABC TV's *20/20* news magazine. The program was readying an exposé of Chinese drywall. It was aware of the lawsuit in Federal court. It had interviewed the former Buildmore dock manager and would like to hear the company's side of the story. The producer said the program wanted to give the company a chance to defend itself. The producer understood Buildmore wasn't the importer of the drywall, but Buildmore had sold it to thousands of builders in the Southeast. The producer portrayed the situation as a tragic case in which Buildmore was a victim. Henshaw knew better than to trust the producer's portrayal of events. It was an excuse to get in front of Buildmore's CEO and to hammer him with the three e-mails the former dock manager had sent.

The three e-mails themselves could be read in two ways – as a minor matter or something to be concerned about. The dock manager had twice reported an odd smell in the warehouse where the drywall had been stored once off-loaded from ships. The smell appeared to be coming from Chinese drywall. The third e-mail suggested that Buildmore might wish to investigate the smell or at least to alert builders that the drywall might need airing once it was screwed to walls. The dock manager's e-mails did not appear alarmist. Responses to the e-mails from the shipping department acknowledged receiving the dock manager's report but nothing else. There were no e-mails discovered that reported the odd smell up the ranks to company executives. While Buildmore's management could claim ignorance, the tort lawyer would charge that the company should have known. That might be enough for a jury.

Henshaw called the general counsel to report the producer's call.

"We're not going on the air."

“We’re going to take a beating if we don’t.”

“So we take the beating... We’re not litigating on *20/20*.”

Henshaw informed the CEO by e-mail of the producer’s call and the general counsel’s opinion. He was called immediately to the CEO’s office where he found the CEO waiting with the general counsel.

“When is the *20/20* piece airing?”

“They were talking a month from now.”

“I don’t like that we’re sitting back and getting kicked in the teeth without responding.”

“It’s dangerous to say anything,” the general counsel said.

“I know, but we can make a statement.”

“*20/20* is not going to read a lengthy statement. At most it will give us one or two sentences.”

“So give our position in two sentences.”

“I want to see it before it goes to *20/20*,” said the general counsel.

Henshaw reviewed Buildmore’s position with the general counsel. The facts were:

1. The former dock manager had sent three e-mails about fumes coming from Chinese drywall.
2. The three e-mails could be read in two ways – as information-only statements with no action required or as warnings.
3. The former dock manager had taken no further action once he had sent the e-mails, and he continued to unload five other shiploads of Chinese drywall.
4. The Atlanta shipping department had filed the three e-mails and had not sent them up the line to management.
5. Buildmore’s executives were surprised by reports of toxic fumes from Chinese drywall.
6. Once Buildmore had substantiated that fumes were being emitted by Chinese drywall, Buildmore’s CEO suspended shipments from China and found a Canadian source.

7. Buildmore was party to the \$55 million settlement with owners of houses sheathed in Chinese drywall. The court, however, was allowing other suits to proceed.
8. Buildmore was a target of 60 other lawsuits that were not part of the settlement.
9. The former dock manager had left Buildmore under good circumstances and was considered an able employee while he was with the company.

Henshaw set about crafting two sentences.

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Questions for discussion:

1. Write the two sentences and defend them.
2. Are the sentences short and pointed enough to be read on the air?
3. Do the sentences exculpate Buildmore and defend its position?
4. Do the sentences leave Buildmore open to criticism?
5. Would you have advised the CEO to go on the air to defend Buildmore?