



# The Brazilian Plywood Situation

STEPS BUILDERS AND CONTRACTORS CAN TAKE NOW TO PROTECT THEMSELVES

## Brief Background on the Brazilian Plywood Dispute

Over the past five years, U.S. builders and contractors have increasingly utilized plywood from multiple mills in Brazil, building materials that were certified as PS 1 by building products rating firms, the most notable being PFS-TECO.

This plywood generally has been available at a discount compared to products from U.S. mills, possibly due to the faster growth of southern yellow pine in Brazil which allows mills in that country to harvest the trees sooner. Some in the industry suggest, though, that this accelerated growing time results in a less dense wood product.

The American Plywood Association (APA) tested Brazilian plywood products certified as PS 1 by PFS-TECO in 2017 and 2018 and found they did not meet PS 1 standards related to bending stiffness. APA subsequently issued a Product Advisory in 2018 laying out the results of their testing.

On May 23, 2022, a U.S. District Court issued an injunction ordering PFS-TECO to revoke the PS 1 certificates and grade stamps it had issued to plywood mills in Brazil and refrain from issuing any new ones there.

While not explicitly required in the injunction, many wholesalers and retailers who found themselves holding the substandard material in inventory were faced with either destroying it or re-selling it after removing the PS 1 stamp, lest they'd later be accused of false advertising or knowingly selling a defective product.

Shortly after that federal court ruling, another ratings firm, Forestwood Industries, Inc., began awarding PS 1 certification for plywood from many of the same Brazilian mills, and U.S. suppliers sought an injunction against that company as well.

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As with the tainted Chinese drywall situation over a decade ago, a significant portion of the financial burden stemming from the good-faith utilization of substandard Brazilian plywood will fall on builders and contractors. There are strategies to minimize this, though.



## The Challenge for Builders and Contractors

Over the past five years, builders and contractors across the U.S. have used Brazilian plywood in new residential and commercial structures, as well as in the renovation of properties in the eastern U.S. that were damaged by hurricanes and flooding. As many as 2 billion feet of this now uncertified, substandard plywood stamped “PS 1-09,” entered the U.S. in the past two years.<sup>1</sup> It accounted for 11% of U.S. supply in 2021 alone.<sup>2</sup>

Builders and contractors used these materials in good faith, with every expectation and assurance that the plywood met or exceeded U.S. standards, given the “PS 1-09” certification label on the product. These materials are now an integral, but possibly increasingly unstable, component of their recent construction projects.

## The Responsibilities for Builders and Contractors

Builders and contractors are responsible to use only materials that are accredited to meet building codes applicable to their project. They're also liable for their work for a period of time after the structure is turned over to the owner, often 10 years, depending on state law, and they must address inherent construction defects identified by the property owner during that period.

Defects that become evident due to noncompliant plywood would fall into this construction defect category and could result in a claim under the builder's Professional Liability insurance policy.

The gray area is a situation where the owner is aware that the substandard plywood was used on their structure and then insists, even without current evidence of damage, that it be removed and replaced. Those matters will be resolved in the months and years ahead, likely by attorneys and the courts.

Builders and contractors clearly have a case to make in their defense if and when these matters are litigated. And litigation is a near-inevitability, so they'll rightly expect their legal costs to be covered under their Professional Liability insurance policy. This policy (which in general limits the policyholder's exposure for claims made related to construction management, project management, design and engineering activities and other actionable situations) can cover not only these legal costs but also any damages resulting from the use of the materials ... with one major caveat.

It's extremely critical to note that for these matters to be covered, the builder or contractor must have adhered to their responsibility (spelled out in their Professional Liability policy) to advise their broker of any circumstances they were aware of that could give rise to a professional liability claim. That means they're obligated to inform their broker of any Brazilian plywood that's been used in their projects.



<sup>1</sup> <https://frereswood.com/blog/brazilian-plywood/>

<sup>2</sup> <https://essential.construction/news/the-dotted-line-what-builders-need-to-know-about-the-brazilian-plywood-ban/>

## Bottom Line: Be Proactive

If you're a builder or contractor that's had residential or commercial projects in the U.S. within the past decade, we strongly recommend you:

- + Work with your suppliers to try to determine which of your projects over the past six years was sourced with this improperly certified Brazilian plywood.
- + In compliance with the obligations within your Professional Liability insurance policy, share this list of projects and relevant contract documents with your insurance broker.
- + Collaborate with your broker to develop a strategy for communicating this information to the owners of those properties that might be affected.

The Brazilian plywood situation promises to be legally complex. The financial stakes are high for all parties that find themselves in this unfortunate chain of custody. As noted, though, builders and contractors do have a seemingly legitimate defense, and they'll be in a position to make the best of a bad situation as long as they're up front with their broker about their good-faith use of this material.



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