



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



[www.mdjwlaw.com](http://www.mdjwlaw.com)

A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101

111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401

900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

July 21, 2008

### **FIFTH CIRCUIT HOLDS INSURERS DO NOT OWE DUTY TO DEFEND OR INDEMNIFY IN SUBROGATION MATTER ARISING FROM A DEFECTIVE CONCRETE SLAB**

Recently, the U.S. Fifth Circuit affirmed summary judgment for two insurers sued in a subrogation matter to recover attorneys' fees and settlement costs incurred in defending certain insureds in an underlying lawsuit. In *Indian Harbor Ins. Co. v. Valley Forge Ins. Group*, 2008 WL 2717800 (5th Cir. July 11, 2008), the insured hired a general contractor ("Traxel") to construct a steel building on its premises. Traxel then hired American Steel who in turn hired Arrow Trucking to deliver the steel for the building. Lastly, Traxel hired Coastal Paving, Inc. ("Coastal") to construct the concrete slab for the building. The insured sued all the construction companies contending the slab was defective and caused significant damage to the building.

Coastal's insurer provided it a defense and paid for the settlement amount associated with claims against Coastal. Coastal's insurer also shared in the defense of Traxel, which the insurer considered an additional insured under Coastal's policy. Valley Forge insured American Steel and Liberty Mutual insured Arrow Trucking—both under business automobile insurance policies. Coastal's insurer argued Traxel and Coastal qualified as insureds—and consequentially were owed a duty of defense—under the policies issued by Valley Forge and Liberty Mutual because the underlying complaint included facts sufficient to support a claim that Coastal and Traxel were vicariously liable for the conduct of American Steel and Arrow Trucking.

Under Texas law an independent contractor can be held vicariously liable if it exercises a sufficient degree of control. Here, despite a misapplication of the "eight corners" rule by the district court, the Fifth Circuit maintained summary judgment for Valley Forge and Liberty Mutual because the underlying petition did not allege the requisite degree of control. None of the underlying allegations indicate Traxel instructed American Steel as to the method it was to utilize in erecting the steel structure. Likewise, the allegations do not indicate Traxel instructed Arrow Trucking with regard to any particular method to follow in delivering the steel. As the underlying complaint does not allege a sufficient degree of control Valley Forge and Liberty Mutual's duty to defend and duty to indemnify were not triggered.

### **FEDERAL DISTRICT COURT APPLIES *LAMAR HOMES* DECISION AND CONCLUDES INSURER HAD A DUTY TO DEFEND ITS INSURED BASED ON ALLEGED CONSTRUCTION AND DESIGN DEFECTS IN UNDERLYING SUIT**

A federal district court recently applied the Texas Supreme Court's decision in *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, 242 S.W.3d 1 (Tex. 2007) and concluded Mid-Continent owed its

insured a duty to defend and indemnify in an underlying lawsuit involving construction and design defect allegations. In *Rotella v. Mid-Continent Cas. Co.*, 2008 WL 2694754 (N.D. Tex. July 10, 2008), an underlying action was filed for breach of warranty, negligence, and breach of contract resulting from alleged construction and design defects in a home. Under the terms of the policy, Mid-Continent was obligated to defend and indemnify the insureds for liability related to “bodily injury” and “property damage” as the result of an “occurrence,” as well as to “defend the insured against any ‘suit’ seeking those damages” and to indemnify.

Initially, Mid-Continent refused to defend and indemnify its insured, arguing the underlying suit did not involve an “occurrence” covered by the policy, and/or it was excused from providing coverage by one or more of the policy exclusions. Later, Mid-Continent argued there was insufficient evidence presented to establish a duty to defend or a duty to indemnify in the underlying suit. In the underlying action, the homeowner alleged injury as a result of “defective workmanship and design contained within the Property.” The CGL policy issued by Mid-Continent contains identical language to the one analyzed in *Lamar Homes*.

Here, the court applied the *Lamar Homes* decision and held unintended construction defects may constitute an “accident” or “occurrence” under the CGL policy, and based on the factual allegations in the underlying petition Mid-Continent’s duty to defend had been triggered. And, Mid-Continent failed to present evidence suggesting that any exclusion in the policy applied.

The court next analyzed the duty to indemnify; but, although liability had been established, the court declared it was unable to determine the extent, if any, of Mid-Continent’s duty to indemnify the insured for the judgment in the underlying action. The order granting summary judgment for the homeowner did not specify the basis of the judgment, nor was there anything in the record that clearly established Mid-Continent’s duty to indemnify its insureds. Therefore, the court denied the insured’s motion for summary judgment on the issue of whether Mid-Continent had a duty to indemnify.

### **APPELLATE COURT AFFIRMS NO-EVIDENCE SUMMARY JUDGMENT ON EXTRA-CONTRACTUAL CLAIMS, BUT REVERSES INSURER’S TRADITIONAL SUMMARY JUDGMENT DUE TO FACT ISSUES ARISING FROM A DAMAGE DISPUTE ASSOCIATED WITH A WATER CLAIM**

Last week a Texas appellate court affirmed a no-evidence summary judgment on extra-contractual issues, but reversed summary judgment for CMI Lloyds and remanded the cause back to the trial court to resolve factual disputes arising from contested damages associated with several water leaks at Plaintiff’s home. In *Laird v. CMI Lloyds*, 2008 WL 2756837 (Tex. App.—Texarkana July 17, 2008), CMI paid Laird over \$30,000 for damages associated with several water leaks in his home. CMI sought a declaratory judgment that it had complied with its payment obligations under the homeowners policy. Laird filed a counterpetition alleging breach of contract, violations of the Texas Insurance Code, and violations of the duty of good faith and fair dealing.

CMI filed its summary judgment and argued Laird’s breach of contract claims should be dismissed because CMI had no other obligations under the policy. Laird responded and filed a motion for partial summary judgment to address certain policy exclusions, to enforce an appraisal award (\$45,673.51), and to argue that the issue of coverage does not protect CMI from extra-contractual claims. The trial court granted CMI’s summary judgment and denied Laird’s motion for partial summary judgment. It declared CMI had no further financial obligation under the policy.

As a preliminary matter, the appellate court held CMI was not obligated to pay the full appraisal award as questions of causation and coverage remained. Next, the court affirmed CMI's no-evidence summary judgment as to Laird's extra-contractual claims. Applying the Texas Supreme Court's decision in *Provident Am. Ins. Co. v. Casteneda*, 988 S.W.2d 189 (Tex. 1998), the court held Laird failed to show CMI's alleged acts or omissions caused an independent injury resulting from a wrongful denial of policy benefits.

Turning to CMI's traditional summary judgment, the court next analyzed several policy exclusions and conditions. After a lengthy discussion on policy issues, the court held the summary judgment evidence yielded some doubt that CMI owed Laird more than \$30,745.19 already paid. Therefore, the appellate court reversed CMI's summary judgment and remanded the cause for further proceedings.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.  
If you would like to add additional recipients or would like to unsubscribe, please reply to this e-mail with your request  
For past copies of the Newsbrief go to [www.mdjwlaw.com](http://www.mdjwlaw.com) and click on our Texas Insurance News page.