Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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THE SUPREME COURT OF TEXAS HOLDS THAT AN INSURER MUST COVER A HOMEBUILDER'S VOLUNTARY PAYMENTS BECAUSE IT DID NOT SUFFER ANY PREJUDICE FROM THE PAYMENTS

The Texas Supreme Court recently reversed a Court of Appeals determination that an insurer was prejudiced because it's insured participated in settlements without its consent, and reinstated the trial court verdict finding coverage in favor of the insured. In *Lennar Corp. v. Markel Am. Ins. Co.*, 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013), Lennar Corp ("Lennar") sought coverage from Markel Am. Ins. Co. ("Markel") for a voluntary remediation program it developed to compensate and replace synthetic stucco commonly known as EIFS with conventional stucco. Improperly installed EIFS can trap water and cause substantial rot and structural damage in homes. Lennar offered, and in some instances openly solicited, their remediation program to hundreds of homeowners regardless if their homes suffered damage from EIFS. As a result, Lennar replaced the EIFS it installed on hundreds of homes.

At trial, the jury found the use of EIFS "created an imminent threat to the health/safety of the inhabitants of the homes," and that Lennar took "reasonable steps to cure its construction defects as soon as practicable". As such, the jury failed to find that Markel was prejudiced by Lennar's failure to obtain Markel's consent, as required by the policy; (a) not to enter into any compromised settlement agreements, or (b) to voluntarily make any payment, assume any obligation, or incur any expense. The trial court rendered judgment in favor of Lennar.

The Court of Appeals reversed the trial court's judgment and the Texas Supreme Court granted petition for review.

In its analysis, the Texas Supreme Court determined that an insurer must suffer a material prejudice in order to excuse coverage. Markel argued that Lennar's remediation settlements were prejudicial, largely because Lennar offered remediation to homeowners that never would have sought redress. Further, Markel maintained that Lennar's unilateral settlement was a material breach of the insurance policy because it significantly impaired its position to adjust claims, provide a defense, or be involved in negotiating a settlement. The Court noted that the jury did not find Markel's arguments persuasive, and the jury was entitled to credit evidence that, had Lennar not proceeded with its remediation process, the damages would have worsened with the deterioration of EIFS and the remediation costs increased.

Next, the Court addressed whether the Policy's consent-to-settlement requirement excuses coverage as a matter of law. The Court held that Lennar's failure to comply with the Policy's consent-to-settle provision did not excuse Markel's liability under the Policy unless it was prejudiced by the remediation settlements. Since the issue of whether Markel suffered prejudice from Lennar's remediation efforts was resolved by the jury in Lennar's favor, no prejudice was established and Markel was not excused from providing coverage.

The Supreme Court affirmed the trial court's $6 Million verdict in Lennar's favor.

COURT OF APPEALS DETERMINES THAT GENERAL PARTNER IS NOT INSURED FOR LIABILITY FOR AN ENTITY NOT LISTED AS AN INSURED UNDER THE POLICY

In *Mid-Continent Casualty Company v. Castagna*, the Court held that the trial court erred in failing to grant an insurer's Motion for Summary Judgment, in part. Mid-Continent Casualty Company issued multiple commercial general liability policies to a residential homebuilder from 2001, 2002, 2003 and 2006 to 2007. The residential homebuilder insured multiple entities associated with McClure Brothers Custom Homes; however, important to this case the homeowner Castagna entered a contract of sale with McClure Brothers Custom Homes, **LP** to build her residence. Also, McClure Brothers Homes, **LLC** was found to be the general partner of McClure Brothers Homes, **LP**.

In the underlying suit, McClure Brother Custom Homes, **LP** and McClure Brothers Homes, **LLC** were sued for foundation defects in a residential construction project. The case underwent arbitration, Mid-Continent defended the homebuilders, and ultimately an arbitration award against the homebuilders was entered in favor of the homeowner. Afterward, the homeowner filed suit to enforce the arbitration award against Mid-Continent.

The homeowner filed a Motion for Summary Judgment against Mid-Continent where she asserted that Mid-Continent was obligated to pay the final judgment confirming the arbitration award because the damages awarded were covered under the 2001, 2002, and 2003 policies. Mid Continent also filed its own Motion for Summary Judgment where it asserted there is no insurance coverage under the policies because the homebuilders were not insured during the policy periods in which the alleged damage occurred, and that there was no evidence that there was an occurrence or property damage prior to 2006 that would trigger coverage.

The Court first addressed, and rejected, Mid-Continent's argument regarding when the "occurrence" of property damage happened. The Court first defined the meaning of "occurred" where it noted that "Occurred means when damage occurred, not when discovery [of the damage] occurred." The Court reviewed the arbitration record and concluded that there was more than a scintilla of evidence that the homeowner witnessed the development of cracks as early as 2001 and the cracks progressed through 2007.

The Court next addressed whether the 2006-2007 policy provided coverage for damages awarded to Castagna because the judgment-debtors-homebuilder and its general partner were not actually named insureds under the 2006-2007 policy. More specifically, McClure Brothers Homes **LLC** was listed as a named insured, and the arbitrator found that it was the general partner for McClure Brothers Custom Homes, **LP**, and therefore jointly and severally liable for McClure Brothers Custom Homes, **LP's** actions. Importantly, however, McClure Brothers Custom Homes, **LP** was not listed as a Named Insured under the 2006-2007 policy.

Unlike the earlier 2001 through 2003 policies, the 2006-2007 policy contained language that no organization is an insured "with respect to the conduct of any current or past partnership…or limited liability company, not shown as the named insured. As such, Mid-Continent successfully argued that McClure Brothers Homes **LLC** was being held liable for acts and omissions of McClure Brothers Custom Homes, **LP**—an entity that was not a named insured—and the trial court erred in denying Mid Continent's Motion for Summary Judgment with respect to coverage

Ultimately, the Court determined that Mid-Continent owed coverage under the 2001 through 2003 policies, but it did not owe coverage under the 2006-2007 policy.

TEXARKANA COURT OF APPEALS HOLDS THAT TENANTS IN SUFFERANCE DO NOT HAVE AN INSURABLE INTEREST IN A PROPERTY LOSS

Recently, the Texarkana Court of Appeals affirmed a trial court's take nothing judgment against the insureds because they had no insurable interest in the dwelling at the time of a fire. In *Rhine v. Priority One Ins. Co.*, 06-13-00039-CV, 2013 WL 4428930 (Tex. App.—Texarkana Aug. 20, 2013, no. pet. h.) the insured owned a house in a semi-rural part of Harrison County, Texas and obtained fire and hazard insurance on the property from Priority One. The house was destroyed by a fire, and Priority One denied coverage, claiming that the policy had been terminated before the claim matured, and at the time of loss, the insureds lost their insurable interest in the property due to foreclosure.

The insureds' home was secured by a mechanic's lien with power of sale regarding the payment of a promissory note given for the construction and improvements to the insured's home. The insureds' were nine months delinquent in payment and the house was foreclosed on November 1, 2011. As a result, the insured had been reduced from owners to tenants in sufferance, and the Priority One Policy did not provide coverage for roomers or tenants. The house was destroyed by a fire on November 15, 2011—two weeks after the foreclosure.

The Court concluded that the policy prevented recovery because the insureds were tenants in sufferance at the time of the loss. Accordingly, the Court affirmed the trial court's judgment in favor of Priority One insurance.

MDJW First Friday Webinar - Premises Liability 2: Causation and Damages

Jamie Cooper, presenter

 Our next First Friday will be held on September 6, 2013 at **noon Central Time**. Following up on last month's presentation on Premises Liability, Jamie Cooper, a partner in our Houston office will present Premises Liability 2: Causation and Damages. This month's presentation will focus on the injured person's claim as it relates to the connection between the negligent act or acts of the property owner and the injuries and damages claimed. There will also be a discussion on two general categories of damages: economic and noneconomic.

Ms. Cooper's background is in general commercial litigation. Her insurance practice focuses on the evaluation and resolution of insurance matters involving coverage disputes, claims handling, and other legal issues of interest to insurers conducting business in Texas. Ms. Cooper provides continuing education courses to carriers on first party coverage as well as courses on compliance with Articles 541 and 542.051 of the Texas Insurance Code. Ms. Cooper is an Adjunct Professor of Property and Casualty Insurance Law at the University of Houston Law Center.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their license number available during the training in order to request credit for the course.

Register for this webinar at: https://student.gototraining.com/r/6242261015576852224 After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

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