

THOUGHT LEADERSHIP

News

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

Newsbrief

04 SEP 2013

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.

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

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.