Article

Insurance Law: 2013 Year In Review

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In insurance law, 2013 was defined by one titanic Supreme Court of Texas case that has the potential to influence a number of areas of insurance law and strategy in insurance conflicts for yean. to come. In Lennar Corp. v. Markel American Ins. Co.,-S.W.Jd-, 2013 WL 4492800 (Tex. 2013), the Supreme Court, in an opinion written by now-Chief Justice Nathan Hecht, reached several conclusions that will have an impact far beyond the facts presented in that case. The insurance industry quickly mobilized amicus efforts to seek and support reversal of the decision in whole or in part on rehearing.

Thus, in my view, it is evident that the decision is good news for Texas commercial policyholders, especially those who try to efficiently resolve large-scale and legitimate claims of consumers through prompt investigation and settlement.

LENNAR HOMES

In Lennar, the insured homebuilder determined that homes built with an exterior insulation and finish system were suffering serious water damage that worsened over time. The insured "undertook to remove the product from all the homes it had built and replace it with conventional stucco." Additionally, "The homebuilder's insurers refused to cooperate with the remediation program, preferring instead to wait until homeowners sued, and denied coverage of the costs." All of the underlying claims were eventually settled, with only three ever reaching litigation.

LEGAL LIABILITY ESTABLISHED BY INSURED'S UNILATERAL SETTLEMENT

The court held that a legal liability sufficient to invoke coverage can be established by a unilateral settlement to which the insurer has not consented, so long as the settlement does not prejudice the insurer. The policy included a condition barring settlement without consent, and it also included similar language in the insuring agreement. The court held that repeating the requirement in the insuring agreement did not mean that the absence of consent was a material breach that obviated the need to show prejudice. The court rejected arguments that Lennar prejudiced the insurer as a matter of law by actively "soliciting claims which might otherwise never have been brought [through} contacting of potential claimants rather than waiting for them to assert a claim..." Strategic use of the court's ruling could assist policyholders with a new tool to encourage insurance carriers co participate in and initiate settlement. While carriers in Texas have traditionally not had a tort duty to initiate settlement, the decision in Lennar strongly suggests that if they take a wait-and-see approach, then the insured can take preemptive action, solve the impasse, and send the bill back to the carrier.

PREVENTATIVE DAMAGES “BECAUSE OF” COVERED DAMAGE

Next, the court held that the policy covered the costs of determining if there was EIFS damage, even if no damage was found. The court reasoned that such preventative damage was ''because of" property damage since damage was actually found as to the costs submitted to the jury. Texas courts have long recognized that the costs of "going in" to correct defect in the insured’s work is covered property damage. It remains to be seen whether purely preventative measures--which are undertaken to avoid harm when health and safety issues are present- will be found to be covered given the court's decision. If so, this could have a dramatic effect on toxic tort dean-up cases and other similar scenarios.

DAMAGE NEED NOT BE ENTIRELY WITHIN THE POLICY PERIOD

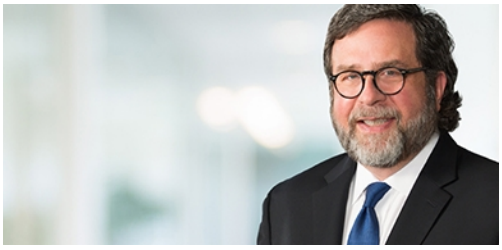
In short, the court held that if a carrier is in for a penny, it is in for a pound. In other words, so long as there is covered property damage within the policy period, even though other damage occurred in other policy periods before and/or after, the insured is allowed to pick which carrier responds. The court confirmed its highly debated statement in American Physicians Insurance Exchange v. Garcia, 876 S.W.2d 842 (Tex.l994), that where multiple policies arc triggered, the insured is "generally in the best position to identify the policy or policies that would maximize coverage." This practice, sometimes called "spiking," is very advantageous to policyholders, in large-scale toxic tort cases because the insured is permitted to pick or spike a line of coverage that best suits it, thus potentially avoiding SIRs and instances of coverage gaps or insolvency. The court refused to revisit its decision in Garcia, and it concluded "that Markel's policy covered Lennar's entire remediation costs for damaged homes." This is clearly the approach predicted by a number of courts applying Texas Law.

WHAT IS THE UPROAR ABOUT?

Critics of the decision in Lennar fear that the court has set the stage tor policyholders to exclude liability insurers from settlement discussions. The court has previously emphasized that carriers who arc given the opportunity to participate in settlement and refuse to do so will suffer.6 The court in Lennar clearly desired to reward responsible corporate insureds seeking to limit and solve problems, noting that "Lennar's responsible efforts to correct defects in its home construction did not absolve [the liability insurer] of responsibility for the costs under its liability policy."

Markel filed a motion for rehearing on Oct. 9, 2013. An amicus brief by a number of leading carriers was filed the next day. On Dec. 13, 2013, the Supreme Court denied the motion for rehearing and rejected the arguments of the insurance carriers.

Primary Contacts



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