



ADVOCACY GROUP
Construction Liability & Legal Research Department

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COMMERCIAL GENERAL LIABILITY (CGL) – Policy Interpretation

On Friday, August 31st, in a long awaited decision, the Texas Supreme Court affirmatively answered the question of whether faulty workmanship performed by a subcontractor that causes property damage satisfies the “occurrence” requirement for insurance coverage where the damage is limited to the home itself. The case is Lamar Homes, Inc. v. Mid-Continent Casualty Co.

The case is significant because all across the country insurers are attempting to eliminate coverage to builders for construction defects arising out of the work of their subcontractors. If the insurers are successful this could create a coverage gap that will be difficult to fill.

This case was sent to the Texas Supreme Court on certified questions from the United States Court of Appeals for the Fifth Circuit asking whether an insurer under a commercial general liability (“CGL”) policy has a duty to defend its insured, a homebuilder, against a homebuyer’s claims of defective construction. The Fifth Circuit certified three questions for the Supreme Court’s consideration, only two of which are relevant here:

1. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?
2. When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy?

Finding for the builder, the Texas Supreme Court concluded:

allegations of unintended construction defects may constitute an “accident” or “occurrence” under a CGL policy and;

allegations of damages to, or loss of use of, the home itself may also constitute “property damage” sufficient to trigger the duty to defend under a CGL policy.

The following are some highlights from the decision:

An “occurrence” depends on the fortuitous nature of the event, that is, whether the damage was expected or intended from the standpoint of the insured.

A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly.

The CGL policy makes no distinction between tort and contract damages.

The CGL policy does not define an “occurrence” in terms of ownership or character of the property damaged by the act or event. Consequently there is no basis for distinguishing between damage to the work itself (the home) and damage to some third party’s property.

The Court rejected the insurer’s argument that allowing damage to the homebuilder’s own work, the home, would transform the liability policy into a performance bond. The court observed that any similarities between the CGL and a performance bond are irrelevant. As the Court said, “[t]he CGL policy covers what it covers.”

The Court adopted Lamar’s understanding of the subcontractor exception to the “Your Work “ exclusion as follows –“ when a general contractor becomes liable for damage to work performed by a subcontractor – or for damage to the general contractor’s own work arising out of a subcontractor’s work – the subcontractor exception preserves coverage that the “your work” exclusion would otherwise negate.

By incorporating the subcontractor exception into the “your work” exclusion the insurance industry specifically contemplated coverage for property damage caused by a subcontractor’s defective performance.

The economic-loss rule is not a useful tool for determining insurance coverage. It is a liability defense or remedies doctrine, not a test for insurance coverage.

NAHB filed an amicus (friend of the court) brief in support of Lamar in both the Fifth Circuit and the Texas Supreme Court. NAHB has been filing amicus briefs in state and federal courts challenging the insurers’ rigid policy interpretation on the grounds that it is overly broad and is not supported by any language in the insurance policy. To date we have filed briefs in Arizona, Florida, Kansas, Pennsylvania, South Carolina and several federal courts.