

Construction Law

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Texas Supreme Court Settles Battle Over Insurer's Duty to Defend Homebuilders in Construction Defects Suit

Lamar Homes, Incorporated v. Mid-Continent Casualty Company

No. 05-0832, 2007 Tex. LEXIS 797 (Tex. August 31, 2007).

Answering certified questions presented by the Fifth Circuit Court of Appeals, the Supreme Court of Texas concluded that allegations of unintended construction defects may constitute an "accident" or "occurrence" under a commercial general liability (CGL) insurance policy and that damage to, or loss of use of, the home itself may constitute "property damage" sufficient to trigger an insurance company's duty to defend. Further, an insurer who breaches this duty may be subject to additional damages.

Several years after Vincent and Janice DiMare purchased a new home from Lamar Homes, Inc. they encountered problems caused by a defective foundation and sued. Lamar forwarded the suit to its insurer, Mid-Continent Casualty Company, seeking defense and indemnification under its CGL policy. After Mid-Continent refused to defend, Lamar sought a declaration of its rights under the policy and recovery under the Texas Insurance Code's "Prompt Payment of Claims" statute.



The federal district court granted summary judgment for Mid-Continent, concluding it had no duty to defend Lamar for construction defects that harmed only Lamar's own product. The district court's conclusion was based on the reasoning that the purpose of a CGL policy is to protect the insured from liability resulting from "property damage" or "bodily injury" caused by the insured's product, but not for the repair or replacement of that product. On appeal, the Fifth Circuit noted the disagreement between Texas courts on the application of the CGL policy under these circumstances and asked the Supreme Court of Texas to resolve the conflict.

The three certified questions presented by the Fifth Circuit were 1) whether a homebuyer suing his general contractor for construction defects, alleging only damage to or loss of use of the home itself, alleges an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy; 2) whether the same allegations allege "property damage" sufficient to trigger that same duty; and 3) if so, whether the "Prompt Payment of Claims" statute applies to an insurer's duty to defend.

The Court declined to reach the question of whether the allegations triggered the insurer's duty to indemnify, saying that this duty is not triggered by the plaintiff's allegations, but rather, by proof at trial. Addressing the duty to defend, the Court noted that CGL policies provide that the insurance carrier will pay those sums that the insured becomes legally obligated to pay due to "bodily injury" or "property damage" caused by an "occurrence," and will defend the insured against any suit seeking those damages. Consequently, the carrier's duty to defend the insured is triggered by a claim for bodily injury or property damage caused by an occurrence.

SPAIN HASTINGS WARD CAREY & CHAMBERS

11806 Barker Cypress
Houston, Texas 77433
Phone: (281) 373-0270
Fax: (281) 373-0271

909 Fannin Street, Suite 3900
Houston, Texas 77010
Phone: (713) 650-9700
Fax: (713) 650-9701

3755 Capital of Texas Highway, Suite 100
Austin, Texas 78704
Phone: (512) 445-0001
Fax: (512) 329-0071

“...the Court found that allegations of unintended construction defects may constitute an ‘occurrence’ under a CGL policy...”

The Court discussed the difference between workmanship injuring only the builder’s own product and that injuring the property of a third part, finding the distinction irrelevant because both were caused by the same thing—negligent or defective work—and the policy’s definition of “occurrence” did not differentiate between who owned the injured property.

The policy defined an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” However, the policy did not define “accident,” so the Court was required to use its generally accepted or commonly understood meaning, which is a “fortuitous, unexpected, and unintended event.” The Court recognized that that an intentional tort is not an accident and thus, not an occurrence regardless of whether the effect was unintended or unexpected. But a deliberate act, performed negligently, is an accident if the effect is not the intended result; that is, the result would have been different had the deliberate act been performed correctly.

The determination of whether Lamar’s faulty workmanship was intended or accidental is dependent on the facts and circumstances of the particular case. For the purposes of whether Mid-Continent had a duty to defend Lamar, those facts and circumstances must generally be gleaned from the DiMare’s complaint. Here, the complaint alleged an “occurrence” because it asserted that Lamar’s defective construction was a product of its negligence, not that Lamar intended or expected its work to damage the DiMare’s home. However, a CGL policy does not cover every occurrence, but only those that cause bodily injury or property damage. Thus, the Court turned to the next question, whether defective construction or faulty workmanship damaging only the contractor’s own work is property damage under the CGL policy.

“...allegations of damage to, or loss of use of, the home itself may also constitute ‘property damage’ sufficient to trigger the duty to defend.”

The policy defines property damage as “physical injury to tangible property, including all resulting loss of use of that property.” The Court found that the home and its component parts were clearly “tangible property,” and that the DiMare’s allegations that Lamar’s defective workmanship caused the home’s sheetrock and stone veneer to crack were allegations of a physical injury. Therefore, the DiMare’s allegations were of physical injury to tangible property, satisfying the policy’s definition of property damage.

Finally, the Court reviewed whether the “Prompt Payment of Claims” statute applies to an insurer’s breach of its duty to defend. This statute provides that an insurer, who is liable for a claim under an insurance policy and who does not promptly respond to, or pay, the claim as the statute requires, is liable to the policy holder not only for the amount of the claim, but also for interest on the amount of the claim at the rate of eighteen percent a year as damages, together with reasonable attorney’s fees.

“...the Prompt Payment of Claims statute may be applied when an insurer wrongfully refuses to promptly pay a defense benefit owed to the insured.”

A “claim” is defined by the policy as a “first-party claim” made by an insured that must be paid by the insurer directly to the insured or its beneficiary. The statute does not separately define a “first-party claim;” however, according to a prior Texas Supreme Court opinion, a first-party claim is stated when “an insured seeks recovery for the insured’s own loss,” whereas a third-party claim is stated when “an insured seeks coverage for injuries to a third party.” Based upon that distinction, a defense claim is a first-party claim because it relates solely to the insured’s own loss. Without the defense benefit provided by a liability policy, the insured alone would be responsible for these costs. Therefore, the insurer was liable under the Prompt Payment of Claims statute.

Accordingly, the Court found that allegations of unintended construction defects may constitute an “occurrence” under a CGL policy and that allegations of damage to, or loss of use of, the home itself may also constitute “property damage” sufficient to trigger the duty to defend. Further, the Prompt Payment of Claims statute may be applied when an insurer wrongfully refuses to promptly pay a defense benefit owed to the insured.

Possibly most important to note, this decision resonates far beyond insurers of homebuilders. Under similar circumstances, it is directly applicable to any CGL insurer of any construction contractor and possibly, to CGL insurers of product manufacturers. As the uniform CGL policies are currently defined, there is nothing in the Court’s reasoning that would limit such “occurrences” or “property damage” to homebuilders. Likewise, the Prompt Payment of Claims holding likely applies to every duty to defend liability policy regardless of the type—auto, homeowners, and commercial—and to every insured under such policies, both business and individual. There is nothing in the Court’s reasoning or the language of the statute that would limit the statute’s application to CGL policies.