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Special Report

A Year After *Lennar*: Proceed with Caution

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Many cases now making their way through the judicial system will clarify the *Lennar Corp. v. Markel Am Ins. Co.* Texas Supreme Court decision from a year ago. Attorneys should proceed with caution when addressing situations involving continuing injury construction defect matters.

According to the court opinion in *Lennar*, the claim by Lennar was for the cost to repair homes that had been damaged because of exterior insulation finishing system (EIFS) siding installed on the homes by Lennar. After the insurance company denied coverage, Lennar settled with the homeowners and later sued its insurers to recover the amount paid.

Two main issues were addressed by the court. The court first held that in order to avoid liability for breach of the condition regarding consent to settle, Markel must show the breach

was material, i.e., there was prejudice. The second issue to be addressed was whether Lennar was required to show what property damage occurred during the Markel policy period. On this issue



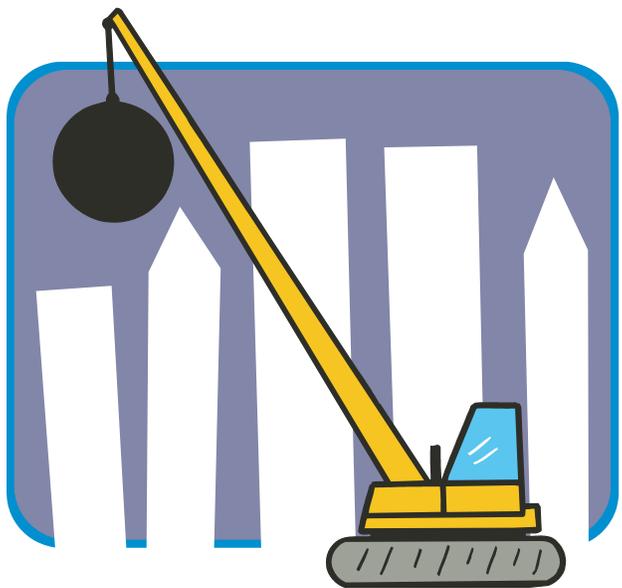
the court held that under the continuing injury rule first announced in *APIE v. Garcia*, that the insured was entitled to only one policy during the period of the continuing injury and could select

which policy was most favorable to it. The insurer selected would then have the right to obtain contribution from other insurers in that same layer.

In the year since the court handed the decision, the breadth of the holding is becoming apparent. On the issue of prejudice for breach of conditions, the courts addressing the issue have not extended *Lennar's* holding beyond the facts in the opinion.

In 2013, *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co.*, the excess carrier wasn't notified until after a verdict had been rendered that would have pierced its limits. In that case, the U.S. Court of Appeals for the Fifth Circuit found that an obligation existed to notify the excess carrier (Philadelphia) of the claim and lawsuit. The remaining issue was whether Philadelphia was prejudiced by not receiving notice of the claim until after the verdict.

The court noted that not only was



Texas. In this case, the general contractor sued its own general liability insurers and those of its subcontractors for defense costs and indemnity. The general contractor attempted to impose pro rata liability for defense costs on all of the insurers. The court disagreed with the arguments advanced by the general contractor holding that insured is only entitled to select

- This right of contribution is owned by the insurers, not the insured.
- The insured must select the same policy period for both defense and indemnity.

The courts have only begun to scratch the surface on the impact of *Lennar* on construction defect litigation. Many cases now making their way through the judicial system will add further enlightenment and clarification to the *Lennar* decision. However, attorneys will be well served in proceeding cautiously when addressing situations involving continuing injury construction defect matters. ■■■

notice late, it was “wholly lacking.” Philadelphia lost the ability to conduct its own investigation and to have a seat at the mediation table. The court concluded that Philadelphia was prejudiced as a matter of law. Berkley argued that the *Lennar* case had changed the standard. The court limited the *Lennar* holding to prejudice from a settlement without the permission of the insurer and refused to extend the holding beyond those facts.

The more important issue in *Lennar* was the application of the continuing injury doctrine to construction defect case. It is anticipated that this holding will have the greatest impact in the litigation of construction defect cases. The only case to address this issue to date is from this year in *The Burlington Ins. Co. v. Ranger Specialized Glass, Inc.* out of the U.S. District Court for the Southern District of

from one of several policies triggered by the allegations.

In continuing injury cases, where multiple policies are triggered by the allegations in the petition, the following rules govern the duty to defend.

- In a continuing injury case where multiple consecutive policies are triggered for the duty to defend, the insured is entitled to trigger only one for the duty to defend.
- If policies are triggered where the insured is an additional insured, those may be triggered in the same fashion as stated above.
- The insured is allowed to pick the policy period for its own insurers and that where it is an additional insured that provides it the greatest relief.
- The insurer selected for the defense may then look to other insurers for contribution whose defense obligations were triggered.



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Micah's current docket

includes cases involving breach of contract, business torts, fraudulent transfer, copyright infringement, financial fraud, insurance policy interpretation, personal injury, products liability and securities class actions.