



# **“Building On The Law”**

## **Construction Law Update**

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# DEFECTIVE WORK EXCLUSIONS

- What do these type of exclusions limit?
  - Defective work exclusions bar coverage for “...any and all costs associated with the removal or replacement of defective, deficient or faulty work...”

# DAMAGE TO PROPERTY/“YOUR WORK” EXCLUSIONS

- What do these type of exclusions limit?
  - These exclusions are designed to exclude coverage for property damage resulting from defective work performed by the insured.
  - Typical exclusion provides a bar to recovery of property damage related to “your work”.

# RECENT APPLICATION OF EXCLUSIONS

*Mid-Continent Casualty Co. v.  
JTH Custom Homes, Inc.*

- (2022 WL 2441855 W.D. Tex. July 4, 2022), *adopted by*, 2022 WL 17732682 (W.D. Tex. Sept. 6, 2022)

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Background Facts)***

- Underlying lawsuit involved the construction of a new home on Lake Travis.
- JTH Custom Homes served as both general contractor and builder.
- Home was not completed on time, but homeowners moved into home December 2017, started to discover defects.
  - Defects included: mold, electrical, drainage, masonry, doors, windows, pools, and fountain.

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Background Facts (cont.))***

- Homeowner sued JTH. Multiple defendants added, 7 separate causes of action. Basis of claim was that JTH failed to supervise employees and subcontractors, resulting in damages.
- JTH demanded defense from CGL carrier, Mid-Continent (“MCC”). MCC provided defense under a Reservation of Rights, but also filed a declaratory action.
- MCC moved for summary judgment on duty to defend and duty to indemnify.

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Summary Judgment)***

## **MCC's Summary Judgment Argument**

MCC argued that both the “Defective Work” exclusion and the “Property Damages/Your Work” Exclusion barred coverage, and, therefore, no duty to defend or indemnify owed to JTH Homes

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Court's Analysis)***

- “Defective Work” Exclusion:
  - Court agreed with MCC that many of the allegations were claims to repair or replace JTH (and subs) defective work....

*However....*

- Some damages claimed by homeowners was not work that was itself defective, deficient, or faulty
  - Examples: water leaks from allegedly defective doors and windows



# ***Mid-Continent Casualty Company v. JTH Custom Homes (Court's Analysis)***

- “Defective Work” Exclusion (cont.):
  - The Court read the exclusion and Petition in most favorable way for insured...
  - **“...the allegations of water damage are not excluded because the exclusion only bars coverage for the cost of repairing and replacing the defective work itself, not the cost of resolving additional damages...”**

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Court's Analysis)***

- Property Damage / “Your Work” Exclusion
  - MCC argued that property damage/“your work” exclusion was complete bar to coverage. Court disagreed.
  - The homeowners alleged that “...defective work caused damage to parts of the Property with non-defective work, such as damage to interior finishes, walls and flooring due to leaking windows and doors.”

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Court's Analysis)***

- Property Damage/"Your Work" Exclusion (cont.):
  - Since non-defective work was damaged, property damage/"your work" exclusion did not apply and did not negate MCC's duty to defend JTH.
  - Also, specific "present tense" language in policy...at a minimum a fact issue existed as far as when the damages occurred, therefore, no summary judgment.

# ***Mid-Continent Casualty Company v. JTH Custom Homes (Court's Ruling)***

“...Applying the ‘eight corners’ rule and construing the Petition liberally, at least one claims fall within the scope of [JTH’s] Policies, thus triggering MCC’s duty to defend JTH and [JTH’s owner] in the Underlying Suit...”

# TAKE-AWAYS

- Courts continue to interpret contracts to operate in favor of the insured (and in favor of a duty to defend)
  - Allegations will be construed liberally; exclusions will be interpreted narrowly.
  - “Defective Work” exclusions less broad than insurers might believe (or want).
  - Use caution when both defective and non-defective work are intertwined.

NUMBER OF OCCURRENCES:  
“CAUSE” TEST IN TEXAS

# CGL Policy Definition of Occurrence

- “Occurrence” means “an accident, including continuous or repeated exposure to the same general harmful conditions.”

# Are the Claims the Result of a Single Occurrence or Multiple Occurrences?

- “Cause” Test: Look at the cause of the damage and/or the basis of liability. The number of occurrences is determined by the number of underlying causes.
  - Majority of jurisdictions
  - Texas
- “Effects” Test: Look at the injuries or damages resulting from the cause. The number of occurrences is determined by the number of injuries resulting from the events.
  - Minority of jurisdictions



## Texas: Cause Test

“Texas courts agree that the proper focus in interpreting ‘occurrence’ is on the events that cause the injuries and give rise to the insured’s liability, rather than on the number of injurious effects.”

– *H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526 (5th Cir. 1998).

# Liability Triggering Event vs Independent Cause Test

- Liability Triggering Event

- Liability stems from the liability-causing event, i.e. a contractual obligation, regardless of how many instances of damage exist.

- Independent Cause Test

- Examines whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.

# Liability Triggering Event

- ***Maurice Pincoffs, Co. v. St. Paul Fire Marine Insurance Co.*, 447 F.2d 201 (5th Cir. 1971).**
  - Occurrence: the event(s) for which the insured is liable.
  - Eight occurrences: eight sales of contaminated birdseed. The sale of contaminated birdseed created the liability, not the act of contamination.
- ***Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651 (Tex. App.— Houston [14th Dist.] 2006)**
  - 450 homes built with defective EIFS and sold.
  - Occurrence: each home was a separate occurrence. Lennar's liability arose from building and selling the homes with the defective EIFS.

# Independent Cause Test

- ***H.E. Butt Grocery Co. v. National Union Fire Ins. Co.*, 150 F.3d 526, 530 (5th Cir. 1998).**
  - Two separate instances of abuse inside an HEB store by the same employee a week apart.
  - Two occurrences
  - “[I]f one cause is interrupted and replaced by another intervening cause, the chain of causation is broken and more than one occurrence has taken place.”
- ***Goose Creek Consolidated ISD v. Continental Casualty Co.*, 658 S.W.2d 338 (Tex. App.—Houston [1st Dist.] 1983).**
  - Two separate fires at two locations likely caused by same group or individual.
  - Two occurrences. Fires were in separate locations at separate times, and one did not cause the other.

# Independent Cause Test

- ***Evanston Ins. Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143, 150 (5th Cir. 2018).**
- “[T]he appropriate inquiry is whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. If so, then there was a single occurrence. If the chain of proximate causation was broken by a pause in the negligent conduct or by some intervening cause, then there were multiple occurrences, even if the insured’s negligent conduct which caused each of the injuries was the same kind of negligent conduct.”

# Southern District of Texas: Independent Cause Test

- ***Urban Oak Builders, LLC v. Gemini Insurance Co.***
  - 2021 WL 7209213 (S.D. Tex. Dec. 14, 2021), *adopted by*, 2022 WL 605575 (S.D. Tex. Feb. 28, 2022)
- ***Millsap Waterproofing, Inc. v. United States Fire Insurance Co.***
  - 2022 WL 1594341 (S.D. Tex. May 19, 2022)

# ***Urban Oak Builders, LLC v. Gemini Insurance Co.***

- Urban Oaks constructed six apartment buildings and a clubhouse.
- Project sold to Southstar, who later sued alleged multiple construction defects in multiple buildings.
- Contractor-controlled insurance program
  - Gemini Insurance Company: general liability policy
  - Ironshore Specialty Insurance Company: excess policy
- Issue: Did Gemini owe a defense or had its policy limits been exhausted?
  - Did Plaintiffs' claims involve a single occurrence of multiple occurrences?

# ***Urban Oak Builders, LLC v. Gemini Insurance Co. (cont.)***

- Applied the “cause” test to determine the number of occurrences.
- Quoting the Fifth Circuit in *Evanston*: “[T]he appropriate inquiry is whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. If so, then there was a single occurrence. If the chain of proximate causation was broken by a pause in the negligent conduct or by some intervening cause, then there were multiple occurrences, even if the insured’s negligent conduct which caused each of the injuries was the same kind of negligent conduct.”



## ***Urban Oak Builders, LLC v. Gemini Insurance Co. (cont.)***

- Southside's Damages
  - Damage to the property alleged to be caused by multiple types of work, by multiple subcontractors, on multiple buildings, and in multiple areas.
  - Did not result from the sale of the building to Southstar.
- Multiple occurrences.
- Relied upon:
  - *U.E. Texas One-Barrington, Ltd. v. General Star Indemnity Co.*, 332 F.3d 274 (5<sup>th</sup> Cir. 2003)
    - Multiple occurrences: 19 buildings with “multiple leaks distinguishable in space and time, and each leak was responsible for damage to a separate building.”
  - *Lennar Corp. v. Great American Insurance Co.*, 200 S.W.3d 651 (Tex. App.— Houston [14th Dist.] 2006)
    - Separate occurrence for each house in which damaged EIFS installed.

# ***Millsap Waterproofing, Inc. v. United States Fire Insurance Co.***

- Millsap Waterproofing performed various types of waterproofing work on a fire-damaged condominium project.
- Condominium Association and 80 homeowners: alleged that Millsap “negligently performed work on windows, doorways, walkways, and balconies. . .” causing water damage to common areas and individual units.
- Settlement resulted with Amerisure paying single occurrence limits and Millsap contributing. Amerisure denied it owed aggregate limits. US Fire, the excess policy provider, denied coverage.
- Millsap: sought a ruling on the number of occurrences.

# ***Millsap Waterproofing, Inc. v. United States Fire Insurance Co. (cont.)***

- Quoting the Fifth Circuit in *Evanston*: “[T]he appropriate inquiry is whether there was one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. If so, then there was a single occurrence. If the chain of proximate causation was broken by a pause in the negligent conduct or by some intervening cause, then there were multiple occurrences, even if the insured’s negligent conduct which caused each of the injuries was the same kind of negligent conduct.”

# ***Millsap Waterproofing, Inc. v. United States Fire Insurance Co. (cont.)***

- Relies on:
  - *U.E. Texas One-Barrington*: multiple occurrences.
    - Work by one subcontractor.
    - Multiple leaks in multiple buildings at distinguishable times and locations.
  - *Lennar Corp.*
  - *Urban Oaks*
- Rejects *Travelers Casualty Insurance Company of America v. Mediterranean Grill & Kabob, Inc.*, 499 F. Supp.3d 371 (W.D. Tex. 2020)
  - Single occurrence when restaurant's contaminated food caused 124 cases of salmonella poisoning over four days.
  - Liability arose from contamination of the product that was then sold to the customers.

# *Millsap Waterproofing, Inc. v. United States Fire Insurance Co. (cont.)*

- “The law is clear: I am to look at the number of different events that caused the complained-of damages, not whether Millsap’s ‘liability in the [state-court lawsuit] arose from the execution of one construction contract.’”
- Damages caused by Millsap resulted “from different types of work on multiple areas of separate buildings.”
  - Not a single, uninterrupted, continuing cause.

# Where Are We Now?

- W.D. Texas: Liability Triggering Event
  - *Travelers Casualty Insurance Company of America v. Mediterranean Grill & Kabob, Inc.*, 499 F. Supp.3d 371 (W.D. Tex. 2020)
- N.D. Texas: Liability Triggering Event
  - *Liberty Insurance Underwriters v. First Mercury Insurance Co.*, 2019 WL 7902961 (N.D. Texas Aug. 2, 2019)
- S.D. Texas: Independent Cause
  - *Urban Oak Builders, LLC v. Gemini Insurance Co.*, 2021 WL 7209213 (S.D. Tex. Dec. 14, 2021), *adopted by*, 2022 WL 605575 (S.D. Tex. Feb. 28, 2022)
  - *Millsap Waterproofing, Inc. v. United States Fire Insurance Co.*, 2022 WL 1594341 (S.D. Tex. May 19, 2022)