CONSTRUCTION DEFECT UPDATE: WHAT'S BUILDING UP IN TEXAS?

Speakers:
ROGER D. HIGGINS
JAMES N. ISBELL
LORI K. ERWIN

Prepared by:
JAMES L. HORDERN, JR.

Texas Insurance Law Update 2007

January, 2007

THOMPSON
COE

CONSTRUCTION DEFECT UPDATE:
WHAT'S BUILDING UP IN TEXAS

I. SUMMARY OF THE CASES 1

II. *LAMAR HOMES, INC. V. MID-CONTINENT CASUALTY COMPANY* 2

III. *GEHAN HOMES, LTD. V. EMPLOYERS MUTUAL CASUALTY COMPANY* 4

IV. *ARCHON INV., INC. V. GREAT AMERICAN LLOYDS INS. CO.* 7

V. *LENNAR CORPORATION V. GREAT AMERICAN INSURANCE COMPANY* 8

- A. Background facts 9
- B. The existence of an "occurrence" 9
- C. The existence of "property damages" 11
- D. Other policy defenses 13
  1. The Self-Insured Retentions 13
  2. Exclusion (j)(5) 13
  3. Exclusion (m) 14
  4. Exclusion (n) 14
  5. "Known loss" and "loss in progress" doctrines 15
  6. Care, custody, and control endorsement 15
  7. Exclusion (b)(2) 16
- E. Summary and effect 16

VI. *GRIMES CONSTRUCTION, INC. V. GREAT AMERICAN LLOYDS INSURANCE COMPANY* 17

VII. *PINE OAK BUILDERS, INC. V. GREAT AMERICAN LLOYDS INSURANCE COMPANY* 18

VIII. CONCLUSION 21

CONSTRUCTION DEFECT UPDATE:
WHAT'S BUILDING UP IN TEXAS?

I. SUMMARY OF THE CASES

The Texas Supreme Court currently has before it no less than six construction-coverage related cases:

- *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, 428 F.3d 193 (5th Cir. 2005) (certified question accepted Nov. 4, 2005 – Texas Supreme Court Docket No. 05-0832)

- *Gehan Homes, Ltd. v. Employers Mutual Casualty Company*, 146 S.W.3d 833 (Tex. App. – Dallas 2004, pet. filed Jan. 5, 2005, briefing on merits requested June 6, 2005)

- *Archon Inv., Inc. v. Great American Lloyds Ins. Co.*, 174 S.W.3d 334, (Tex. App. – Houston [1st Dist.] 2005, pet. filed Nov. 17, 2005, briefing on merits requested April 25, 2006)

- *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651 (Tex. App. – Houston [14th Dist.] 2006, pet. for review filed May 11, 2006).

- *Grimes Const., Inc. v. Great American Lloyds Ins. Co.*, 188 S.W.3d 805, 813 (Tex. App. – Fort Worth 2006, pet. for review filed May 11, 2006, briefing on merits requested Oct. 17, 2006)

- *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, ___ S.W.3d ___, 2006 WL 1892669, Case No. 14-05-00487-CV (Tex. App. – Houston [14th Dist.] July 6, 2006, pet. requested Oct. 4, 2006)

The *Lamar Homes* case has been pending for almost a year after oral argument. Although review has not been granted as yet in *Gehan Homes*, *Archon Investments*, or *Grimes Construction*, the fact that briefing on the merits has been requested by the Texas Supreme Court indicates increased interest in the case by at least some of the justices. The petition for review in *Lennar Corp.* has been pending for eight months. *Pine Oak Builders*' petition for review is relatively recent.

Lamar Homes, the one case that has currently been argued to the Texas Supreme Court, simply certified two issues about coverage after noting the conflicting lines of authority. *Gehan Homes* based its opinion very strongly on the "eight corners" analysis for a duty-to-defend case and decided the underlying petition invoked the claims under the policy that the carrier was required to defend. The three Houston courts of appeals' cases, *Archon Investments*, *Lennar Corp.*, and *Pine Oak Builders*, in combination decided that construction defects are an occurrence and that some damages resulting from the faulty work are property damage, both for purposes of a duty to defend and a duty to indemnify. They also discussed other issues,

however, that were more favorable to insurers. Finally, the *Grimes Construction* court took the opposite approach. It adopted the idea that CGL policies were not meant to cover construction defects and economic losses. Therefore, it found no duty to defend a claim for economic damage from a construction defect. Given this dichotomy of views, clarification by the Texas Supreme Court is both expected and needed.

II. *LAMAR HOMES, INC. V. MID-CONTINENT CASUALTY COMPANY*[1]

This is the only one of the six currently accepted by the Texas Supreme Court for formal review. It was accepted upon certified questions from the United States Court of Appeals for the Fifth Circuit. The two questions at issue concern when is a construction-defect claim within the coverage portion of the CGL policy (it does not directly address exclusions):[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 an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?
>
> 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?

The case arose from a contract to purchase a home that the claimants entered into with the insured, Lamar Homes. They subsequently sued Lamar Homes and its subcontractor alleging that Lamar Homes was negligent and failed to design and/or construct the foundation of the residence in a good and workmanlike fashion in accordance with implied and express warranties. *Id.* at 194. Lamar Homes forwarded the lawsuit to Mid-Continent Casualty for defense and indemnification under its CGL policy, but Mid-Continent refused to defend. Lamar Homes filed suit in Texas state court seeking a declaration that the Mid-Continent policy covered the litigation claims, and Mid-Continent removed the case to federal court. On cross motions for summary judgment, the district court found there was no duty to provide a defense because the gravamen of the underlying petition sought relief for a breach of contract resulting in pure economic loss, coverage for which would transform a liability policy to a performance bond.

The Fifth Circuit found there was a great conflict among Texas courts of appeals and federal district courts on the interpretation of CGL policies in construction-defect cases and that it should request the Texas Supreme Court to resolve the conflicts.

---

1 428 F.3d 193 (5th Cir. 2005) (certified question accepted Nov. 4, 2005 – Texas Supreme Court Docket No. 05-0832).

2 There is also a third certified question concerning whether of a Texas statute providing for recovery of 18% interest when a claim is not timely paid applies to liability policies in addition than first-party policies. That issue is beyond the scope of this paper.

First, the intermediate courts were conflicted whether construction errors based on bad workmanship are an "occurrence" defined in the usual manner as "an accident, including a continuous or repeated exposure to substantially the same general harmful conditions." The Fifth Circuit noted some courts reasoned that shoddy work is foreseeable and therefore not an accident or an expected loss.[3] On the other hand, many other courts found that where shoddy workmanship is the result of a builder's negligence, rather than intentional conduct, the loss is unexpected and therefore accidental.[4]

Second, the lower courts also were in conflict on whether damage caused by defective workmanship constitutes "property damage" under a CGL policy. Many courts reasoned that claims for the cost of repairing faulty workmanship are merely "pure economic loss," which are damages that flow from a breach of contract, and that requiring their coverage under a CGL policy would make the policy little different from a performance bond.[5] Others held that when construction errors caused physical damage to the object of the contract, the damage constituted property damage and was covered under the policy regardless of whether the only "tangible property" damage was the residence itself.[6]

Lamar Homes contended that the line of cases in favor of insurance companies ignored the 1986 amendments to the standard CGL policy. Prior to 1986, the standard CGL policy contained a broad "Your Work" exclusion excluding coverage for any property damage as subject to the contract caused by faulty workmanship. In 1986, the policy was amended to except from that exclusion damage to the subject of the contract caused by the work of a subcontractor.[7] Therefore, Lamar Homes said it was inappropriate to deny defense coverage based on a "business risk doctrine" for claims arising from the work of a subcontractor. The Fifth Circuit noted that this reasoning had been accepted by the Houston Court of Appeals in the *Lennar Corp.* case.[8]

Mid-Continent, on the other hand, contended that Lamar Homes' argument was a misguided attempt to use policy exclusions to create coverage, which Mid-Continent argued had been rejected by Texas courts.[9] The Fifth Circuit decided that because of (1) the frequency the issue is litigated and (2) the large amount of conflicting case law, the issue was better resolved by the Texas Supreme Court, especially as the Texas Supreme Court had already called for a

---

[3] *Id.* at 196-197.

[4] *Id.* at 196-197 (conflicting cases collected at footnote 7).

[5] *Id.* at 198.

[6] *Id.* (differing intermediate court opinions listed at footnotes 8 and 9).

[7] *Id.* at 198-199.

[8] *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651 (Tex. App. – Houston [14th Dist.] 2006, pet. for review filed May 11, 2006) (discussed at section V below).

[9] *Id.* at 199. *See, e.g., State Farm Fire & Cas. Co. v. Volding*, 426 S.W.2d 907, 909 (Tex. Civ. App. – Dallas 1968, ref'd n.r.e.) (an exclusionary clause . . . can never be said to create coverage where none existed before.").

briefing on whether it should review similar issues in another case.[10] The Texas Supreme Court accepted the *Lamar Homes* certified questions and held oral argument almost a year ago on February 14, 2006.

III. *GEHAN HOMES, LTD. V. EMPLOYERS MUTUAL CASUALTY COMPANY*[11]

The *Gehan Homes* opinion actually preceded the Fifth Circuit opinion in *Lamar Homes*. It found that an insured had a duty to defend a claim by a home purchaser related to foundation problems, but repeatedly based its opinion on the use of the "eight corners" rule in determining a duty to defend. Additionally, it found an alternative duty to defend under a claim for bodily injury.

The home purchasers, the Larsons, sued Gehan Homes claiming there were foundation problems with their home. They asserted the house was not as represented, not of proper quality, and was not designed or constructed in a good and workmanlike manner. They also pleaded that Gehan Homes was negligent in relying upon the developers' soil analysis and in failing to obtain an accurate soil analysis.

When presented with the claims, Gehan Homes' insurers filed a declaratory judgment action and asked for a finding that they had no duty to defend or indemnify. The trial court agreed on summary judgment.

The Dallas Court of Appeals reversed the summary judgment in favor of the insurers. Its determination that there was a duty to defend relied heavily on the "eight corners" rule under which the duty to defend is determined solely by the allegations in the underlying pleadings and the language of the insurance policy.[12] The facts in the pleadings must be accepted as true, and the insurer has a duty to defend against any claim that could potentially be covered, regardless of the claims' merits.[13] If the pleadings do not state facts sufficient to determine coverage, the general rule is that the insurer is obligated to defend if potentially there is a case under the pleadings within the coverage of the policy.[14] Finally, if any of the claims asserted require coverage, an insurer is required to defend the entire suit.[15]

---

[10] Citing *Gehan Homes, Ltd. v. Employers Mutual Cas. Co.*, 146 S.W.3d 833 (Tex. App. – Dallas 2004, pet. filed Jan. 5, 2005, briefing on merits requested June 6, 2005) (discussed immediately below).

[11] 146 S.W.3d 833 (Tex. App. – Dallas 2004, pet. filed Jan. 5, 2005, briefing on merits requested June 6, 2005).

[12] *Id.* at 838, quoting *Nat'l Union Fire Ins. Co. v. Merchants Fast Motors Alliance, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

[13] *Id.*, quoting *Heyden Newport Chem. Corp. v. Southern General Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965).

[14] *Id.*

[15] *Id.*, citing *Stumph v. Dallas Fire Ins. Co.*, 34 S.W.3d 722, 728 (Tex. App. – Austin 2000, no pet.) and *Pro-Tech Coatings, Inc. v. Union Standard Ins. Co.*, 897 S.W.2d 885, 892 (Tex. App. – Dallas 1995, no writ).

The court first ruled that the underlying pleadings pleaded an "occurrence" under the CGL policies. The policies contained the standard definition of an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."[16] The *Gehan Homes* court cited the facts and rulings in a number of Texas cases, some finding that there was an occurrence and some not under similar circumstances, but ultimately did not attempt to harmonize them or determine that one line was better than the other. Rather, the court simply ruled that since there were pleadings of negligence as well as a breach of contract, it could not under the "eight corners" rule determine that the underlying suit was a pure economic damage case. Likewise, the fact that there were alternative pleadings of malice did not defeat a duty to defend because there were other allegations of negligence.

The court then turned to the insurer's argument that there were no pleadings of "property damage." The policy definition of property damage was:

> [p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the occurrence that caused it.[17]

Again, the court refused to determine whether the general basis of the claim was a pure economic loss. It noted that the Larsons sought damages for the reasonable expense of temporary housing, which it found was a loss of use. Also, if the policy was interpreted as not applying to physical injury to the property that is the subject of the underlying contract, it would render many of the exclusions surplusage, in violation of basic rules of contract construction.

The court also found sufficient pleadings of bodily injury to establish coverage, even if there was not property damage. The court noted that the Texas Supreme Court has held bodily injuries under a CGL policy do not include injuries that are solely mental in nature.[18] The insurers argued that any physical pain associated with the Larsons' injuries came solely through their mental suffering. The Dallas Court of Appeals, however, held that their allegation that they "suffered great physical and mental pain" even though listed under the general heading of "Mental Anguish" was a claim for bodily injury because the allegations must be liberally construed in favor of the insured.[19]

The court then turned to the policy exclusions. It noted that all but two of the exclusions claimed dealt solely with property damage and that because the alleged bodily injury claims are

---

16 *Id.* at 839.

17 *Id.* at 844.

18 *Id.* at 844, citing *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997).

19 *Id.* at 844. This finding was key and separates this case from *Lamar Homes* because of its effect on the policy exclusions.

not subject to those exclusions, there was still coverage.[20] Thus, because an insurer has a duty to defend the entire suit if there is a claim in the underlying petition that is potentially covered by the policy, the exclusions did not even potentially defeat the insurer's duty to defend.[21]

The court then examined the other claimed exclusions, which were not limited solely to property damage. The first was exclusion 2(a) related to damages that are "expected or intended from the standpoint of the insurer." The second was exclusion 2(b) excluding "bodily injury" or "property damage" that the insured is obligated to pay under contract or agreement on liability. The court summarily and without any great analysis used the "eight corners" rule to determine that the Larsons had made enough allegations outside the scope of those exclusions to maintain a duty to defend.

The final argument that there was no duty to defend was that there was no showing an occurrence during the policy period. The court held that because the petition did not plead the date of the occurrence, and the pleadings are strictly construed against the insurer and doubt resolved in favor of coverage, the insurer had not established as a matter of law that there was no allegation of potential occurrence within the policy period. Having eliminated all of the arguments against a finding of no duty to defend, the court concluded that a ruling that there was no duty to indemnify was premature and must await resolution of the underlying claims.[22]

This case well demonstrates why the Fifth Circuit felt Texas law to be uncertain in the construction-defect-coverage area and in need of clarification by the Texas Supreme Court. The Dallas Court of Appeals cites numerous cases and discusses their rulings, but provides no analysis or harmonization of them.

Depending on its ruling in *Lamar Homes*, the Texas Supreme Court may not need to examine *Gehan Homes* in detail. On the other hand, even if the insurer's position is upheld in *Lamar Homes*, it does not necessarily require a reversal of *Gehan Homes* because of the alternate finding of "bodily injury." The Supreme Court could either (1) deny the petition because of its alternate grounds and a lack of a wish to examine the issue (or informal agreement that it was correctly decided), (2) order oral arguments to consider that further issue, or (3) in a *per curiam* manner remand the issue to the court of appeals for further examination citing the case law it feels was not appropriately considered.

---

[20] *Id.* at 845.

[21] *Id.*, citing *St. Paul Ins. Co. v. Tex. Dept. of Transp.*, 999 S.W.2d 881, 884 (Tex. App. – Austin 1999, pet. denied). The Court of Appeals' opinion does not cite the exclusions referenced, but it is probable that they are the exclusions related to "Your Work" such as paragraph (j). The insurer's briefs on the merits to the Texas Supreme Court do not appear to be pursuing those exclusions at length, as they mainly argue that there is no occurrence, property injury, or bodily injury.

[22] *Id.* at 846, citing *Nationwide Prop. & Cas. Ins. Co. v. McFarland*, 887 S.W.2d 487, 491 (Tex. App. – Dallas 1994, writ denied). The *Archon Investments* court opinion, however, was issued after the Fourteenth District Court of Appeals' decision in *Lennar Corp.* (discussed subsequently) was issued in memorandum form. *See* 174 S.W.3d at 342 n.7.

IV. *ARCHON INVESTMENTS, INC. V. GREAT AMERICAN LLOYDS INSURANCE COMPANY*[23]

Archon Investments is the opinion from the first of the two state courts of appeals in Houston concerning these issues that are pending before the Texas Supreme Court.[24] The basic facts are extremely similar to *Lamar Homes* and *Gehan Homes*. Here, the purchaser noticed a few years after the house was built that the wood was rotting around the windows, possibly as a result of leakage from the stucco siding or because the windows might have been installed by a subcontractor without requisite flashing. He sued Archon Investments and two of its subcontractors, contending that the defendants used materials that did not meet industry standards and failed to construct the home in a good and workmanlike manner. In addition to suing for breach of contract, breach of warranty, and similar claims, he also pleaded negligence and negligent misrepresentation.

Great American, the insurer, refused to defend, and the builder brought a declaratory judgment action. On cross motions for summary judgment, the trial court found no duty to defend or indemnify.

On appeal the *Archon Investments* court like, and explicitly citing, *Gehan Homes*, relied on the very broad nature of the "eight corners" rule to determine whether there was an "occurrence." It noted that the home purchaser sought to recover for damage to the building caused by work done on Archon Investments' behalf by a subcontractor.[25] Because Archon Investments could not have intended the negligent work of its subcontractors to cause physical damage to the home, the damage due to that negligence fell within the scope of the occurrence language.

Unlike *Gehan Homes*, however, the Houston Court of Appeals more directly and substantively addressed the insurer's argument that the "economic loss doctrine" meant that it was not required to indemnify Archon Investments when Archon Investments could only be held liable in the underlying suit for the economic loss of the subject of its contract with the home purchaser. Great American did so by relying on the underlying federal district court case that was appealed in *Lamar Homes*. The district court had in turn relied on *Jim Walter Homes*[26] in which the Texas Supreme Court held that "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone."[27]

---

23 174 S.W.3d 334 (Tex. App. – Houston [1st Dist.] 2005, pet. filed Nov. 17, 2005, briefing on merits requested April 25, 2006).

24 Appeals from trial courts in the Houston area are made to two separate courts of appeals, the First District Court of Appeals and the Fourteenth District Court of Appeals. The courts have concurrent jurisdiction and appeals are distributed between them.

25 *Id.* at 340.

26 *Jim Walter Homes v. Reed*, 711 S.W.2d 617 (Tex. 1986).

27 *Id.* at 618.

The Houston court of appeals distinguished *Jim Walters Homes* and refused to apply it. It noted the *Jim Walters Homes*' appeal was based on adjudication of the actual causes of action. The suit was for damages arising out of the sale and construction of a house, and the jury found that Jim Walters Homes breached the warranty of good workmanship and had been grossly negligent in supervising construction. The issue before the Texas Supreme Court was whether the gross negligence was an independent tort that would support an award of exemplary damages, and the Supreme Court held that it was not because the plaintiff's injuries sounded only in contract because the house they were promised and paid for was not the house they received. Therefore, they had lost only the benefit of the bargain, and punitive damages were not recoverable.

The Houston court of appeals asserted that it should not apply a determination of the correctness of assessing punitive damages in an adjudicated case to a determination of a duty to defend based on the pleadings under an insurance policy. In essence, there was as yet no finding that the case was actually a breach of warranty rather than a negligence case (especially as there were allegations that it was subcontractors that had caused the direct harm).

Finally, the court stated that the cause of the loss as determined at trial will determine whether there is indemnity coverage.[28] It distinguished Great American's reliance on the court's prior opinion in *Hartrick v. Great American.*[29] *Hartrick* was a duty-to-indemnify case in which the underlying jury had already found that the builder had breached the implied warranties of good and workmanlike construction and suitability, but that neither the builder nor its subcontractor was negligent or liable under the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"). Therefore, the jury had already found that the builder voluntarily and intentionally failed to comply with the implied promises imposed on it as a matter of law despite the builder's claims otherwise that there was no duty to defend. Thus, the decision was not made based on the underlying claimant's pleadings.

V. *LENNAR CORPORATION V. GREAT AMERICAN INSURANCE COMPANY*[30]

Lennar is the first of the two construction-defect-coverage cases pending appeal to the Texas Supreme Court from the other Houston court of appeals. Although the petition for review is later filed than the opinions discussed above, and the Texas Supreme Court has not even yet requested a full briefing on the merits, it is extremely important for a number of reasons. First, because of the peculiarities of the delay between the opinion's issuance in memorandum form and its formal publication, it is actually cited by the cases above. Second, it contains a much broader analysis of the issues concerning "occurrence" and "property damage." Third, it is an appeal from a summary judgment based on a duty to indemnify, rather than a duty to defend. Therefore, the analysis does not concern the "eight corners" rule. Fourth, the opinion discusses many of the standard exclusions from coverage and other defense doctrines, such as fortuity.

---

[28] *Id.* at 343.

[29] *Hartrick v. Great Am. Lloyd's Ins. Co.*, 62 S.W.3d 270 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

[30] 200 S.W.3d 651 (Tex. App. – Houston [14th Dist.] 2006, pet. for review filed May 11, 2006).

Finally, *Lennar* involves claims from the synthetic stucco called Exterior Insulation and Finish System ("EIFS") for homes. EIFS-related claims are wide-spread problems in the construction-defect-coverage area.

A. Background facts

In the late 1990's, Lennar (the insured) built more than 400 homes in the Houston area using EIFS. Supposedly, the manufacturers of EIFS marketed it as an ideal product for wood-framed homes. Lennar contended it later discovered that EIFS is defectively designed such that it traps water behind it, which can cause damage to other parts of the home. In 1999, Lennar began receiving complaints about EIFS-related problems. It initially addressed the problems on an individual basis, but by September 1999 became convinced EIFS was a defect product. Therefore it removed the EIFS from all the homes and replaced it with traditional stucco.[31] Lennar also claimed it repaired resulting water damage to the homes.

Lennar sought indemnification for all of its replacement repair costs from the carriers, but the carriers refused, contending there was no coverage. Lennar sued them requesting a declaratory judgment that there was a duty to indemnify. Lennar and each carrier filed motions for summary judgment. The trial court denied Lennar's motion and granted all of the carriers' motions. The court of appeals affirmed the denial of Lennar's motion for summary judgment, affirmed the summary judgments of some of the insureds, but reversed and remanded the coverage summary judgments in favor of carriers Great American/American Dynasty and Markel.

B. The existence of an "occurrence."

The court noted and cited the two lines of numerous cases and/or commentary under Texas law that come to different opinions as to whether faulty construction can be an "occurrence."[32] There being no controlling authority, it then turned to a more substantive analysis.

First, the court found that "business risk" is ordinarily eliminated through exclusions, not through the "occurrence" definition.[33] The court noted the CGL "insuring agreement" contains no language categorically eliminating coverage for damage to an insured's own work, nor is there a "tort/contract" demarcation explicitly contained in the policy definitions.

Although the insurers repeatedly asserted the Texas Supreme Court's holding in *Jim Walter Homes*,[34] to assert that an economic loss is not covered, the Houston Court of Appeals

---

[31] Of the approximately 400 homes involved, only two homeowners filed suit against Lennar.

[32] *Id.* at 664-667.

[33] *Id.* at 668.

[34] *Jim Walter Homes, Inc. v Reed*, 711 S.W.2d 617 (Tex. 1986), discussed above at section IV in connection with the *Archon Investments* case.

distinguished that case. It noted that *Jim Walters Homes* was not an application of the economic loss doctrine to a determination of whether an insured's action constitutes an accident under a CGL policy or whether certain damages are recoverable by a claimant against a homebuilder.[35] Therefore, it was inapplicable.

The court ruled the proper framework for analyzing an "accident" and, thus, "occurrence" is the *Cowan*[36]*/Orkin*[37] line of Texas Supreme Court cases. Under those cases, an "accident" includes an insured's negligent acts causing damage that is undesigned and unexpected.[38] The trial court must determine whether the damage was unintended and unexpected – not whose work was damaged.[39] Accordingly, the *Lennar* court found the Texas Supreme Court case law does not necessarily eliminate coverage for damage to the insured's own work.

The court then reviewed the standard CGL policy "business risk" exclusions, particularly the exclusions having to do with "your work,"[40] noting that the opinions cited by the insurance carriers did not consider the effect of those exclusions on the "occurrence analysis." The court held that it must analyze those exclusions in considering the definition of an "occurrence" because of its obligation to read all parts of an insurance policy together to ascertain intent and to give effect to all the parts, so that none of the parts are rendered superfluous or meaningless.[41] In doing so, it expressly relied on the Texas Supreme Court *King v. Dallas Fire Ins. Co.*[42] case, in which that court considered the effect of the intentional act exclusion in interpreting the definition of an "occurrence." The *Lennar* court found that interpreting "occurrence" to exclude many business risks would render the "'business risk' exclusions, particularly the 'your work' exclusion, superfluous and meaningless."[43]

The court then further relied on the history of the exception to the business risk exclusions for when the damaged work, or the work at which a damage arose, was performed <u>by subcontractors</u>.[44] Initially, there was no exception to the exclusion for subcontractors. In 1976, as more subcontractors were used in projects and contractors were unhappy with the lack of coverage for work performed by the subcontractors, the insurance industry began to offer (for an

---

35 *Lennar Corp.*, 200 S.W.3d at 669.

36 *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997).

37 *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967).

38 *Lennar Corp.* 200 S.W.3d at 669.

39 *Id.*

40 *Id.* at 670.

41 *Id.* at 671.

42 85 S.W.3d 185, 192-193 (Tex. 2002).

43 *Lennar Corp.*, 200 S.W.3d at 671.

44 *Id.* at 672.

additional premium) an endorsement known as the Broad Form Property Damage Endorsement ("BFPD").[45] Among other things, the BFPD narrowed the "your work" exclusion and extended coverage or "property damage" to the work of a subcontractor or damages arising out of the work of a subcontractor. In 1986, the industry incorporated those aspects of the BFPD directly into the CGL as the subcontractor exception to the "your work" exclusion. The *Lennar* court found this history demonstrated that insurers intended to cover some defective construction resulting in damage to the insured's work and that finding no "occurrence" for defective construction would render the exception superfluous and meaningless.[46] The court further recognized that some jurisdictions have reasoned that an exception to an exclusion cannot create coverage where none otherwise exists, but found that reasoning contrary to the principle announced in *King*.[47] Moreover, the court found the subcontractor exception does not create coverage, it merely restores coverage that had originally existed, but was precluded by the "your work" exclusion.

Finally, the court rejected the insurance-carrier argument that allowing defective construction to constitute an "occurrence" transforms a CGL policy into a performance bond.[48] The court noted circumstances in which a performance bond would require coverage, but the CGL policy even as interpreted by the court would not. Ultimately, however, it stated that the carriers' choice of language of the policy was the relevant factor and that the "performance bond" rationale had been modified by the subcontractor exclusion to the "your work" exclusion.

The court then applied this reasoning to the facts and found the uncontroverted evidence was that Lennar did not intend to build homes with a defective product and did not expect the resulting damage. Therefore, the construction of the homes with the defect was inadvertent, or, at most, negligent, and Lennar's defective construction constituted an "occurrence" under Texas law.[49, 50]

C. The existence of "property damages."

The court then had to decide whether the defective-construction "occurrence" caused "property damage." The policies contained the standard CGL "property damage" definition of "[p]hysical injury to tangible property, including all resulting loss of use of that property."[51]

---

45 *Id.* at 677

46 *Id.* at 673.

47 *Id.* at 673 n.26.

48 *Id.* at 673-674.

49 *Id.* at 676.

50 One of the insurers, American Dynasty, argued that Florida law was applicable on the issue and was clear that there could be no "occurrence." The court found that Florida law had recently become "unclear" on the issue. Therefore, there was no "conflict" sufficient to require a choice-of-law analysis. *Id.* at 676-677.

51 *Id.* at 677.

None of the homeowners apparently claimed a "loss of use," which was an alternative definition of "property damage."[52]

The court divided Lennar's claimed costs into three different categories: (1) the cost to repair water damage to the homes, which it determined was damages because of property damage; (2) the cost of removing and replacing EIFS as a preventative measure, which it ruled was not; and (3) overhead costs, inspection costs, personnel costs, and attorney's fees, which it also ruled was not.[53]

The summary judgment evidence showed the EIFS' entrapment of moisture caused water damage to at least some of the homes. This could include wood rot, damage to substrate, sheathing, framing, insulation, sheetrock, wallpaper, paint, carpet, carpet padding, wooden trim and baseboards, mold damage, and termite infestation. The court easily found these to constitute "physical injury to tangible property."[54] The court likewise found that other costs to repair the water damage might result, such as repairing broken windows, cracked driveways, and landscaping damage caused by the repairs.[55] Furthermore, removal of the EIFS in order to access and repair the underlying damage or determine the theory of underlying damage would also be recoverable under the policy.[56]

The court noted that the carriers' claim that Lennar had not proven that all of the homes sustained water damage and that Lennar's own evidence was somewhat conflicting. Because the case was being remanded (to a certain extent as explained), that issue would be resolved in trial court.[57]

For the removal and replacement of the EIFS generally, the court found the EIFS was not physically injured after applications to the homes; *i.e.*, it was not changed from a satisfactory state to an unsatisfactory state or otherwise physically altered.[58] Its defective nature did not constitute "property damage" in and of itself, and the cost of removal was often a preventative measure and not damages. Therefore, it was Lennar's burden to apportion the EIFS-replacement damages between its cost to remove and replace as a preventative measure, which was not

---

[52] *Id.* at n.31.

[53] *Id.* at 677.

[54] *Id.* at 677, citing *American Family Mut. Ins. Co. v. American Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65, 74-75 (2004) (finding insured's faulty site preparation caused "property damage" because foundation sank causing the rest of the building to buckle and crack).

[55] *Id.* at 678 n.33.

[56] *Id.*

[57] *Id.* at 678.

[58] *Id.* at 678-679.

recoverable, and its costs to repair water damage to the homes (which in some cases might include the cost to remove the EIFS), which was recoverable.[59]

Finally, the court found that Lennar's overhead costs, inspection costs, personnel costs, and attorney's fees were not recoverable damages because they did not fall within the "legally obligated to pay" portion of the insuring agreement.[60] Although Lennar may have been legally obligated to pay the third-party EIFS claims by replacing EIFS, making repairs, and/or making cash payments, it was not obligated to incur its own overhead costs, inspection costs, personnel costs, and attorney's fees. The court noted the insuring agreement referred to the claimants' damages the insured becomes legally obligated to pay, not the insured's damages.

D. Other policy defenses.

Having found that there was an occurrence and that there was some, but an unadjudicated amount, of property damage, the court also considered several of the carriers' alternative arguments for denial of coverage.

1. The Self-Insured Retentions

The court found that the unopposed evidence showed that there was no damage exceeding the self-insured-retention in several policies because under these facts, the damage to each home constituted a separate occurrence.[61] The American Dynasty summary judgment on the same issue failed, however, because its SIR had a $1 million annual aggregate and there was some evidence of damages in excess of that, although not sufficient to provide a summary judgment for Lennar.

2. Exclusion (j)(5)

This exclusion removes coverage for a "property damage" to:

> that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf *are* performing operations, if the "property damage" arises out of those operations.[62]

The court found that the use of present tense in the exclusion meant it only applies to "property damage" arising <u>while</u> Lennar is <u>currently</u> working on a project.[63] Because there was

---

59 *Id.* at 679-680.

60 *Id.* at 680 (the "insuring agreement" provided the carrier would pay those sums that Lennar "becomes *legally obligated to pay* as damages because of . . . property damage.") (emphasis added by court).

61 *Id.* at 685.

62 *Id.* at 686 (emphasis added).

63 *Id.* at 686.

some evidence that the damage would not start until after the work was complete, summary judgment of this exclusion was improper.

3. Exclusion (m)

This exclusion prevents coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

The court found that while the exclusion might apply to the prophylactic replacement of EIFS, it does not apply to repair of physical injury (water damage) to the homes.[64]

4. Exclusion (n)

This exclusion, commonly called the "sistership" exclusion, precludes coverage for:

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjust, removal or disposal of:
>
> (1) "your product";
>
> (2) "your work"; or
>
> (3) "impaired property";
>
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.[65]

Again, the court found this exclusion might apply to replacement of the EIFS as a preventative measure, but not to the cost to repair water damage caused by defective EIFS.

---

[64] *Id.* at 687.

[65] *Id.* at 687.

5. "Known loss" and "loss in progress" doctrines

Fortuity is an inherent requirement of all risk insurance policies.[66] A "known loss" is a loss the insured knew had occurred at the time it purchased the policy.[67] A "loss in progress" occurs when the insured is, or should be, aware of an ongoing progress loss at the time it purchased the policy.[68] Coverage is precluded for a "known loss" or "loss in progress."[69]

Several insurers argued that when their policies were purchased, Lennar knew of the extent of the EIFS-related problems; therefore, these doctrines precluded coverage of all the EIFS claims. The court agreed that there was evidence that some specific house claims had been made prior to policy purchases, but the evidence did not demonstrate which ones sufficiently for summary judgment. The court agreed the doctrines precluded coverage for homes on which Lennar was aware of damage or had made repairs when it purchased the policy.[70]

The court found the evidence conflicting, however, on whether Lennar realized the magnitude of the EIFS-related problems at the time of the policy purchases sufficiently to bar recovery for all the homes.[71] There was some evidence in the record that it was not until September 1999 that Lennar realized the problem was due to a systematic product defect, rather than some installation problems at specific homes. Therefore, the summary judgments in favor of carriers based on "known loss" and "loss of progress" claims were reversed and remanded for trial or further proceedings.

6. Care, custody, and control endorsement

Markel American Insurance Company ("Markel") argued that the exclusion in endorsement 2 to its policy which excluded "property damage" to "[p]roperty . . . occupied by, used by, or owned by any Insured" precluded coverage.[72] The court found that by its terms it only applied "while" the property is occupied, used, or owned by Lennar. Markel, however, referred to another exclusion, B(6)(a), which used a different verb tense ("property you own, rent, or occupy") to argue that the endorsement 2 verb tense referred to property that was <u>ever</u> occupied, used, or owned by Lennar. The court disagreed finding that the differences were between active and passive voice, not past and continuing tense. Furthermore, it found the title

---

66 *Id.* at 687, citing *Scottsdale Ins. Co. v. Travis*, 48 S.W.3d 72 (Tex. App. – Dallas 2001, pet. denied) and *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495 (Tex. App. – Houston [14th Dist.] 1995, no writ).

67 *Id.* at 687-688.

68 *Id.* at 688.

69 *Id.*

70 *Id.* at 688.

71 *Id.* at 688-689.

72 *Id.* at 692.

of endorsement 2, "Care, Custody, and Control Exclusion" indicated an application only to property while in Lennar's "care, custody, and control."[73]

The court then distinguished Markel's two cases in which courts had found coverage was precluded by such exclusions even though the insureds no longer owned or leased the property.[74] In those cases, the damage occurred while the insureds owned or leased the properties, even though they no longer owned or leased them when the claims were made. Because there was no evidence to support damage occurring while Lennar owned the homes, summary judgment in favor of the insureds on that point was inappropriate.

7. Exclusion (b)(2)

This exclusion precluded coverage for "property damage" for which the insured was obligated to pay damages by reason of the assumption of liability in the contract or agreement. The court ruled this exclusion applied only when the insured contractually assumes liability through indemnity or a hold harmless agreement or similar agreement. Lennar's settlement resulted from Lennar's conduct. Therefore, it did not apply.

E. Summary and effect.

Lennar is not before the Texas Supreme Court, but its holdings go further and more specifically to construction-defect-coverage questions than many of the preceding cases. Its holdings cannot be limited to a broad reading of an underlying plaintiff's petition under the "eight corners" test because it is a duty-to-indemnity case. It specifically rules that in such a case, an "occurrence" is present if construction relates to a use of a defective product that, at the time, the builder did not know to be defective. It also holds that any of the resulting damages to the building (as well as the cost of removing the work itself in order to repair such damage) is covered although general preventative repair as well as overhead-type costs of the builder are not. It will be interesting to see how the Texas Supreme Court handles this case, depending on the outcome in *Lamar Homes*. Certainly, if the Texas Supreme Court finds that there is no duty to defend under the certified questions in *Lamar Homes*, *Lennar* will be mooted. If not, however, how the Texas Supreme Court will interpret these clauses under the actual "indemnity facts" as set forth in *Lennar* or whether it will simply ignore the case or return the case to the court of appeals for further consideration in light of those rulings will be critical.

---

[73] *Id.* at 692.

[74] *Dryden Oil Co. of New England, Inc. v. Travelers Indem. Co.*, 91 F.3d 278, 284 (1st Cir. 1996); *Morrone v. Harleysville Mut. Ins. Co.*, 283 N.J.Super. 411, 662 A.2d 562, 566 (Ct. App. 1995).

VI. *GRIMES CONSTRUCTION, INC. V. GREAT AMERICAN LLOYDS INSURANCE COMPANY*[75]

Grimes Construction is mainly notable for being a case about the duty to defend with similar facts to the other cases herein that comes to the exact opposite conclusion, thereby creating a conflict in Texas case law demonstrating the need for Texas Supreme Court guidance.

When the builder sued the owner for payment on the contract, the owner counterclaimed for faulty construction, failure to complete the home timely, breach of contract, fraud, negligence, misrepresentation, and similar claims. The case proceeded to arbitration, at which time the owner was also making claims for negligent hiring and supervision. In response to the counterclaim, Grimes Construction requested that the carrier defend and indemnify it, but the carrier denied the claim. Grimes Construction filed a declaratory judgment action, and both parties filed motions for summary judgment.

Both the trial court and the court of appeals agreed that the insurer's motion was proper. The court began with a detailed description of the proper review of a "duty to defend" case.[76] It then analyzed the negligence claims and found them to be merely a rewording of the main claims, which were breach of contract or warranty.[77] Rather than reading the claimant's demand for arbitration, which the court admitted contained "more than just conclusory allegations of negligence," as creating a duty to defend, the court held the negligence allegation was merely a "recharacterization" of their basic breach of contract or warranty claims, and found that because the damages were reasonably foreseeable from faulty workmanship, it did not qualify as an "occurrence."

The court also found that the negligent hiring and supervision claim was not an "occurrence." It distinguished the Texas Supreme Court's *King v. Dallas Fire Ins. Co.*[78] case because *King* involved the separation of the insured's clause between an employer and the employee and an exclusionary provision stating that whether an occurrence was an accident depended on the standpoint of the insured, not the employee. The *Grimes Construction* court noted the insured in *King* (the employer was at issue) did not intend to cause damages to others. On the other hand, it found that a subcontractor's actions in performance of its contractual duties are more foreseeable to the builder than torts generally considered outside of the course and scope of employment (such as the assault in *King*).

The court noted, but disagreed with, the ruling in *Archon Investments* (discussed above) and also distinguished it factually. The claimant's allegations of negligence asserted ten acts of negligent conduct against the builder, but only one against the subcontractor itself. Therefore, the *Grimes Construction* court found the essence of the claims stemmed from the builder, not the

---

75 188 S.W.3d 805, 813 (Tex. App. – Fort Worth 2006, pet. for review filed May 11, 2006, briefing on merits requested Oct. 17, 2006).

76 *Id.* at 809.

77 *Id.* at 811-814.

78 85 S.W.3d 185, 186 (Tex. 2002).

subcontractor, and the damages were foreseeable. For similar reasons, it found no "occurrence" under pleadings of vicarious liability of the builder for the actions of the subcontractor.

Because the court found no duty to defend, there was also no duty to indemnify, which is a more circumscribed duty.

VII. *PINE OAK BUILDERS, INC. V. GREAT AMERICAN LLOYDS INSURANCE COMPANY*[79]

Pine Oak Builders was decided by the same court as *Lennar*. Accordingly, much of its discussion was wholesale adoption of the *Lennar* rulings and reasonings, and need not be repeated. There were, however, some differences and additional rulings of which an adjuster should be aware.

The primary difference is that the *Pine Oak Builders* case included duty to defend issues in addition to duty to indemnify issues. There were five underlying lawsuits, each brought by a homeowner who purchased a Pine Oak Builders home either directly from the homebuilder or from a prior owner. They each made EIFS-related damage claims, although they also contained additional claims.[80] As in the various cases above, the insurer and insured disagreed on the relative duties of the carrier, and the court of appeals was required to consider the policy's obligations on appeal from summary judgment.

The court of appeals began by noting and adopting its holdings in *Lennar* concerning the application of the "business risk" doctrine to the definition of "occurrence" and certain exclusions. The court, then, however, was required to analyze how the duty to defend works with respect to one of the underlying cases, the *Glass* lawsuit, because the petition nowhere mentioned the work "subcontractor" so as to invoke the "subcontractor" exception to the "your work" exclusion. The court refused to accept Pine Oak Builders' argument that when the underlying petition does not mention whether the work was done by the contractor or subcontractor, the petition should be liberally construed to perhaps include the subcontractor. Instead, the court noted that the petition clearly stated all the alleged faulty construction was performed by Pine Oak Builders and did not raise an issue of performance by anyone else.[81]

Pine Oak Builders then argued that it should be allowed to provide extrinsic evidence showing that subcontractors were used. The court of appeals noted some extremely limited grounds of the use of extrinsic evidence in a Texas duty-to-defend analysis, falling into two categories.[82] Under the first, extrinsic evidence may be used to establish fundamental coverage facts, such as (1) whether the person being sued is excluded as an insured under the policy, (2) whether the property at issue in the lawsuit is excluded from coverage, and (3) whether an

---

79 ___ S.W.3d ___, 2006 WL 1892669, Case No. 14-05-00487-CV (Tex. App. – Houston [14th Dist.] July 6, 2006, pet. requested Oct. 4, 2006).

80 Where relevant, the distinctions and additional claims are discussed.

81 *Id.* at *5.

82 *Id.* at *5.

insurance policy exists.[83] Those cases do not, however, allow evidence of the specific alleged occurrence to determine if the occurrence itself is covered. Therefore, Pine Oak Builders' offered extrinsic evidence did not fall in this category.

The court noted the second category is found only in a few cases and is invoked "[w]hen the petition in the underlying lawsuit does not allege facts sufficient for a determination of whether those facts, even if true, are covered by the policy."[84] The *Pine Oak Builders* court found this category to be the minority view of Texas courts of appeals and not to have been adopted by any Texas Supreme Court case. Therefore it declined to follow it, and ruled there was no duty to defend the *Glass* case.

The court of appeals then addressed how the policy trigger date should be handled when there are a series of policies and the individual lawsuits did not show the date of the "occurrence" such as to trigger coverage under a particular policy.[85] The insurers argued that Texas law had adopted the "manifestation" rule for policy trigger, under which the occurrence occurs at the time the complaining party was actually damaged, not the time the wrongful act was committed. They argued the damage is sustained when it becomes "readily apparent" or "manifest."[86]

The court of appeals disagreed, noting that only two courts have adopted the manifestation rule, and the Texas Supreme Court has declined to adopt or reject the rule.[87] It further noted that the cases relied upon by the insurers did not involve policies that defined an "occurrence" to include a "continuous or repeated exposure to conditions." Therefore, the court adopted the "exposure" trigger"[88] and ruled that any property damage that "occurred because of continuous or repeated exposure to conditions during the policy period . . . is potentially covered."[89] The insurers would also have a duty to defend any claim concerning such alleged potential property damage.

The court then analyzed the claims alleged in the remaining underlying lawsuits. In three of them, the petitions specifically alleged that each new rainfall caused new and independent damage and that accumulation of moisture continuously caused damage. Therefore, they stated causes of action potentially within coverage.

---

[83] *Id.*

[84] *Id.* at *6, quoting *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452 (Tex. App. – Corpus Christi 1992, writ denied).

[85] *Id.* at *6.

[86] *Id.*

[87] *Id.* at *7.

[88] *Id.* at *7, discussing *Pilgrim Enterprises, Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488, 496 (Tex. App. – Houston [1st Dist.] 2000, no pet.).

[89] *Id.* at *8.

In the fourth, *Barclay*, the petition stated the home was built in 1996 and that the EIFS failed and caused damage. It included a number of other allegations including failure to install sprinkler heads and flashing, failure to provide adequate drainage, ventilation, and caulking. The court found that although this does not provide a specific date for all of the damages, it was clear from the petition that the alleged damage occurred in 1996 (the year of construction) or later, therefore evoking a duty to defend in each of the post-1995 policies.

The insurers then argued that certain specific exclusions in some of the policies concerning the EIFS "hazard" precluded coverage. Pine Oak Builders first argued that Great American's exclusion was invalid because Great American did not obtain pre-approval for it from the Texas Commissioner of Insurance.[90] The court, however, found that the exclusion was entered on an approved form because the Commissioner approved one that permitted an exclusion of "designated work" and contained a blank for "description of your work." The policy at issue had the blank completed by reference to an attached document, which detailed the EIFS-related work to be excluded.[91]

The court then analyzed whether any of the alleged damages did not fall within the EIFS exclusion, primarily focusing on the Mid-Continent policy.[92] The EIFS exclusion broadly excluded coverage for property damage directly related to EIFS, but also excluded coverage for damage resulting from work performed on any "exterior component, fixture, or feature" of the structure if EIFS was installed on any part of that structure.[93] The underlying *Sorrels* claim made only the most generalize statement of damage ("Defendant Pine Oak failed to properly construct the Residence in a manner that would protect it from damage") that arguably was not excluded. The court, however, read that statement in context as referring to the application and installation of EIFS so that damages were excluded. The *Fourriers*' pleadings contained some non-EIFS-related claims related to grade clearance and expansion joints, but did not allege any property damage resulted from those two problems. Because the policy covers only property damage, not the cost to repair, replace, or remediate the defective construction itself, the court ruled that that petition did not invoke coverage. The court likewise found the *Vint* allegations to be within the broad EIFs exclusion. Although the *Barclay* case petition cited some non-EIFS claims, there was no claim that those particular items caused other damage.

---

90 *Id.* at *9.

91 Although beyond the scope of this paper, you should note that whether approved forms are required and the question of whether the use of an unapproved form voids only the exclusion or allows the insured to either accept the entire policy as written or void the entire policy is an arguable matter under Texas law. *See, e.g., Urrutia v. Decker*, 992 S.W.2d 440, 443-444 (Tex. 1999); *Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888 (Tex. Civ. App. – Houston [1st Dist.] 1969, writ ref'd n.r.e.).

92 The Great American policies only included such an exclusion for the final two years of coverage. Thus, Great American would still have a duty to defend where there were any alleged damages that occurred before then.

93 *Id.* at *11.

Finally, the court ruled that under clear Texas law, in the cases where it had upheld the summary judgment that there was no duty to defend, there could be no duty to indemnify.[94] On the other hand, where there was a duty to defend, there might still be a duty to indemnify upon the facts as would eventually be determined in the case.

VIII. CONCLUSION

Based on the cases before it, the Texas Supreme Court should soon determine a number of issues critical to the question of whether construction-defect cases are covered, in whole or in part, by standard CGL policies. Unless and until these cases are decided, all of the issues listed above should be preserved in a carefully-drafted reservation of rights letter directed to the insured.

---

94 *Id.* at *13-*14.