

# RECENT DEVELOPMENTS IN CONSTRUCTION COVERAGE

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# BUSINESS RISKS EXCLUSIONS

I, J(5) & J(6)

# Business Risks

## Your Work Exclusion

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- I. "Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

CG 2294

- I. Damage to Your Work

"Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

# Business Risks (Your Work)

*Great American Insurance Co. v. Hamel*

444 S.W.3d 780 (Tex.App.-El Paso 2014  
pet. filed)

## FACTS:

- Insured hired to inspect and complete home construction
- Used contractors
- ISO form CG 0001
- Duty to defend issue

# Business Risks (Your Work)

*Great American Insurance Co. v. Hamel*

## ALLEGATIONS:

- Home constructed initially by GSM and then by insured
- Insured retained the right and had the duty to control and supervise the subcontractors

## HOLDING:

Exclusion I does not eliminate duty to defend because of "subcontractor" exception.

# Business Risks (Your Work)

*Oklahoma Surety Company v. Noviello;*  
2014 WL 7497987 (Tex.App.-Dallas 2014, no pet.)

## FACTS:

- Lawsuit against designer and developer of townhome
- Water infiltration resulting in flooding
- Duty to defend
- ISO 2294 Form

## ALLEGATIONS:

- Negligently constructed townhome
- Failure to cap roof
- Failure to properly install and seal windows resulting in extensive flooding
- Home and Plaintiff suffered damages

# Business Risks (Your Work)

*Oklahoma Surety Company v. Noviello;*

## HOLDING:

- “Your Work” Exclusion precludes duty to defend
- Rejects insured’s argument that exclusion only applies to insured’s defective work – concludes it applies to all of insured’s work – defective or not
- Rejects insured’s argument that allegations could have reasonably included damage to appliances, rugs and other products not insured’s work
- Although must construe allegations liberally, Court cannot create allegations that are not pled

# Business Risks (Your Work)

*Feaster v. Mid-Continent Cas. Co.;*  
2015 WL 164041 (S.D. Tex. 2015)

## FACTS:

- Home built in 2005
- Home purchased in 2006
- Several years later, home encounters structural and cosmetic damages
- Duty to defend and indemnify
- ISO 2294 Form



# Business Risks (Your Work)

*Feaster v. Mid-Continent Cas. Co.;*

## HOLDING:

- Exclusion I precludes duty to defend.
- Court rejects insured's argument that exclusion is unenforceable because it makes coverage illusory. Notes form approved by Texas Department of Insurance and policy provides coverage to damage other than insured's work.

# Business Risks (Exclusion J(6))

## Exclusion J(6)

“Property Damage” to

\* \* \*

- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

# Business Risks (Exclusion J(6))

*Mid-Continent Cas. Co. v. Krolczyk*;

408 S.W.3d 896 (Tex.App.-Houston [1<sup>st</sup> Dist.] 2013, rev. denied)

## FACTS:

- Insured constructed road in 3 stages:
  - 1) construction of drainage ditches, base for entire road and 1/3 asphalt
  - 2) Second 1/3 of asphalt poured (no base work)
  - 3) Last section of asphalt poured (no base work)
- As a result of inadequate material and work on base, base failed resulting in asphalt cracking and potholes.
- Mid-Continent argued that entire road (including asphalt) was "that particular part" and exclusion precluded duty to defend.
- Insured argued that road constructed in 3 phases and only defective work was drainage and base. Damage to asphalt not excluded.

# Business Risks (Exclusion J(6))

## *Mid-Continent Cas. Co. v. Krolczyk*

### HOLDING:

- Exclusion does not eliminate duty to defend
- Exclusion only applies to repair or replace the insured's defective work. Does not apply to non-defective work which was damaged.
- Determined "that particular part" was limited to drainage and base.

# Trigger of Coverage

This insurance applies to “bodily injury” and “property damage” only if:

The “bodily injury” or “property damage” occurs during the policy period.

# Trigger of Coverage

*Don's Building Supply, Inc. v. Onebeacon Ins. Co.*;  
267 S.W.3d 20 (Tex. 2008)

## FACTS:

- GL Coverage with Onebeacon from 1993-96
- Sued for damage from EIFS installation on homes
- Suits claimed property damage began "within six months to one year after application"
- All homes involved installation during Onebeacon policies
- Issue before the Court was what trigger theory to adopt-manifestation or exposure
- Court adopted actual injury trigger
- Did not explain how it actually worked with respect to duty to defend or duty to indemnify

# Trigger of Coverage

*Gehan Homes, Ltd. v. Employers Mut. Ins. Co.*;  
146 S.W.3d 833 (Tex.App.-Dallas 2004, pet. denied).

## FACTS:

- Policy period of June 97-June 98
- Lawsuit filed May 2001
- Duty to defend

## ALLEGATIONS:

- Suffered “past” bodily injury and property damage

## HOLDING:

- Employers had duty to defend
- Could not conclude that there was no damage during policy period
- Giving every benefit of doubt, “past” could mean during policy period

# Trigger of Coverage

*Amerisure Mut. Ins. Co. v. Travelers Lloyds Ins. Co.*;  
2010 WL 1068087 (S.D. Tex. 2010)

## FACTS:

- Western Heritage had coverage from 2004-05
- Beacon National had coverage from 2003-04
- Underlying lawsuit filed September 2007
- Duty to defend

## ALLEGATIONS:

- Insured began construction in July 2003
- Work was substantially complete in March 2004
- Owner first learned of defects in December 2006

## HOLDING:

- No duty to defend
- Must allege actual date of actual harm



# Trigger of Coverage

*Vines-Herrin Custom Homes, LLC v. Great Amer. Lloyds Ins. Co.*; 357 S.W.3d 166 (Tex.App.-Dallas 2011, rev. denied)

## FACTS:

- Great American Coverage from 11/98 – 11/2000
- Mid-Continent Coverage from 11/2000 – 9/2002
- House built in 1999
- House purchased in 2000
- By April 2001, water infiltration noticed

## ALLEGATIONS:

- Home constructed in 1999
- Home purchased in May 2000
- By April 2001, noticed water infiltration
- By April 2002, noticed more water issues

## HOLDING:

- Alleges damage within policy period
- By definition, damage must actually occur at or before manifestation

# Trigger of Coverage

*Great Amer. Lloyds Ins. Co. v. Audubon Ins. Co.*;  
377 S.W.3d 802 (Tex.App.-Dallas 2012)

## ALLEGATIONS:

- Home builder and contractors were negligent
- Defects damaged home in the past

## HOLDING:

- Great American had duty to defend
- Where facts alleged are not sufficient to show clearly that there is no coverage, carrier has duty to defend if potentially alleges covered claim

# Trigger of Coverage

*AIX Spec. Ins. Co. v. Universal Cas. Co.*;  
2012 WL 6862489 (S.D. Tex. 2012)

## FACTS:

- Policies from October 24, 2005 to October 24, 2008
- Dispute involving condominium project
- First leaks occur in Summer 2007 but were not discovered until later
- Repair made in 2008, 2009 and 2010
- Claims no coverage under 2005-2006 and 07-08 policies

## ALLEGATIONS:

- First leak occurred in Summer 2007
- Additional leaks have occurred since then
- Repairs were made in 2008, 2009, and 2010

## HOLDING:

- 07-08 Policy is triggered
- Interpreted liberally, property damage must have occurred between leaks and repairs and therefore potential for coverage

# Trigger of Coverage

*Lennar Corp. v. Markel American Ins. Co.*;  
413 S.W.3d 750 (Tex. 2013)

- Homeowners' suits based on application of EIFS
- All insurers denied coverage
- Lennar preplaced EIFS on some 465 homes that sustained water damage
- All insurers settled except Markel

# Trigger of Coverage

*Lennar Corp. v. Markel American Ins. Co*

- A fair inference from the record is that most of the damage to the homes began **before or during Markel's policy period and continued afterward.** Markel agrees that all the homes for which Lennar claims remediation costs sustained some damage during the policy period, but insists that only the costs for

# Trigger of Coverage

*Lennar Corp. v. Markel American Ins. Co*

- remediating the damage in existence during the policy period are covered losses. Lennar concedes that it did not attempt to prove the specific amount of damage to each house during the policy period but contends that it would be practically impossible to do so and that the policy does not require it.

# Trigger of Coverage

*Lennar Corp. v. Markel American Ins. Co*

- “Coverage under Markel’s policy is limited to property damage that occurs during the policy period but expressly includes damage from a continuous exposure to the same harmful conditions. For damage that occurs during the policy period, coverage extends to the “total amount” of loss suffered as a result, not just the loss incurred during the policy period.”

# Trigger of Coverage

*Great American Insurance Co. v. Hamel*

## FACTS:

- Insured hired to inspect and complete home construction
- Completed home in October 1995
- By August 2000, home owner began to observe baseboard warping and staining of walls
- Filed suit in 2005
- Wood rot started in 1<sup>st</sup> policy period which would have required replacement
- All damage occurred before end of 3<sup>rd</sup> policy period



# Trigger of Coverage

*Great American Insurance Co. v. Hamel*

## HOLDING:

- Insured established property damage during 1<sup>st</sup> policy and no later than 3<sup>rd</sup>
- Insured does not have to allocate or prove damages within each policy period
- Cites APIE regarding insured's right to select policy period which covers loss. Texas law does not provide for allocation between policies.
- Does not cite Markel