LENNAR CORP
v.
MARKEL AMERICAN INS.

Fred L. Shuchart
Cooper & Scully, P.C.
700 Louisiana, Suite 3850
Houston, TX 77002
Telephone: 713-236-6810
Telecopy: 713-236-6880
Email: Fred@cooperscully.com

APIE v. GARCIA

- 1994 TEXAS SUPREME COURT
- MEDICAL MALPRACTICE CASE
- FROM 1980 TO 1982 DR. GARCIA PRESCRIBED MEDICATION
- 1980 ICA $100K OCCURRENCE POLICY
- 1981-82 ICA $500K OCCURRENCE POLICIES

APIE v GARCIA

- 1983 APIE $500K CLAIMS MADE POLICY
- 1983 NOTICE OF CLAIM SENT
- JULY 1985 SETTLEMENT DEMAND FOR $100K ICA LIMIT AND $500 APIE; LATER INCREASED TO $1.1M AND $1.6M
- $2.2M JUDGMENT

APIE v GARCIA

- DID APIE VIOLATE STOWERS?
- WHAT ARE THE POLICY LIMITS?

APIE v GARCIA

- "IF A SINGLE OCCURRENCE TRIGGERS MORE THAN ONE POLICY, *COVERING DIFFERENT POLICY PERIODS*, THEN DIFFERENT LIMITS MAY HAVE APPLIED AT DIFFERENT TIMES. IN SUCH A CASE, THE INSURED'S INDEMNITY LIMIT SHOULD BE WHATEVER LIMIT APPLIED AT THE *SINGLE POINT* IN TIME DURING THE COVERAGE PERIODS OF THE TRIGGERED POLICIES WHEN THE INSURED'S LIMIT WAS HIGHEST…

APIE v GARCIA

- …THE INSURED IS GENERALLY IN THE BEST POSITION TO IDENTIFY THE POLICY OR POLICIES THAT WOULD MAXIMIZE COVERAGE. ONCE THE APPLICABLE LIMIT IS IDENTIFIED, ALL THE INSURERS WHOSE *POLICIES* ARE TRIGGERED MUST ALLOCATE FUNDING OF THE INDEMNITY LIMIT AMONG THEMSELVES ACCORDING TO THEIR SUBROGATION RIGHTS."

DON'S BUILDING

- 2008 TEXAS SUPREME COURT
- 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"

DON'S BUILDING

- ALL HOMES INVOLVED INSTALLATION DURING ONEBEACON POLICIES
- ISSUE BEFORE THE COURT WAS WHAT TRIGGER THEORY TO ADOPT—MANIFESTATION OR ACTUAL INJURY
- COURT ADOPTED ACTUAL INJURY TRIGGER

DON'S BUILDING

- ("IF A SINGLE OCCURRENCE TRIGGERS MORE THAN ONE POLICY . . . ALL INSURERS WHOSE POLICIES ARE TRIGGERED MUST ALLOCATE FUNDING OF THE INDEMNITY LIMIT AMONG THEMSELVES ACCORDING TO THEIR SUBROGATION RIGHTS.")

LENNAR v MARKEL

- HOMEOWNERS' SUITS BASED ON APPLICATION OF EIFS
- ALL INSURERS DENIED COVERAGE
- LENNAR REPLACED EIFS ON SOME 465 HOMES THAT SUSTAINED WATER DAMAGE
- ALL INSURERS SETTLED EXCEPT MARKEL

LENNAR v MARKEL

- JURY FOUND FOR LENNAR

$2,965,114.16	ACTUAL DAMAGES
$425,000.00	CREDIT FOR SETTLEMENT WITH OTHER INSURERS
$2,421,825.89	ATTORNEYS FEES
$1,227,476.03	PREJUDGMENT INTEREST

LENNAR v MARKEL

- COURT OF APPEALS REVERSED ON TWO GROUNDS:
  - NO CONSENT TO SETTLE BY MARKEL
  - NO SEGREGATION OF DAMAGES TO SHOW COSTS OF REPAIR AS OPPOSED TO COSTS TO REMOVE EIFS TO SEE IF PROPERTY DAMAGE EXISTED

LENNAR v MARKEL

- ISSUES BEFORE SUPREME COURT:
  - 1) NOT HAVING CONSENTED TO THE HOMEBUILDER'S REMEDIATION PROGRAM, IS THE INSURER NEVERTHELESS RESPONSIBLE FOR THE COSTS IF IT SUFFERED NO PREJUDICE AS A RESULT?

LENNAR v MARKEL

- 2) IS THE INSURER RESPONSIBLE FOR (i) COSTS INCURRED TO DETERMINE PROPERTY DAMAGE AS WELL AS TO REPAIR IT, AND

- (ii) COSTS TO REMEDIATE DAMAGE THAT BEGAN BEFORE AND CONTINUED AFTER THE POLICY PERIOD?

LENNAR v MARKEL

- CONSENT TO SETTLE-
- BREACH MUST BE MATERIAL
- MATERIALITY MUST SHOW PREJUDICE
- JURY FOUND THAT MARKEL NOT PREJUDICED BY SETTLEMENTS
- QUESTION-WAS REAL PREJUDICE SETTLEMENT WITH OTHER INSURER

LENNAR v MARKEL

- PROPERTY DAMAGE?
  - "AS WE HAVE EXPLAINED, WATER DAMAGE FROM EIFS OCCURS WITHIN THE WALLS OF HOMES TO WHICH IT IS APPLIED AND THUS IS OFTEN HIDDEN FROM SIGHT. LENNAR'S EVIDENCE AT TRIAL WAS THAT THE EXTENT OF DAMAGE TO A HOME CANNOT BE DETERMINED WITHOUT REMOVING ALL THE EIFS.

LENNAR v MARKEL

- UNDER NO REASONABLE CONSTRUCTION OF THE PHRASE "BECAUSE OF", CAN THE COST OF FINDING EIFS PROPERTY DAMAGE IN ORDER TO REPAIR IT NOT BE CONSIDERED TO BE "BECAUSE OF" THE DAMAGE. WE ARE NOT CONFRONTED WITH A SITUATION IN WHICH THE EXISTENCE OF DAMAGE WAS DOUBTFUL.

LENNAR v MARKEL

- SEGREGATION BY POLICY PERIOD-
- "ACCORDING TO THE EVIDENCE AT TRIAL, WATER DAMAGE FROM EIFS BEGINS WITHIN SIX TO TWELVE MONTHS AFTER HOME CONSTRUCTION IS COMPLETED AND CONTINUES UNTIL IT IS REPAIRED. LENNAR STOPPED USING EIFS IN 1998. MARKEL'S POLICY WAS IN EFFECT THROUGHOUT 1999 AND UNTIL OCTOBER 2000.

LENNAR v MARKEL

- 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

LENNAR v MARKEL

- 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 THE IT WOULD BE PRACTICALLY IMPOSSIBLE TO DO SO AND THAT THE POLICY DOES NOT REQUIRE IT."

LENNAR v MARKEL

- "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

LENNAR v MARKEL

- EXTENDS TO THE "TOTAL AMOUNT" OF LOSS SUFFERED AS A RESULT, NOT JUST THE LOSS INCURRED DURING THE POLICY PERIOD."
- "ULTIMATE NET LOSS" MEANS THE TOTAL AMOUNT OF DAMAGES FOR WHICH THE INSURED IS LEGALLY LIABLE IN PAYMENT. . .

LENNAR v MARKEL

- "THIS READING OF THE POLICY IS CONFIRMED BY OUR DECISION IN *AMERICAN PHYSICIANS INSURANCE EXCHANGE V. GARCIA." AS TO BOTH STACKING AND ALLOCATION.*

LENNAR v MARKEL

- "MARKEL ARGUES ALTERNATIVELY THAT IT SHOULD BE RESPONSIBLE ALONG WITH LENNAR'S OTHER INSURERS ONLY FOR ITS PRO RATA SHARE OF THE TOTAL REMEDIATION EXPENSES. *GARCIA* REJECTS THIS APPROACH, LEAVING UP TO INSURERS TO ALLOCATE IT AMONG THEMSELVES ACCORDING TO THEIR SUBROGATION RIGHTS."

INTERPRETATIONS

- *MID-CONTINENT CAS. CO. v. ACADEMY DEVELOPMENT* – "MID-CONTINENT CONTENDS DEFENSE COSTS SHOULD BE APPORTIONED *PRO RATA* ACROSS ALL FIVE OF THE POLICIES. DEFENDANTS COUNTER THEY ARE ENTITLED INSTEAD TO CHOOSE ANY ONE OF THE POLICIES UNDER WHICH MID-CONTINENT

INTERPRETATIONS

- IS TO PROVIDE A COMPLETE DEFENSE. AS STATED, THE POLICIES FOR THE LAST THREE YEARS CONTAINED HIGHER DEDUCTIBLE AMOUNTS, AND THE DEDUCTIBLE ALSO APPLIED TO DEFENSE COSTS…ACCORDINGLY THE COURT DID NOT ERR BY PERMITTING DEFENDANTS TO SELECT ANY ONE OF THE TRIGGERED POLICIES FOR THEIR DEFENSE.”

INTERPRETATIONS

- *LSG TECHNOLOGIES v U.S.FIRE INS.CO.* - "HORIZONTAL EXHAUSTION CANNOT BE RECONCILED WITH THE HOLDING IN *GARCIA.* UNDER *GARCIA* EVEN WHEN A SINGLE OCCURRENCE TRIGGERS SEVERAL POLICIES, *CONSECUTIVE*, NON-OVELAPPING POLICIES CANNOT BE COMBINED--

INTERPRETATIONS

- OR STACKED—TO CREATE A POLICY LIMIT THAT EQUALS THE AGGREGATE OF THE INDIVIDUAL POLICIES' LIMITS. IT WOULD, THEREFORE, BE INCONSISTENT WITH SUCH A RULE TO REQUIRE THAT THE LIMITS OF *CONSECUTIVE*, NON-OVERLAPPING BE EXHAUSTED BEFORE THE EXCESS INSURER'S

INTERPRETATIONS

- OBLIGATIONS ARE TRIGGERED… HORIZONTAL EXHAUSTION WOULD SERVE TO RAISE THE CAP ESTABLISHED IN AN INDIVIDUAL POLICY IN CONTRAVENTION OF *GARCIA.* ADMITTEDLY, THE *GARCIA* CASE DID NOT INCLUDE AN EXCESS INSURER; HOWEVER, THE *GARCIA* COURT CONTEMPLATED THAT 'MULTIPLE POLICIES MAY PROVIDE

INTERPRETATIONS

- AN AGGREGATE LIMIT UNDER CERTAIN CIRCUMSTANCES, *SUCH AS IF THE INSURED PURCHASED CONCURRENT EXCESS LIABILITY INSURANCE.'…*THE AGGREGATION OF CONCURRENT POLICIES, SUCH AS A PRIMARY POLICY COUPLED WITH AN EXCESS POLICY, COMPORTS WITH VERTICAL EXHAUSTION AND NOT WITH HORIZONTAL EXHAUSTION."

RULES WE KNOW

- 1) IN A CONTINUING INJURY CASE, THERE IS NO STACKING OF *CONSECUTIVE* POLICIES- "CONSECUTIVE POLICIES, COVERING DISTINCT POLICY PERIODS, COULD NOT BE "STACKED" TO MULTIPLY COVERAGE FOR A SINGLE CLAIM INVOLVING INDIVISIBLE INJURY." *APIE*

RULES WE KNOW

- 2) STACKING IS ALLOWED FOR CONCURRENT COVERAGE-"MULTIPLE POLICIES MAY PROVIDE AN AGGREGATE LIMIT UNDER CERTAIN CIRCUMSTANCES, SUCH AS IF THE INSURED PURCHASED CONCURRENT EXCESS LIABILITY COVERAGE." *APIE*

RULES WE KNOW

- 3) THE INSURED IS ALLOWED TO PICK THE *POLICY PERIOD* THAT PROVIDES THE GREATEST RECOVERY-"THE INSURED IS GENERALLY IN THE BEST POSITION TO IDENTIFY THE POLICY OR POLICIES THAT WOULD MAXIMIZE COVERAGE." *APIE*

RULES WE KNOW

- 4) THE INSURER(S) SELECTED ARE LIABLE FOR THE LOSS UP TO THEIR POLICY LIMITS-

RULES WE KNOW

- 5) THE EXHAUSTION FOR THE POLICY PERIOD THAT IS SELECTED IS VERTICAL RATHER THAN HORIZONTAL-

RULES WE KNOW

- 6) THE VERTICAL EXHAUSTION MUST BE FOR THE SAME POLICY PERIOD-"IN SUCH A CASE, THE INSURED'S INDEMNITY LIMIT SHOULD BE WHATEVER LIMIT APPLIED AT THE *SINGLE POINT* IN TIME DURING THE COVERAGE PERIODS WHEN THE INSURED'S LIMIT WAS THE HIGHEST." *APIE*

RULES WE KNOW

- 7) THE INSURER(S) MAY THEN SEEK SUBROGATION FROM OTHER INSURERS IN THEIR LAYERS-

RULES WE KNOW

- 8) THE INSURED MUST SELECT THE SAME POLICY PERIOD FOR BOTH DEFENSE AND INDEMNITY-

WHAT WE DON'T KNOW

- HOW ARE UNINSURED PERIODS TREATED?
- HOW ARE PERIODS WITH COVERAGE EXCLUSIONS TREATED?
- HOW DO WE TREAT LARGE SIR'S?
- WHO HAS THE BURDEN OF IDENTIFYING THE POLICY PERIODS TRIGGERED?

WHAT WE DON'T KNOW

- HOW DOES SUBROGATION WORK?
  - What is the appropriate allocation formula?
  - Other insurance?
  - What is the burden of proof on targeted carrier?
- WHAT IF THE INSURED DOES NOT SELECT?
  - What act constitutes selection?
- CAN THE INSURED CHANGE ITS MIND?
  - What if later in the case other parties are added that ultimately increases amount available to insured in a single year (i.e. becomes the highest point).

What We Don't Know

- WHAT IF THE INSURED FAILS TO TENDER TO ALL CARRIERS?
  - Does the selected tender have a "cooperation" defense?
- IS TENDER BY A TARGETED INSURER TO OTHER INSURERS SUFFICIENT?
  - Does this impose a duty on the carrier to tender?
  - How would this be reconciled with *Crocker*?
- DOES THE SELECTION RULE *ALWAYS* APPLY TO DEFENSE?
  - How does subrogation work on defense costs when the insured (i.e. a general contractor) is an AI on multiple policies issued to different insureds (i.e. subcontractors) given that each carrier must defend the "entire suit."
- WHAT HAPPENS IF INSURED SETTLES *PAST* DEFENSE COSTS WITH OTHER INSURERS