Recent Developments in Construction Coverage

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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."
  – *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (1994)

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 –
    - "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 triggered policies when the insured's limit was the highest." *APIE*

Rules We Know

- 5) The exhaustion for the policy period that is selected is vertical rather than horizontal --
    - "Multiple policies may provide an aggregate limit under certain circumstances, such as if the insured purchased concurrent excess liability insurance." *APIE*

- 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 –
    - "Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights." *APIE*

Rules We Know

- 8) The insured must select the same policy period for both defense and indemnity.

Rules We Know

- 9) If the insured selects an insurer who defends, the insured has no further rights against any other consecutive insurer in the same layer.

Rules We Know

- 10) If the insured selects an insurer who pays its policy limits, the insured has no further rights against any other consecutive insurer in the same layer.

Vertical Exhaustion

- *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842 (1994).
- *Don's Building Supply*, Inc. *v*. *OneBeacon Ins. Co*., 2008 WL 3991187 (Tex., August 29, 2008).
- *Lennar Corp. v. Markel Am. Ins. Co. 11*--0394, 2013 WL 4492800 (Tex. Aug. 23, 2013).

Interpretations

- *LGS Technologies, LP v. U.S. Fire Ins. Co.*, No. 2:07-CV-399, 2015 U.S. Dist. LEXIS 139085 (E.D. Tex. Aug 14, 2015)
- *Mid-Continent Casualty Company v. Academy Developm.*, No. 11-20219 (5th Cir. 2012).
- *Burlington Ins. Co. v. Ranger Specialized Glass, Inc.,* No. 4:12-cv-1759 (S.D. Tex.—Houston, Dec. 17, 2012).

Additional Insured Issues – Extrinsic Evidence

- *D. R. Horton Texas, Ltd. v. Markel International Ins. Co.;* 300 S.W.3d 773 (Tex.App.—Houston [14th Dist.] 2006)
- *Willbros RPI, Inc. v. Continental Cas. Co., 601 F.3d 306 (2010)*
- *Roberts, Taylor and Sensabaugh, Inc. v. Lexington Insurance Co., H-06-2197 (S. D. Tex. Sept. 5, 2007)*
- *Swinerton Builders v. Zurich American Ins. Co.,* H-10-1791 (S.D. Tex. – Houston, Nov. 24, 2010).

Additional Insured Issues – Standard of Review of Pleadings

- *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, 279 SW 3d 650 - Tex: Supreme Court 2009
- *D. R. Horton—Texas, Ltd. v. Markel Intern. Ins.*, 300 S.W.3d 773 (Tex.App.—Houston [14th Dist.] 2006)

Additional Insured Issues – Standard of Review of Pleadings

- AIX Specialty Ins. Co. v. Universal Cas. Co., No. H-12-507 (S.D. Tex. – Houston, Dec. 27, 2012)
  - In the Condo Association suit, the underlying plaintiff sued only G.T. Leach, alleging claims against G.T. Leach for breach of the implied warranty of good and workmanlike conduct and negligent construction based on latent construction defects present in the condominium project. The Condo Association's complaint in no way implicates work, whether defective or not, completed by Ashford or any other subcontractor. Given the utter absence of such allegations, coverage as an additional insured pursuant to the CGL policies is not triggered by the underlying complaint. That G.T. Leach subsequently filed a third-party petition against Ashford does not alter the eight corners of the underlying plaintiff's complaint and the relevant insurance policy to which the court must refer in determining the duty to defend.[55] Accordingly, Defendant has no duty to defend G.T. Leach against the claims asserted by the Condo Association.
    - F.n. 55 The court is unpersuaded by Plaintiff's argument that the court should consider the "twelve corners" of the underlying complaint, the insurance policy, and the third-party complaint in assessing whether a duty to defend exists in this situation.

Additional Insured Issues – Standard of Review of Pleadings

- *Indian Harbor Ins. Co. v. KB Lone Star, Inc.*, H-11-CV-1846, 2012 WL 1038658 (S.D. Tex. Mar. 27, 2012)
  - Therefore, insists Indian Harbor, KB is only entitled to coverage regarding liability arising out of Innovative's operations. Indian Harbor charges that KB is now trying to convert this limited additional insured endorsement into a much broader grant of coverage that is not supported by the terms of the policy. The underlying lawsuits are devoid of allegations of or implications relating to Innovative's work (so KB has no coverage under the policy as a matter of law), and both the SAHA and Arias plaintiffs ultimately dismissed Innovative from their suits. See D.R. Horton-Texas, Ltd., 300 S.W. 3d 773, 778-81 (Tex. App.-Houston [14th Dist.] 2006)(holding that the insurer has no duty to defend the additional insured because the underlying petition did not allege that the work of the named insured caused the damage, nor was the named insured named as a party in the underlying lawsuit), aff'd in part and rev'd in part on other grounds, 300 S.W. 3d 740 (Tex. 2009).

Exclusions

- Exclusion (L)
  - *Lend Lease (US) Construction, Inc. v. Amerisure Mutual Insurance Co., 4:13-03552 (S. District [Houston] June 16, 2015)*
    - *Lend Lease argues, however, that the "your work" exclusion does not apply as to Lend Lease, because of the exception provided for work performed by a subcontractor. Plaintiff, however, misrepresents the nature of an additional insured in an insurance policy. "Your work" applies to the work as performed by Texan Floor, as the Named Insured under the policy. The Amerisure policies provide that "[t]hroughout this endorsement the words 'you' and 'your' refer to the Named Insured shown in the Declaratons."*

Exclusions

- Exclusion (L)
  - *Lend Lease (US) Construction, Inc. v. Amerisure Mutual Insurance Co., 4:13-03552 (S. District [Houston] June 16, 2015)*
  - Therefore, the exception for work perform "on your behalf by a subcontractor" refers only to subcontractors of the Named Insured, in this case, Texan Floor, not to additional insureds, such as Lend Lease. There is, furthermore, no evidence of any other subcontractor relationship, which might implicate this exception.

    * * *

    Accordingly, the court finds that Defendants have met their burden to show that the "your work" and "your product" exclusions bar coverage for the repair and replacement of the defective flooring. See Great Amer., 236 F.Supp.2d at 697.