

# VERTICAL EXHAUSTION

R. Brent Cooper  
Julie Shehane  
Robert J. Witmeyer  
Cooper & Scully, P.C.  
900 Jackson Street, Suite 100  
Dallas, TX 75202  
Telephone: 214-712-9501  
Telecopy: 214-712-9540

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# APIE v. GARCIA

- 1994 TEXAS SUPREME COURT
- MEDICAL MALPRACTICE CASE
- FROM 1980 TO 1982 DR. GARCIA PRESCRIBED HALDOL AND NAVANE
- ALLEGED TO HAVE CAUSED TARDIVE DYSKINESIA
- 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

- “THE CONSECUTIVE POLICIES, COVERING DISTINCT POLICY PERIODS, COULD NOT BE ‘STACKED’ TO MULTIPLY COVERAGE FOR A SINGLE CLAIM INVOLVING INDIVISIBLE INJURY.”

# 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

- COURT LEFT OPEN THE ISSUE OF IMPACT OF CONTINUING INJURY
- FOOTNOTE 45 "BECAUSE AS TO ALL OF THE UNDERLYING CLAIMS, THE EIFS WAS INSTALLED DURING THE THREE-YEAR POLICY PERIOD OF THE ONEBEACON POLICIES, *SEE SUPRA* NOTE 2 AND ACCOMPANYING TEST,

# DON'S BUILDING

- THIS CASE DOES NOT REQUIRE AN ANALYSIS OF COVERAGE QUESTIONS IN CIRCUMSTANCES WHERE PROPERTY DAMAGE OCCURRED IN THE COURSE OF A CONTINUING PROCESS, BUT BEGAN BEFORE THE INCEPTION OF THE TERM OF THE POLICY IN ISSUE.

# DON'S BUILDING

- NOR DO WE UNDERSTAND THE FIFTH CIRCUIT TO HAVE ASKED HOW ONEBEACON'S INDEMNITY OBLIGATIONS ARE DETERMINED IF THE FACTS ULTIMATELY SHOW THAT THE PROPERTY DAMAGE BEGAN DURING THE ONEBEACON POLICY PERIOD BUT CONTINUED BEYOND THAT PERIOD, PERHAPS INTO PERIODS COVERED BY OTHER POLICIES.

# DON'S BUILDING

- WE EXPRESS NO OPINION ON THESE QUESTIONS, *BUT SEE AM. PHYSICIANS'S INS. EXCH. V GARCIA, 876 S.W.2D 842, 855 (TEX. 1994)*

# 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?

# SETTLEMENT

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

# PROPERTY DAMAGE

- 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.

# PROPERTY DAMAGE

- ACCORDINGLY, THE ONLY COST EVIDENCE LENNAR PRESENTED WAS FOR REMOVING ALL THE EIFS FROM DAMAGED HOUSES, REPAIRING THE DAMAGE, AND RECOVERING THE HOUSE WITH CONVENTIONAL STUCCO...

# PROPERTY DAMAGE

- WE HAVE NOTED THAT THE PHRASE, "BECAUSE OF", USED IN DETERMINING A COVERED LOSS UNDER A COMMERCIAL GENERAL LIABILITY POLICY, "IS SUSCEPTIBLE TO A BROAD DEFINITION." BUT IT NEED NOT BE READ BROADLY TO REACH ALL OF LENNAR'S REMEDIATION COSTS.

# PROPERTY DAMAGE

- UNDER NO REASONABLE CONSTRUCTION OF THE PHRASE 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.

# PROPERTY DAMAGE

- *MARKEL CONCEDES THAT EACH OF THE 465 HOMES FOR WHICH LENNAR SOUGHT TO RECOVER REMEDIATION COSTS WAS ACTUALLY DAMAGED.*



# SEGREGATION

- 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.

# SEGREGATION

- 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

# SEGREGATION

- 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."

# SEGREGATION

- "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.

# CONTINUING INJURY

- “THIS READING OF THE POLICY IS CONFIRMED BY OUR DECISION IN *AMERICAN PHYSICIANS INSURANCE EXCHANGE V. GARCIA*. . . . WE REJECTED THE PLAINTIFF’S STACKING ARGUMENT, EXPLAINING INSTEAD: ‘IF A SINGLE OCCURRENCE TRIGGERS MORE THAN ONE POLICY, COVERING DIFFERENT POLICY PERIODS,

# CONTINUING INJURY

- THEN DIFFERENT LIMITS MAY HAVE APPLIED AT SUCH DIFFERENT TIMES. IN SUCH A CASE, THE INSURED'S INDEMNITY LIMITS 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.

# CONTINUING INJURY

- 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 INSURERS WHOSE POLICIES ARE TRIGGERED MUST ALLOCATE FUNDING OF THE INDEMNITY LIMIT

# CONTINUING INJURY

- AMONG THEMSELVES ACCORDING TO THEIR SUBROGATION RIGHTS.' MARKEL DISMISSES THIS AS DICTA, BUT HAVING SAID WHAT THE POLICY LIMITS WERE NOT, IT WAS IMPORTANT FOR US TO SAY WHAT THEY WERE AND WHY"



# CONTINUING INJURY

- “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."

# INTERPRETATIONS

- *THE BURLINGTON INSUR. CO. v. RANGER SPECIALIZED GLASS-*  
"HOWEVER, AS THE FIFTH CIRCUIT HAS OBSERVED, "TEXAS COURTS HAVE REJECTED THE PRO RATA METHOD FOR CALCULATING AN INSURER'S DUTY TO DEFEND WHEN MORE THAN ONE POLICY IS



# INTERPRETATIONS

- TRIGGERED BY A CLAIM." MID-CONTINENT CAS. CO. v ACAD. DEV. INC. 476 F.APP'X 316, 321-22 (FIFTH CIR. 2012)

# INTERPRETATIONS

- TRAMMEL CROW RESIDENTIAL V. ST. PAUL FIRE & MARINE INS.CO. (N.D.TEX. 2014)
- SUIT FOR DEFECTIVE CONSTRUCTION CAUSING WATER INTRUSION AND DAMAGE TO THE PREMISES
- HELD VERTICAL EXHAUSTION

# INTREPRETATIONS

- -HELD ONLY ONE OCCURRENCE (MULTIPLE LEAKS, MULTIPLE UNITS, MULTIPLE DEFECTS-EVENT GIVING RISE TO LIABILITY WAS SALE OF PROPERTY)
- INSURED ONLY REQUIRED TO EXHAUST ONE PRIMARY BEFORE GOING TO EXCESS

# 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*

- 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*



# 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-"ONCE THE APPLICABLE LIMIT IS IDENTIFIED, ALL INSURERS WHOSE POLICIES ARE TRIGGERED MUST ALLOCATE FUNDING OF THE INDEMNITY LIMIT AMONG THEMSELVES ACCORDING TO THEIR SUBROGATIONS 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.

# 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

- WHAT HAPPENS IF THE INSURED REFUSES TO SELECT AN INSURER?
- CAN OTHER INSURERS ASSERT A NO SETTLEMENT CLAUSE?
- CAN OTHER INSURERS CHALLENGE THE REASONABLENESS OF THE SETTLEMENT?

# 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).



# APPLICATION

01-02	02-03	03-04	04-05	05-06
Insurer No. 1	Insurer No. 1	Insurer No. 2	Insurer No. 2	Insurer No. 3
\$1M	\$1M	\$1M	\$1M	\$1M
Insurer No. 4	Insurer No. 4	Insurer No. 4	Insurer No. 4	Insurer No. 5
\$5M	\$5M	\$5M	\$5M	\$5M