INSURANCE

SUIT THAT ALLEGES ONLY DAMAGE TO OR LOSS OF USE OF THE HOME ITSELF, IS FOR "PROPERTY DAMAGE" SUFFICIENT TO TRIGGER THE DUTY TO DEFEND OR INDEMNIFY UNDER A CGL POLICY

Lamar Homes, Inc. v. Mid-Continent Cas. Co., 50 Tex. Sup. Ct. J. 1162 (2007).

FACTS: Vincent and Janice DiMare sued Lamar Homes, Inc., for defects in the construction of their home. The DiMares alleged that the negligently built foundation caused the sheetrock and stone veneer of their home to crack. Lamar Homes forwarded the lawsuit to Mid-Continent Casualty Company, "seeking a defense and indemnification under a commercial general liability or CGL insurance policy." After Mid-Continent refused to defend, Lamar Homes sought a declaration of its rights under the CGL policy and recovery under former Texas Insurance Code article 21.55.

The 5th Circuit Court noted a split in Texas courts concerning the application of CGL policies under similar circumstances. The 5th Circuit asked the Texas Supreme Court to answer three certified questions. The second question the 5th Circuit asked was "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?"

HOLDING: Certified questions answered in the affirmative.

REASONING: The court held that damage caused by "defective construction or faulty workmanship" is "property damage" under the CGL policy. According to the policy, "property damage" is "[p]hysical injury to tangible property, including all resulting loss of use of that property." The court relied on this broad definition to counter the many narrow arguments of Mid-Continent and the district court.

First, the district court argued that covering damage caused by the homebuilder's own work turned the CGL policy into a performance bond. The court responded by saying any similarities between the CGL policy and any other form of insurance were "irrelevant." As the court succinctly stated, "[t]he CGL policy covers what it covers."

Second, the district court made the sweeping argument that the CGL policy never covers the "insured's defective work." The court agreed there are instances when this is true, for example if the defective work was intentional, or if there was a specific exclusion in the policy. Lamar Homes' policy does contain a coverage exclusion for "property damage" that arises out of the insured's work, but there is an exception in this exclusion for work performed by the subcontractor. The subcontractor exception was a basis for Lamar Homes' claim.

Finally, Mid-Continent argued that the CGL policy only covers tort liability and not economic loss caused by a breach of contract. The court again looked to the face of the CGL policy and found that it made "no distinction between tort and contract damages." After dismissing Mid-Continent's and the district court's arguments, the court also held the insurance carrier had a duty to defend.

SUIT AGAINST THE LIFE INSURER WAS NOT CERTIFIABLE AS A CLASS ACTION, BECAUSE THE PLAINTIFF'S EQUITABLE CLAIMS REQUIRED RESOLUTION OF INDIVIDUAL ISSUES

Stonebridge Life Ins. Co. v. Pitts, 236 S.W.3d. 201(Tex. 2007).

FACTS: Stonebridge Life Insurance Company provided accidental death and dismemberment insurance nationwide through telemarketing. Stonebridge would buy personal information about potential customers, which included their credit card and bank account numbers. Stonebridge employed a marketing strategy where telemarketers would call the people that Stonebridge had acquired credit card or bank information for and offer the individual their insurance product for a sixty or ninety-day trial period. The potential customer was told that the insurance would be free during the trial period, but after the time period ended, their credit card or bank account would automatically be billed the premium. While the potential customers were told which bank account or credit card Stonebridge would bill, they were not told that Stonebridge already had the specific information for that particular account, and Stonebridge would not contact the individual again before their account would be charged. The trial court certified a statewide class.

The class members claimed they were subjected to the same telemarketing effort. As a result, the class believed the only issue in the case was whether Stonebridge charged their credit cards and bank accounts for premiums which "in equity and good conscience" belonged to the class members. The class certification argument was based solely on the fact that the class's common issues would predominate over individual issues. Stonebridge countered this argument saying class certification should be precluded because the equitable claim the class members asserted would require resolution of individual issues that would predominate at trial.

HOLDING: Reversed and remanded.

REASONING: The Texas Supreme Court held class certification is not appropriate unless it is determinable from the outset that the individual issues can be considered in a manageable, time-efficient, and fair manner. The court found the test for predominance was not whether common issues outnumber uncommon issues. Instead, the test was whether common or individual issues will be the object of most of the efforts of the litigants and the court. To evaluate predominance, the court must identify substantive issues that will control the litigation, assess which issues will predominate, and then, make a determination on whether or not the predominant issues are common to the class.

In order for the plaintiffs to win their case, they would have to establish that they paid money to the defendants, either by mistake or by fraud, that in equity or good conscience should be returned to the plaintiffs. The court held that for the plaintiffs to recover under this type of theory, an individualized inquiry into the state of mind of each plaintiff would be required. Therefore, the court refused to agree with the certification of the class, stating the class representatives failed to prove at the outset of the case that individual issues could be considered in a fair, manageable, and time-efficient manner on a class-wide basis.