

[Allegations Against Insured Do Not Fall Under EIFS Exclusion, Judge Concludes](#)

Mealey's(R) Litigation Report: Insurance
Online ISSN: 2158-8635, Print ISSN: 8755-9005

May 1, 2013

Copyright 2013 LexisNexis, a division of RELX Inc.

Copyright in individual articles as noted therein.

Cite: 27-25 Mealey's Litig. Rep. Ins. 5 (2013)

Section: Volume 27, Issue #25

Length: 761 words

Dateline: SAN ANTONIO

Body

Underlying allegations against an insured do not unambiguously fall within a commercial general liability insurance policy's exterior insulation and finish system (EIFS) exclusion, a Texas federal judge ruled April 18, denying default judgment to an insurer (Catlin Specialty Insurance Co. v. Montelongo Inc. d/b/a Montelongo Homes & Remodeling, et al., No. 12-711, W.D. Texas; [2013 U.S. Dist. LEXIS 55496](#)).

(Order available 69-130514-019R)

However, U.S. Judge Xavier Rodriguez of the Western District of Texas held that the law in Texas is unsettled on the interpretation of the contractual liability exclusion.

Therefore, the judge stayed the Catlin Specialty Insurance Co.'s motion for default judgment pending a decision by the Texas Supreme Court on certified questions raised in [Ewing Construction Co. Inc. v. Amerisure Insurance Co. \(684 F.3d 512](#) [5th Cir. June 15, 2012]).

Breach Of Contract

Homeowners Maria Monica Ayala and Frank Kingman sued Montelongo Homes and Remodeling (MHR), asserting claims for breach of contract, breach of warranty, construction defects, violations of the Deceptive Trade Practices Act and negligence. They alleged that the home's exterior stucco began cracking and eventually fell off the home, allowing water to enter.

The homeowners alleged that the problems in the home are latent defects that are caused by defective construction of the home by MHR and its subcontractors.

Catlin, which insured MHR, sued the insured and the homeowners in the Texas federal court, seeking a declaration that it has no duty to defend or indemnify the underlying action. MHR failed to answer the insurer's complaint. Catlin

Allegations Against Insured Do Not Fall Under EIFS Exclusion, Judge Concludes

moved for entry of default judgment, seeking an order finding and declaring that it has no duty to defend or indemnify.

Duty To Defend

Catlin asserted that several exclusions in its policy with MHR apply to the allegations in the underlying action and that, therefore, it has no duty to defend or indemnify MHR in connection with the underlying action. Specifically, the insurer argued that the contractual liability exclusion and the EIFS exclusion preclude coverage.

The homeowners responded that the EIFS exclusion does not apply because the underlying action alleges other latent defects, aside from the exterior, that have led to the damage. They argued that because the law in Texas regarding the contractual liability exclusion is currently unsettled, the motion should be denied or at least stayed until the issue is settled.

Judge Rodriguez denied the motion in part and stayed the case in part pending the outcome of Ewing. He found that the homeowners allege other latent defects aside from the exterior walls that have led to the damage. Moreover, the judge ruled that the damage could be related to the installation of traditional stucco, which may not fall under the EIFS exclusion.

Thus, Judge Rodriguez concluded that he could not declare that the homeowners' allegations necessarily fall within the EIFS exclusion.

Contractual Liability

Turning to the contractual liability exclusion, the judge noted that in Ewing, the U.S. District Court for the Southern District of Texas held that the exclusion applies when an insured has entered into a contract and, by doing so, has assumed liability for its own performance under that contract. On appeal, the Fifth Circuit U.S. Court of Appeals in Ewing certified questions.

"Because the Texas Supreme Court's decision in Ewing will clarify the issue of the contractual liability exclusion under Texas law, the Court's holding will determine whether Catlin Specialty Insurance Co. has a duty to defend or indemnify MHR in this case. Briefing before the Texas Supreme Court is complete and the Court held oral argument on February 27, 2013," he said.

Therefore, the judge explained that the issue of whether the contractual liability bars coverage in the case should be stayed pending the issuance of the ruling in Ewing.

Richard M. Kuntz and Rostyslaw J. Smyk of Ruberry, Stalmack & Garvey in Chicago represent Catlin. Jay K. Farwell of Gardner Law in San Antonio represents Ayala and Kingman.

(Additional documents available: Plaintiff's motion for default judgment 69-130514-020B

Defendants' opposition 69-130514-021B

Plaintiff's reply 69-130514-022B)

View today's headlines and listen to the latest podcast at www.lexisnexis.com/legalnews. Do you have news to share? Interested in writing a commentary article? Email the Mealey News Desk at Mealeys@LexisNexis.com

Load Date: May 1, 2013