



## **NEW TEXAS CLIENT ALERT– October 7, 2011**

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### **Recent 5<sup>th</sup> Circuit Decision Notes Difference Between CGL Exclusion L (“Your Work”) and Exclusions J5 and J6 (“That Particular Part” of Property that Must Be Repaired/Replaced); Exclusion L Encompasses Even Damage to Insured’s Non-Defective Work Caused by Insured’s Defective Workmanship**

Construction defect (“CD”) claims under the CGL policy nearly always present at least some thorny coverage issues in light of the standard CGL policy’s attempt, via its CD-related exclusions, to avoid extending coverage for the insured contractor’s pure defective workmanship. As the Texas Supreme Court noted in its *Lamar Homes* opinion, since the Texas high court has now established in *Lamar Homes* that most CD cases do potentially allege an “occurrence” and “property damage,” the battleground on coverage is now, after *Lamar Homes*, going to be those exclusions rather than the basic CGL insuring agreement. But there has been a tendency by some courts to lump the several CD-related exclusions together and then construe and apply them as a group collectively as if the parameters of each of them was the same when, in fact, each has its own reason for being in the policy and each has at least some differences from the others.

A recent opinion by the 5<sup>th</sup> Circuit Court of Appeals, decided under Texas law, points out the fallacy of treating the CD-related CGL Exclusions J5, J6 and L globally instead of separately according to their individual wording. In *American Home v. Cat Tech*, 2011 WL 4583838 (5<sup>th</sup> Cir. Oct. 5, 2011), the court noted that whereas several prior Texas decisions have made the blanket statement that the CGL policy only excluded coverage for property damage to the insured’s defective work itself and did not exclude coverage where the insured’s defective work causes damage to other work of the insured that is non-defective, e.g., *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380, 382 (Tex. App.—Dallas 1987); *Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co.*, 754 S.W.2d 824 (Tex. App.—Ft. Worth 1988). As the 5<sup>th</sup> Circuit pointed out, however, upon closer examination beneath the broad pronouncements, those decisions appear to be based solely on a construction of Exclusions J5 and/or J6 rather than Exclusion L. Of course, Exclusions J5 and J6, by their own terms, only apply to “that particular part” of property (1) that the insured or its subs are working on if the property damages arise out of that work (J5), and (2) that must be restored, replaced or repaired because the insured’s defective work was performed on it (J6). By contrast, the 5<sup>th</sup> Circuit noted that Exclusion L simply excludes coverage for damage to the named insured’s work, i.e., “your work.” According to the court, therefore, while Exclusions J5 and J6’s limitation to “that particular part” may only encompass damage to the insured’s defective work itself, Exclusion L is broader in at least this respect: It excludes coverage to any work of the insured, defective or non-defective. Thus, the court held that the exclusion applied not only to the portion damages attributable to the repair/replacement of the actual part of the structure where the insured had done the defective work, but also to other parts of the structure that the insured also worked on properly but which were also damaged as a consequence of its defective work. The exclusion did not apply, of course, to damages to other things that the insured did not work on but which were damaged by the defective work.

**Practical Pointers**—This case is a good reminder that each of the CD-related exclusions in the CGL policy are intended to encompass specific things and they should not be lumped all



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together and applied as if they all mean or say the same thing. As the noted case illustrates, Exclusion L is, in some aspects, broader than Exclusions J5 and J6. Of course, in other ways, it is narrower as, for example, its inapplicability to damage to the insured's work if that damaged work, or the work out of which the damage arises, was done by a subcontractor. In other ways, the exclusions are simply different. For example, Exclusions J5 and J6 apply when the damage occurs during the work or to non-completed work, whereas Exclusion L only applies to damage to completed work. Thus, as this case illustrates, analyzing the standard CGL exclusions in CD cases requires a careful look at (1) what was damaged, (2) what was the scope of the insured's work compared to what was damaged, (3) did the damage occur before, during or after completion of the insured's work and (4) were subs involved or not. Depending on the answers to these basic key inquiries, one or more of the CD-related exclusions may or may not apply in whole or in part but, in any event, each exclusion must be separately examined based on its own wording rather than according to easier to apply, but often inaccurate, global glosses.

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