

HOT TOPICS IN CONSTRUCTION LITIGATION

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A. Introduction

Recent Texas case law is changing the legal landscape in construction defect litigation. With the recent decision of *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 2007 WL 2459193 (Tex. Aug. 31, 2007), owners allegations of construction defects can constitute an “accident” or “occurrence” under CGL policies. In the case of *Pugh v. General Terrazzo Supplies, Inc.*, No. 01-06-00449-CV, 2007 WL 2005063 (Tex. App.—Houston [1st Dist. July 12, 2007, no pet. h.]), the court held that the economic-loss doctrine barred an owner’s claims against a supplier of an allegedly defective product.

B. Economic-Loss Doctrine

1. Overview

The doctrine of economic loss primarily applies in two ways. First, a plaintiff cannot recover in tort against a defendant with whom the plaintiff is in a contractual relationship if the claimed damages relate to the subject matter of the contract. In other words, the economic-loss doctrine limits recovery for purely economic loss to remedies provided in the contract: “When the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone.”³ Further, the doctrine precludes tort claims against “contractual strangers” when claims are only economic losses.⁴ Second, the doctrine precludes tort claims when brought to recover economic losses against the manufacturer or seller of a defective product where the defect damages only the product and does not cause “personal injury” or damage to “other

³ *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (citing *Mid-Continent Aircraft Corp. v. Curry County Spraying Service*, 572 S.W.2d 308, 312 (Tex. 1978)).

⁴ *Pugh v. General Terrazzo Supplies, Inc.*, No. 01-06-00449-CV, 2007 WL 2005063, at *5 (Tex. App.—Houston [1st. Dist.] 2007, no pet. h.) (citing *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691 (Tex. App.—Eastland 2002, no pet.); *Coastal Conduit & Ditching, Inc v. Noram Energy Corp.*, 29 S.W.3d 282, 285–86 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

property.”⁵ A recent Texas appellate court has rejected the argument that “damage to a finished product caused by a defective component part constitutes damage to ‘other property.’”⁶

The Texas Supreme Court dealt with the economic-loss rule in the context of defective home construction more than two decades ago; however, the breadth of its application remains unclear.⁷ In *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986), home purchasers sued the builder for breach of warranty of good workmanship and gross negligence in supervising the construction of the home.⁸ The court characterized the purchaser’s injury as one resulting from a breach of contract: “[T]he house they were promised and paid for was not the house they received.”⁹

2. Economic-Loss Rule and CGL Policies

Recently, in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 2007 WL 2459193 (Tex. Aug. 31, 2007), the Texas Supreme Court concluded that “allegations of unintended construction defects may constitute an ‘accident’ or ‘occurrence’ under the CGL policy and that allegations of damage to or loss of use of the home itself may constitute ‘property damage’ sufficient to trigger the duty to defend under a CGL policy.”¹⁰ In that case, Vincent and Janice DiMare (“the DiMares”) purchased a home from Lamar Homes, Inc. (“Lamar”).¹¹ Several years later, they found defects in their foundation.¹² The DiMares brought suit against Lamar and its subcontractor. The DiMares claimed Lamar was negligent and failed to construct

⁵ *Pugh*, 2007 WL 2005063 at *4 (citing *Coastal Conduit*, 29 S.W.3d at 285–86; see also *Mid Continent Aircraft Corp. v. Currey County Spraying Serv., Inc.*, 572 S.W.2d 308, 312–13 (Tex. 1978)).

⁶ *Pugh*, 2007 WL 2005063 at *5 (citing *Murray v. Ford Motor Co.*, 97 S.W.3d 888, 891 (Tex. App.—Dallas 2003, no pet.)).

⁷ See *Jim Walter Homes*, 711 S.W.2d at 618; see also, e.g., *Pugh*, 2007 WL 2005063.

⁸ *Jim Walter Homes*, 711 S.W.2d at 617.

⁹ *Id.* at 618.

¹⁰ *Lamar Homes*, 2007 WL 2459193 at *1.

¹¹ *Id.*

¹² *Id.*

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