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APPELLATE LAWYER of the WEEK

In Due Time

Sometimes a client's reward for "doing the right thing" is twelve years of litigation and a trip to the Texas Supreme Court, says John Slates whose efforts on behalf of a homebuilder recently paid off before the high court.

"No good deed goes unpunished. And I think the court recognized that, particularly in its closing language,"

says Slates, of Dallas' Slates Harwell, of the Supreme Court's Aug. 23, 2013 decision in *Lennar Corporation et al. v. Markel American Insurance Co.* Slates represents Lennar in the case.

The background to the case, according to the majority opinion in *Lennar* is as follows.

After determining that the homes they built with an exterior insulation and finish system [EIFS] suffered serious water damage that worsens over time, Lennar began to remove the product from all homes it had built and replaced the EIFS with conventional stucco.

According to the opinion, Markel, Lennar's insurer, refused to cooperate with this remediation program, preferring instead to wait until homeowners sued, and denied coverage of the costs.



John Slates

After 12 years of litigation, the dispute was appealed to the high court where they considered two questions, including: (1) Not having consented to the homebuilder's remediation program, was Markel nevertheless responsible for the costs if it suffered if no prejudice?; and (2) Was Markel responsible for costs incurred to determine property damage as well as to repair it, and costs to remediate damage that began before and continued after the policy period?

A majority opinion in the case resolved both of those issues in Lennar's favor, finding that Markel was not prejudiced "in any way" by the Lennar's settlements with homeowners. The majority also found that Markel's policy covered Lennar's entire remediation costs for the damage homes, rejecting the insurer's call for the high court to adopt a "pro rata" approach to apportioning of expenses when multiple insurance policies cover a claim.

"Lennar's responsible efforts to correct defects in its home construction did not absolve Markel of responsibility for the costs under its liability policy," wrote Justice Nathan Hecht in the majority opinion, reversing the court of appeals judgment in the case and affirming the trial court's decision in the case.

Justice Jeff Boyd wrote a concurring opinion noting that "if we are going to continue imposing the prejudice requirement, as I agree our precedent compels us to do, we should admit we

are doing so on public policy grounds, rather than continue our well-intentioned but ultimately inadequate efforts to justify our holdings on the basis of contract principals."

Having a good client was no small part of the win, Slates says.

"I think you have to give Lennar credit for recognizing the problem and dealing with it. And in my opinion, the right outcome is they [the homeowners] will be reimbursed," Slates says.

Timothy Lee, a partner in Houston's Ware, Jackson, Lee & Chambers who represents Markel, says his client is "exceptionally disappointed" in the ruling and believes the high court may not realize the implications their ruling will have on insurance coverage disputes.

"The court has really widened the coverage of very standard general commercial liability policies with losses that occur over time," Lee says.

Notes Lee: "It's easy for Lennar to do the right thing if they get their insurance company to pay for it."

— JOHN COUNCIL

To suggest an **Appellate Lawyer of the Week**,
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