VOLUME 3, ISSUE 3

DECEMBER, 2010

SMB LEGAL NOTES

Shorall McGoldrick Brinkmann
attorneys • phoenix • flagstaff

INSURING CONSTRUCTION DEFECT LITIGATION

The California Supreme Court's decision in *Montrose Chemical Corp. v. Admiral Insurance*, 10 Cal.4th 645 (1995), recognized that many common CGL (commercial general liability) insurance policies contain insuring clauses that allow for a "continuous trigger" of coverage. In other words, continuing damage to a structure from the same defect, can trigger more than one policy period. This legal development allowed construction defect litigation in southern California to resurrect itself as contractors' insurance carriers became obligated to defend claims for defects originating years before.

Arizona lawyers had long assumed that the continuous trigger applied to insurance policies being enforced in Arizona courts. This meant that construction defect litigation in Arizona progressed along the same lines as it had in California: if damage continued to occur from the same defend in a new policy period, new insurance policies that had not yet been exhausted could be used to defect litigation, and fund judgments. Yet, it was not until 2007 that Arizona's Court of Appeals specifically endorsed the continuous trigger theory of coverage in *Lennar Corp. v. Auto-Owners, Insurance*, 214 Ariz. 255 (App. 2007).

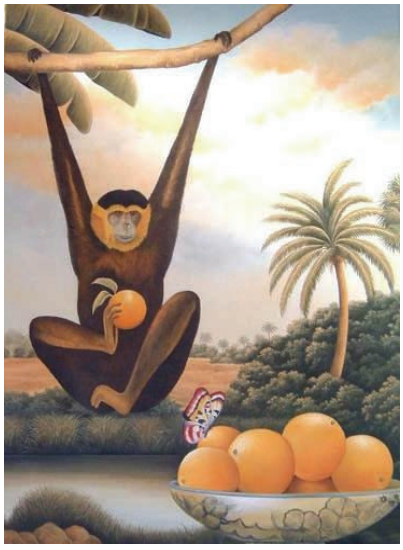
In 2010, the Arizona Court of Appeals found, in *Desert Mountain Properties, LP v. Liberty Mutual Fire Insurance*, 225 Ariz. 194 (App. 2010), that a builder's repairs to construction, without the need of suit, may be covered under the builder's CGL policy. However, the insured will need to demonstrate that it has incurred damages separate from the expenses for the preventative repairs themselves. The court's analysis was fairly predictable given the challenges of determining whether damages are excluded as being a contractor's "own work" under a CGL policy.

A month prior to the Arizona Court of Appeals' decision in *Desert Mountain*, the California Court of Appeal announced its opinion in *Clarendon American Insurance v. Starnet Insurance*, 186 Cal. App.4th 1397 (2010), which held that statutory pre-suit notices in common interest development (CID) suits are "claims" for purposes of triggering insurance. Both of these opinions looked set to provide additional "insured" options for builders and developers facing defect claims.

However, the California Supreme Court has accepted review of the *Clarendon* case, and as of November 10, 2010, has suspended the case pending the disposition of another case. If the California courts ultimately find that the "Calderon process" of pre-suit notice in CID litigation constitutes a "claim" for insurance purposes, such a finding may be influential in Arizona where notice and opportunity to repair statutes have been in effect since 2003.

While those defending claims have often waited for suit to be filed, case law is beginning to catch up to the legislative policy of having homeowners provide pre-suit notice of alleged defects to builders. Ultimately, this trend may allow for more insurance funding of builders' responses to defect notices, which may also drive down the cost of dealing with homeowners' defect allegations. Nevertheless, the builder will still need to identify a covered loss in addition to the repair expenses in order to trigger coverage.

The attorneys of SMB's construction litigation practice group are admitted in both Arizona and California, allowing for **strategic representation** of the Southwest construction industry.



contacts

tom shorall
tomshorall@smbattorneys.com

scott zerlaut
scottzerlaut@smbattorneys.com

asa markel
asamarkel@smbattorneys.com

Shorall McGoldrick Brinkmann
1232 east missouri avenue
phoenix, az 85014
602.230.5400
602.230.5432 (fax)