



Greetings again from **Evans & Co.**, with another installment of **Case Notes**, this time discussing details and ramifications of recent rulings in **Texas** and **Louisiana**. We pay particular attention to cases involving issues of **Insurance Coverage, Construction Defect, Commercial Auto, and Insurance Bad Faith**.

With this issue, we welcome a host of new subscribers from the U.K., many of whom are familiar with our firm's work, and also quite a few new domestic insurance and claims adjusting personnel.

We take this opportunity to remind you that we provide insurance coverage advice and litigation in **Arizona, Utah**, and will soon in **Alabama**, in addition to the states in which we have offices shown below.

Today's **Case Notes** provides updates on the law of **Texas** and **Louisiana**. You may access our entire brief by pressing [here](#), or **Texas** only [here](#), and **Louisiana** only [here](#).

## TEXAS CASES

Our **Texas** case summaries include a very important statement by the Texas Supreme Court in **Lennar v. Markel** where it is now clear that a insurer may need to pay claims outside of its policy period, and seek appropriate reimbursement from other carriers on other policy periods, upon appropriate – expensive – proof. **This would seem to encourage very early and flexible discussions among carriers, regarding defense and indemnity apportionment, so that they do not have to bear the expense of a second lawsuit.** Flexibility is important because all facts bearing on apportionment will not be known at the outset. **Lennar** also cements the insured's right to repair and have that repair be an insured expense, even without the consent of the insurer – unless the insurer can later prove, likely to a jury, that there is actual prejudice, which will be just about never.

**Texas** bids farewell to the “unlawful acts” exclusion for tort claims, which has gone the way of contributory fault being a bar to recovery, and in fact, is a lingering variation on the latter. **Now criminal tortfeasors will just have their day in court, their recovery reduced by their percentage of fault (to 50% before the cliff).** Whether criminal fault is any more damning than civil fault remains to be seen, though we would speculate that Texas juries will give more weight to crimes that cause torts, than to neglect.

An important Federal **EIFS** case under **Texas** law has framed important questions on the **scope of “insured contracts” coverage** which will likely be answered soon by the Texas Supreme Court, which we will pass on in a follow-up **Case Notes**.

## **LOUISIANA CASES**

Turning to **Louisiana** cases, it is somehow unsurprising to see the Louisiana Supreme Court holding that ***the “exclusive remedy” of the New Home Warranty Act isn't an exclusive remedy*** when it comes to known defects.

Insurers will take heart that the Louisiana 1<sup>st</sup> Circuit Court of Appeals has underscored existing law that the insured bears the burden of proving a loss occurred within the insurer's policy period. In another case, ***the assault and battery exclusion, stood up to assault on its breadth, and was affirmed as excluding liability for negligence that was contemporaneous with the assault***. So we have a forfeiture clause given effect, somewhat against the flow of other rulings on forfeiture clauses.

We brief yet another case in **Louisiana bad faith law**, which has developed greatly over the past five years courtesy of Hurricane Katrina and the statutes passed by the legislature just before and after. The first party's tender after “adjustment” was for about 4% of what was eventually proven; a second tender was for about 10%. No “safe harbor” for this insurer, which was tagged with statutory bad faith damages, though the attorneys' fees portion was just \$15,000. We'd guess the carrier spent twice that or more on their meritless defense.

We hope you continue to benefit from these summaries, and remind you that they are archived, and may be viewed at our firm's website: [www.evanslawfirm.com](http://www.evanslawfirm.com).

Press [here](#) to go to the Evans & Co. website for firm information and access to prior case digests.