

# BROWN SIMS

## ATTORNEYS AT LAW

*In Scottsdale Ins. Co. v. Knox Park Const. Inc., 488 F.3d 680 (5th Cir. 2007), Knox Park sued the insured Shade Tree Electric, for construction defects in Shade Trees work, alleging negligence, breach of warranty and breach of contract. Shade Tree's primary insurer, Scottsdale, filed a declaratory judgment action regarding its duties to defend and indemnify. Scottsdale amended its pleadings to add Landmark Insurance, the umbrella insurer, as a defendant. Landmark obtained a partial summary judgment that it had no duty to defend. Scottsdale, Shade Tree and Knox Park settled the underlying suit for \$535,000 with Knox Park purportedly reserving the right to recover from Landmark alone the difference between \$535,000 and \$1.2 million. Landmark then obtained a second summary judgment that Scottsdale had failed to show an ultimate net loss in excess of the limit reserved to Scottsdale's policy and thus failed to demonstrate that coverage was triggered under the Landmark policy.*

*In an opinion authored by Judge Clement, the Fifth Circuit held that the Landmark policy covered the breach of warranty claims against Shade Tree while the Scottsdale policy did not. Thus, the Court held that the Landmark policy provided "horizontal coverage" even though the Scottsdale policy was not exhausted. Landmark's umbrella policy provided it would pay those sums the insured became legally obligated to pay for ultimate net loss in excess of the retained limit because of bodily injury or property damage to which this insurance applies. The Landmark policy's definition of retained limit included amounts applicable to any claim or suit from underlying insurance; it defined underlying insurance as "coverage's afforded" under certain designated insurance policies. The Court held that "coverage's afforded" referred to insurance coverage provided and not excluded by the Scottsdale policy and not to the underlying policy limit of \$1 million. The Court apparently found Landmark's insistence that Scottsdale settle the claims against Shade Tree for an amount within Scottsdale's policy limit to constitute a denial of coverage by Landmark for the breach of warranty claims against Shade Tree. Consequently, the Court further held that Landmark waived its policy's consent clause by denying coverage for the breach of warranty claims.*

*Judge Garwood dissented from the part of the Court's opinion finding that Landmark had denied coverage but agreed with the result because he believed Landmark owed a duty to defend and consequently waived the consent clause by refusing to defend.*

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