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# Revisiting Construction Defects As “Occurrences” Under CGL Insurance Policies

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## **REVISITING CONSTRUCTION DEFECTS AS “OCCURRENCES” UNDER CGL INSURANCE POLICIES**

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Imagine a situation in which a homeowner hires a contractor to redo a bathroom, for example, and the work is done incompetently such that the plumbing leaks and causes damage to other parts of the house. If the homeowner sues the contractor to recover the costs of repairing the faulty workmanship and the damage caused by the faulty workmanship, has there been an “occurrence” that is covered by the contractor’s Commercial General Liability (“CGL”) insurance policy? This article provides an answer to that question.

The issue of whether construction defects are occurrences under CGL insurance policies has been litigated frequently in recent years. Historically, courts have been divided in their approaches to deciding the issue and in their conclusions. This article contains a comprehensive, nationwide analysis and critique of state courts’ approaches and decisions on the issue. It also proposes an analytical framework in which courts can decide the issue with the theoretical and public policy concerns, such as moral hazard, the compensation of injured parties, and the enforcement of contracts in mind.

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## INTRODUCTION

Imagine someone hires a general contractor to completely redo the master bathroom of the person’s home. To provide the dream bathroom the homeowner wants, the entire bathroom is stripped down to the studs. New plumbing and electrical work must be installed because the location of the vanity, toilet, and shower are all changed. The general contractor hired to do the job is a small, local business with four employees and has annual revenues of approximately \$500,000. The general contractor’s limited assets are comprised primarily of the tools and equipment needed to do construction work. The general contractor has both workmen’s compensation insurance and Commercial General Liability

(“CGL”) insurance. To complete the electrical and plumbing portions of the job, the general contractor hires an electrician and a master plumber as subcontractors.

The finished bathroom looks fantastic, and the homeowner is initially elated, but a month after the job is completed, water starts dripping into the living room, which is located below the new bathroom. The flooring and expensive paintings in the living room are ruined. The cost to repair the damage in the living room, replace the expensive paintings, and fix the leaking pipes in the bathroom is significant. The homeowner’s calls to the general contractor are unreturned because the general contractor does not have the skills necessary to fix the defective plumbing in the new bathroom or the money to replace the flooring and paintings in the living room. The homeowner then sues the general contractor, who in turn tenders the claim to its CGL insurer. The insurer denies coverage on the grounds that the defective workmanship is not an “occurrence” under the CGL policy; so, the claim is not covered.

This hypothetical scenario is actually a daily reality for many homeowners and contractors in America, and the resolution of such claims has been a patchwork quilt of inconsistent results and analyses by the courts from state to state.<sup>1</sup> The judicial discord centers on the issue of whether defective workmanship is an “occurrence” under CGL policies.

“Occurrence” is defined under standard form CGL policies, currently used by most insurers, as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>2</sup> Notably, the term “accident” is not defined.

In essence, the insurer’s argument is that construction defects, such as the defective plumbing work in the bathroom hypothetical, are not occurrences because it is reasonably foreseeable that a contractor who does defective work will be legally required to either fix the faulty workmanship or pay for it. Thus, claims related to defective workmanship are not the result of “accidents.” Insurers also argue that CGL policies would effectively become warranties or performance bonds regarding the quality of a contractor’s work if CGL policies covered construction defects, which is not the purpose of liability insurance.

In response, contractors argue they do not intend to do their work

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1. The author first addressed this subject in December 2011. See Christopher C. French, *Construction Defects: Are They “Occurrences”?*, 47 GONZ. L. REV. 1, 22-41 (2011) (addressing state courts’ varying approaches and conclusions regarding the issue of whether construction defects are “occurrences”). Since 2011, numerous state supreme courts have addressed the issue of whether construction defects can constitute occurrences under CGL policies. This article updates the research contained in the earlier article and provides a current analysis of the issue.

2. Ins. Servs. Office, Inc., Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), reprinted in DONALD S. MALECKI, COMMERCIAL GENERAL LIABILITY COVERAGE GUIDE app. J, § V(13), at 479 (9th ed. 2011).

defectively or expect that their work will cause damage. By this logic, defective workmanship is unintentional, which means it is accidental, so it is an occurrence. Contractors further argue that they buy CGL insurance specifically to protect themselves against liability claims related to their business - construction. If construction defect claims, the most common claims asserted against contractors, were not covered by CGL insurance, then why would or should a contractor even buy CGL insurance?

By way of analogy, consider auto insurance. People intentionally drive cars. It is reasonably foreseeable that if a person drives negligently by, for example, texting while driving or looking at the scenery on the side of the road instead of the road itself, the driver may hit someone or something. It is also foreseeable that the driver would be held legally liable for the injuries or damage she causes when she does so. Does that mean auto insurance does not or should not cover such liabilities? Of course not, because that is the very reason people have auto insurance – to cover their liabilities for the injuries or damage resulting from their negligent driving. No one can tenably argue that because car crashes are the foreseeable result of negligent driving, auto insurance should not cover the injuries and damages associated with car crashes. Are insurance claims related to defective workmanship fundamentally different from insurance claims related to car crashes?

To address the issue of whether construction defects are occurrences under CGL policies, this article proceeds in four parts. Part I sets forth relevant policy language, such as the definitions of “occurrence” and “property damage,” as well as the “business risk” exclusions contained in CGL policies. Part II addresses the principles of insurance policy interpretation relevant to the determination of whether construction defects are occurrences. Part III discusses the courts’ treatment of the issue and the various approaches that courts have taken in resolving the issue. Part IV provides an analytical framework in which courts can decide the issue when it is presented to them.

## I. THE POLICY LANGUAGE

### A. *The Insuring Agreement*

Under the Insurance Services Office, Inc.’s (“ISO”)<sup>3</sup> current standard form

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3. ISO is an influential organization within the insurance industry that provides a variety of services to many insurers. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 879 n.6 (Fla. 2007). One of ISO’s primary functions is to draft policy forms that are then submitted to state insurance regulators for approval. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). As a provider of services to approximately 1400 property and casualty insurers, ISO “is the almost exclusive source of support services in this country for CGL insurance.” *Id.* As a result, “most CGL insurance written in the United States is written on [ISO] forms.” *Id.*

CGL policy, the basic insuring agreement language that sets forth the insurer's payment obligations to the policyholder provides as follows:

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory . . . ."<sup>4</sup>

*B. The Definitions of "Property Damage" and "Occurrence"*

"Property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . ."<sup>5</sup> Notably, the definition does not make a distinction between property that is created by the contractor/policyholder (i.e., the contractor's workmanship) and separate property owned by a third party, such as the homeowner (e.g., the rest of the house).

For many years, "occurrence" was defined in ISO's standard form CGL policies as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured* . . . ."<sup>6</sup> Under this definition, to determine whether there was an occurrence, the analysis focused on whether there was an accident that resulted in bodily injury or property damage that the policyholder did not expect or intend.<sup>7</sup> In short, the question amounts to: did unexpected and unintended bodily injury or property damage result from the policyholder's actions?

Beginning in 1986, and continuing today in the current version of ISO's standard form CGL policy, "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful

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4. Ins. Servs. Office, Inc., Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), *supra* note 2, app. J, § I(1), at 466.

5. *Id.* § V(17), at 480.

6. Ins. Servs. Office, Inc., Form No. GL 00 02 01 73, Comprehensive General Liability Insurance Coverage Form (1973), *supra* note 2, app. A, at 259 (emphasis added).

7. See, e.g., *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 579 P.2d 1015, 1017 (Wash. Ct. App. 1978) (ruling "the school building fire was not an insurable 'occurrence' under the policy because it was not an 'accident'" in a case where a boy intentionally lit a trash can on fire and the fire spread to the rest of the school).

conditions.”<sup>8</sup> As courts were already treating the “expected or intended” language in the definition of an “occurrence” as an exclusion,<sup>9</sup> in 1986 the language was formally moved to the exclusions section of CGL policies: “This insurance does not apply to . . . ‘[b]odily injury’ or ‘property damage’ expected or intended from the standpoint of the insured. . . .”<sup>10</sup> This move, however, did not change the analysis of whether there has been an occurrence. The question to be answered still remains whether the policyholder did something that resulted in property damage or bodily injury that the policyholder did not expect or intend to cause.<sup>11</sup>

### C. The “Business Risk” Exclusions

Under ISO’s 1973 CGL policy form, there were three exclusions commonly referred to as the “business risk” exclusions, which purport to

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8. Ins. Servs. Office, Inc., Form No. CG 00 01 11 85, Commercial General Liability Coverage Form (1986), *supra* note 2, app. B, § V(9), at 277; Ins. Servs. Office, Inc., Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), *supra* note 2, app. J, § V(13), at 479.

9. See, e.g., *Upjohn Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 1029337, at \*9 (W.D. Mich. July 22, 1994) (“[A]lthough the neither expected nor intended language appears in the occurrence clause, it essentially operates as an exclusion.”); *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F. Supp. 816, 820-21 (N.D. Cal. 1987) (determining that the “expected or intended” language is an exclusionary clause, and thus requires a narrow interpretation to provide the insured the greatest protection); *Nat’l Farmers Union Prop. & Cas. Co. v. Kovash*, 452 N.W.2d 307, 311 n.3 (N.D. 1990) (“A determination of coverage under the ‘expected or intended’ language in the definition of an occurrence generally involves the same determination as coverage under an exclusion for intentional acts.” (citing James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R.4th 957, 971 (1984))).

10. Ins. Servs. Office, Inc., Form No. CG 00 01 11 85, Commercial General Liability Coverage Form (1986), *supra* note 2, app. B, § I(2)(a), at 269; Ins. Servs. Office, Inc., Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), *supra* note 2, app. J, § I(2)(a) at 467.

11. See, e.g., PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, *POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE* §6.03[B][1] (1st ed. 1997 & Supp. 2009) (“Most jurisdictions follow the rule that only expected or intended injury, as opposed to expected or intended acts, can preclude coverage.”). See also *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 883 (Fla. 2007) (“[T]hese policies provide coverage not only for ‘accidental events,’ but also injuries or damage neither expected nor intended from the standpoint of the insured.”); *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508, 520 (W. Va. 2013) (“In determining whether under a liability insurance policy an occurrence was or was not an ‘accident’—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue.” (citing *Columbia Cas. Co. v. Westfield Ins. Co.*, 617 S.E.2d 797 (W. Va. 2005))).

eliminate coverage for certain risks inherent in doing business.<sup>12</sup> They were worded as follows:

This [insurance] does not apply . . . :

- (n) to property damage to the named insured's products arising out of such products or any part of such products;
- (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
- (p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein . . . .<sup>13</sup>

Since 1973, the business risk exclusions have been redrafted to narrow the scope of the exclusions.<sup>14</sup> Beginning in 1976, policyholders could purchase what was commonly referred to as a Broad Form Property Endorsement that replaced, among other exclusions, Exclusion (o) with an exclusion that expanded coverage.<sup>15</sup>

In 1986, the business risk exclusions were revised again to incorporate the Broad Form Property Endorsement into the policy itself, clarify the language in the business risk exclusions, and add an exception for work done by subcontractors.<sup>16</sup> Since 1986, the business risk exclusions have been worded as follows:

This insurance does not apply to . . . :

- k. Damage to Your Product

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12. Ins. Servs. Office, Inc., Form No. GL 00 02 01 73, Comprehensive General Liability Insurance Coverage Form (1973), *supra* note 2, app. A, § I(n)-(p), at 262.

13. *Id.*

14. See 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D § 132.9[B], at 148-50 (2002) (commenting on the changes as limiting the availability of previous exclusions to insurance coverage).

15. See *id.* (replacing exclusions (k) and (o) with "Broad Form Property Damage Liability Coverage" that narrows the previous business risk exclusions to insurance coverage).

16. See *id.* § 132.9[C]-[D], at 150-53 ("Because the term 'your work' is an integral part of the 1986 Damage to 'Your Work' Exception 'I,' the term 'your work' must be understood. Part V of the 1986 CGL provides the following definition: 'Your work' means: a. Work or operations performed by you or on your behalf; and b. Materials, parts or equipment furnished in connection with such work or operations.'). For more on the new language, see Ins. Servs. Office, Inc., Form No. CG 00 01 11 85, Commercial General Liability Coverage Form (1986), *supra* note 2, app. B, § I(2)(k)-(m), at 270-71.



“Property damage” to “your product” arising out of it or any part of it.

l. Damage to Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.” This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.<sup>17</sup>

According to one commentator, the subcontractor exception was added because:

[T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.<sup>18</sup>

ISO itself, through a July 15, 1986 circular, stated that the 1986 revisions to the business risk exclusions were intended to incorporate the 1976 Broad Form Property Endorsement and to make it clear that the policy “cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor’s work after the insured’s operations are completed.”<sup>19</sup>

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17. Ins. Servs. Office, Inc., Form No. CG 00 01 11 85, Commercial General Liability Coverage Form (1986), *supra* note 2, app. B, § I(2)(k)-(m), at 270-71.

18. 2 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 14.13[D], at 14-224.8 (3d ed. Supp. 2007).

19. U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 879 (Fla. 2007) (alteration in original) (quoting Ins. Servs. Office, Inc., Circular No. GL-86-204, Commercial General Liability Program Instructions Pamphlet (1986)).

## II. THE RULES OF INSURANCE POLICY INTERPRETATION

When courts are asked to interpret and apply policy language, such as the definitions of “occurrence” and “property damage,” there are three well-established rules of policy interpretation that are particularly relevant: (1) *contra proferentem*, (2) the “reasonable expectations” doctrine, and (3) construction of the policy as a whole.

### A. *Contra Proferentem*

As drafters of the policy language, the doctrine of *contra proferentem* applies, which means any ambiguities in the policy language are construed against the insurers and in favor of coverage.<sup>20</sup> For determining whether policy language is ambiguous, the test under many states’ laws is whether the provisions at issue are reasonably or fairly susceptible to different interpretations or meanings.<sup>21</sup> If the policyholder and insurer both offer reasonable interpretations of the policy language, then the policy language is ambiguous and should be construed in favor of coverage.<sup>22</sup> Stated

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20. See, e.g., Restatement (Second) of Contracts § 206 (1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”). See also Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1121 n.64 (2006) (“The language of a contract will be construed most strictly or strongly against the party responsible for its use . . .”) (quoting 17A C.J.S. *Contracts* §337 (2003)); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 774 n.4 (2015) (“[T]he *contra proferentem* rule is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.” (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (1990))).

21. See, e.g., Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 537 (1996) (noting that the first inquiry courts make to determine the ambiguity of a disputed policy provision is whether it is “reasonably susceptible to two meanings.”). See also *New Castle Cnty. Del. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 243 F.3d 744, 750 (3d Cir. 2001) (“The settled test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” (quoting *New Castle Cnty. Del. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 174 F.3d 338, 344 (3d Cir. 1999))); *Salem Grp. v. Oliver*, 607 A.2d 138, 139 (N.J. 1992) (“When a policy fairly supports an interpretation favorable to both the insured and the insurer, the policy should be interpreted in favor of the insured.”).

22. In addition to *supra* note 21, see *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474, 476 (N.H. 1994) (“If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer.”).

differently, *contra proferentum* applies even if the insurer's interpretation is more reasonable than the policyholder's so long as the policyholder's interpretation is also reasonable.<sup>23</sup> Where the controversy involves a phrase that insurers have failed to define and has generated many lawsuits with inconsistent rulings by courts, common sense suggests the policy language must be ambiguous – i.e., susceptible to multiple reasonable interpretations.<sup>24</sup>

### B. The "Reasonable Expectations" Doctrine

Another staple of insurance policy interpretation is that insurance policies should be interpreted in such a way as to fulfill the "reasonable expectations" of the policyholder.<sup>25</sup> The seminal article regarding the

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23. Along with *supra* note 21, see *Bonner v. United Servs. Auto. Ass'n*, 841 S.W.2d 504, 506 (Tex. App. 1992) ("The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.").

24. See, e.g., Boardman, *Contra Proferentem*, *supra* note 20, at 1122-23 ("[T]he mere fact that several . . . courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation," and is therefore ambiguous." (quoting *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 796 (3d Cir. 1987))); *Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So.2d 314, 316 (Fla. Dist. Ct. App. 1981) ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."); *Crawford v. Prudential Ins. Co. of Am.*, 783 P.2d 900, 908 (Kan. 1989) (The "reported cases are in conflict, the trial judge and the Court of Appeals reached different conclusions and the justices of this court [disagree]. . . . Under such circumstances, the clause is, by definition, ambiguous and must be interpreted in favor of the insured."); *Allstate Ins. Co. v. Hartford Accident & Indem. Co.*, 311 S.W.2d 41, 47 (Mo. Ct. App. 1958) ("Since we assume that all courts adopt a reasonable construction, the conflict is of itself indicative that the word as so used is susceptible of at least two reasonable interpretations, one of which extends the coverage to the situation at hand."); *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.*, 161 N.E. 276 (Ohio 1928) ("Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof, the question whether such clause is ambiguous ceases to be an open one."); *Cohen v. Erie Indem. Co.*, 432 A.2d 596, 599 (Pa. Super. Ct. 1981) ("The mere fact that . . . [courts differ on the construction of the provision] itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation.").

25. See, e.g., ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* §§ 6.3(a)(3), at 633-34 (student ed. 1988) (discussing the reasonable expectations doctrine as applied by courts); BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE*

“reasonable expectations” doctrine was written more than forty years ago by then Professor Robert Keeton.<sup>26</sup> In his subsequent treatise, then Judge Keeton summarized the doctrine as follows: “In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.”<sup>27</sup> In other words, under Judge Keeton’s view of the reasonable expectations

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DISPUTES §1.03[b][2][B], at 35-46 (14th ed. 2008) (identifying courts in forty-two states that have expressed support for, or applied a form of, the reasonable expectations doctrine); STEMPEL, *supra* note 18, § 4.09[C], at 4-110 to -112 (3d ed. Supp. 2011) (presenting different arguments that justify the reasonable expectations approach). *See also* AIU Ins. Co. v. Superior Court, 799 P.2d 1253, 1264 (Cal. 1990) (noting that ambiguous coverage clauses of insurance policies are to be interpreted broadly to protect the objectively reasonable expectations of the insured); Roland v. Georgia Farm Bureau Mut. Ins. Co., 462 S.E.2d 623, 625 (Ga. 1995) (“[a] contract of insurance should be strictly construed against the insurer and read in favor of coverage in accordance with the reasonable expectations of the insured”); A.B.C. Builders, Inc. v. Am. Mut. Ins. Co., 661 A.2d 1187, 1190 (N.H. 1995) (“the policy language must be so clear as to create no ambiguity which might affect the insured’s reasonable expectations”); Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 495-96 (W. Va. 1987) (holding that courts will apply the reasonable expectations doctrine to construe the policy in a manner that “a reasonable person standing in the shoes of the insured would expect the language to mean,” even though painstaking examination of the policy provisions would have negated those expectations (internal quotation marks omitted)).

26. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970) (defining and providing the basic reasoning underlying the “reasonable expectations” doctrine).

27. KEETON & WIDISS, *supra* note 25, § 6.3(a)(3), at 633. For commentary regarding the reasonable expectations doctrine and its various iterations, *see* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990) (providing a detailed historical account of the doctrine and asserting that the doctrine is principled and can be applied within justifiable guidelines); Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21 (1998) (discussing the doctrine as conceptualized by Keeton); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 287-96 (1986) (formulating standards for applying the doctrine); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 392 (1986) (arguing for refinements to the doctrine in response to the fading appeal that the doctrine holds for courts and commentators, and contending that courts should “discard their unfortunate tendency to speak the platitudes of reasonable expectations without undertaking a careful and systematic analysis”); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1395 (2007) (criticizing the reasonable expectations doctrine and arguing that the case law endorsing the doctrine is “confused and inconsistent”); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 182-83, 191-95 (1998) (describing the various judicial approaches to the doctrine and noting both liberal and narrow approaches among the numerous states that have adopted the doctrine).

doctrine, “even when the policy language unambiguously precludes coverage, under certain circumstances, courts will hold that coverage exists.”<sup>28</sup> In short, the policyholder should receive the coverage that it reasonably expected it would receive when it bought the policy even if there is some policy language or exclusion that arguably defeats coverage for the claim.

### C. *Construction of the Policy as a Whole*

The third rule of insurance policy interpretation applicable to the issue of whether construction defects are occurrences provides that, if possible, the policy should be interpreted in a way that reconciles the various provisions of the policy and attempts to give effect to all of the policy’s provisions.<sup>29</sup> In essence, this rule instructs courts to attempt to interpret all of a policy’s provisions in a way that is consistent with the general purpose of the policy as a whole. This means that the definition of “occurrence” should not be read in isolation in determining whether a claim is covered. Instead, the definition of “occurrence,” as well as the rest of the policy provisions including the business risk exclusions, should be interpreted together to determine whether the policy covers the claim at issue.

### D. *The Rules of Policy Interpretations and the “Expected or Intended” Exclusion*

In analyzing whether construction defects are “accidents,” several questions arise with respect to the “expected or intended” language contained in CGL policies, regardless of whether the phrase is located in the definition of “occurrence” or in the exclusions section of the policy. What must be expected or intended by the policyholder in order for the exclusion to apply – the

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28. Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 22 (1997).

29. See, e.g., *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (applying New York law and stating “an interpretation that gives a reasonable and effective meaning to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect”); *Fireman’s Fund Ins. Co. v. Allstate Ins. Co.*, 286 Cal. Rptr. 146, 155-56 (Cal. Ct. App. 1991) (“In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract.” (quoting *State Farm Mut. Auto. Ins. Co. v. Crane*, 266 Cal. Rptr. 422, 424-25 (Cal. Ct. App. 1990))); *Weiss v. Bituminous Cas. Corp.*, 319 N.E.2d 491, 495 (Ill. 1974) (explaining that the provisions of an insurance policy should be interpreted in the context of the entire policy); *Welborn v. Ill. Nat’l Cas. Co.*, 106 N.E.2d 142, 143 (Ill. App. Ct. 1952) (“[T]he court should determine the intention [of the parties] from the whole agreement, and endeavor to give a meaning to all provisions, so far as possible, which will render them consistent and operative.”).

policyholder's actions or the resulting property damage or injury? Should the court or jury consider the policyholder's intentions and expectations from a subjective or an objective point of view?

In answering these questions, it is important to remember that the "expected or intended" language acts as an exclusion regardless of where it is found in CGL policies.<sup>30</sup> As an exclusion, the rules of policy interpretation dictate that it should be narrowly construed<sup>31</sup> with all ambiguities resolved in favor of the policyholder.<sup>32</sup> Further, as an exclusion, the insurer has the burden of proving it applies.<sup>33</sup>

### 1. The Resulting Damage, Not the Act Itself, Must Be Expected or Intended

So, what must be expected or intended for the policyholder to lose coverage – the act that causes the injury or damage or the injury or damage itself? Generally speaking, the policyholder typically intends to engage in the conduct at issue, such as the construction work, that gives rise to the damage. Thus, what exactly must the policyholder expect or intend before the claim is excluded from coverage? The majority rule is that the injury or damage must be expected or intended, not the act giving rise to the injury or damage.<sup>34</sup>

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30. See *supra* note 9 (collecting cases in which the court treats the "expected or intended" language in "occurrence" as an exclusion).

31. See, e.g., *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987) (holding that policy provision excluding acts explicitly covered in prior section of policy are construed against insurer); *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011) ("While clauses providing coverage are interpreted broadly so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insurer." (quoting *Nat'l Union Fire Ins. v. Reno's Exec. Air*, 682 P.2d 1380, 1383 (Nev. 1984))).

32. See *supra* Part II.A. (discussing the doctrine of *contra proferentem*, which resolves ambiguities in favor of coverage and against the insurer).

33. See, e.g., *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (stating that the insurer has burden to prove the applicability of an exclusion as an affirmative defense); *United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co.*, 376 A.2d 1183, 1187 (N.J. 1977) ("When an insurance carrier puts in issue its coverage of a loss under a contract of insurance by relying on an exclusionary clause, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage."); *Cont'l Ins. Co. v. Louis Marx & Co., Inc.*, 415 N.E.2d 315, 317 (Ohio 1980) (stating that the insurer has the burden of proof for a defense that is based upon an exclusion); *Brown v. Snohomish Cnty. Physicians Corp.*, 845 P.2d 334, 340 (Wash. 1993) (noting that once the policyholder has made a *prima facie* case that there is coverage, the burden shifts to the insurer to prove an exclusionary provision applies).

34. See, e.g., *Allstate Ins. Co. v. Sparks*, 493 A.2d 1110, 1112 (Md. Ct. Spec. App. 1985) (explaining that the intentional injury exclusion applied only where the insured intended both an act causing damage and the results of that act); *Hanover Ins. Co. v. Talhouni*, 604 N.E.2d 689, 690 (Mass. 1992) ("The focus in these cases is whether the

A minority of courts interpreted the language to mean that if any injury or damage is expected or intended, then coverage is lost even if the injury or damage that resulted was different than what the policyholder expected or intended.<sup>35</sup> Other courts held that coverage is not precluded if the policyholder expected an injury or damage that was different than, or significantly less severe than, what actually occurred.<sup>36</sup> The latter approach is more consistent with the rule that exclusions should be interpreted narrowly with any ambiguities resolved in favor of coverage.

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insured 'intended' the injury, not whether the insured 'intended' the act."); *White v. Smith*, 440 S.W.2d 497, 508 (Mo. Ct. App. 1969) (explaining that, although some damages are foreseeable, "damages not intentionally inflicted but resulting from an insured's negligence . . . may be caused by accident and within the coverage afforded by a liability insurance policy." (internal quotation marks omitted)); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 510 (N.Y. 1993) ("Resulting damage can be unintended even though the act leading to the damage was intentional. A person may engage in behavior that involves a calculated risk without expecting that an accident will occur." (citations omitted)); *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 289 N.E.2d 360, 365 (Ohio Ct. App. 1972) (recognizing that the term occurrence is broader than the term "accident" and may encompass a fully intended action that resulted in unintended damage); *Vt. Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417, 420-21 (S.C. 1994) (explaining that an intentional injury exclusion did not bar coverage where the insured had not intended the injury resulting from his voluntary act).

35. See *Lopez ex rel. Lopez v. Am. Family Mut. Ins. Co.*, 148 P.3d 438, 439 (Colo. App. 2006) (explaining that the intentional act exclusion applies "whenever *some* injury is intended, even though the injury that actually results differs in character or degree from the injury actually intended." (emphasis added) (quoting *Am. Family Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 955 (Colo. 1991))); *Butler v. Behaeghe*, 548 P.2d 934, 939 (Colo. App. 1976) (holding in an assault case that where the insured "intentionally struck the plaintiff, he must be deemed to have intended the ordinary consequences of his voluntary actions" and thus "it is immaterial that the particular injury that resulted was not specifically intended."); *Georgia Farm Bureau Mut. Ins. Co. v. Purvis*, 444 S.E.2d 109, 110 (Ga. Ct. App. 1994) (concluding that an intentional act exclusion is applicable where "the insured acts with the intent or expectation that . . . injury occur, *even if the actual, resulting injury is different either in kind or magnitude from that intended or expected.*" (quoting *Stein v. Mass. Bay Ins. Co.*, 324 S.E.2d 510, 511-12 (Ga. Ct. App. 1985))); *State Farm Fire & Cas. Co. v. Johnson*, 466 N.W.2d 287, 289 (Mich. Ct. App. 1990) (per curiam) ("Once intended harm is established, the fact of an unintended injury is irrelevant."); *Farmers Mut. Ins. Co. of Neb. v. Kment*, 658 N.W.2d 662, 668 (Neb. 2003) ("In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party, but does not have to show that the insured intended the specific injury that occurred.").

36. See, e.g., *Yount v. Maisano*, 627 So. 2d 148, 152 (La. 1993) ("[W]hen minor injury is intended, and a substantially greater or more severe injury results, whether by chance, coincidence, accident, or whatever, coverage for the more severe injury is not barred." (quoting *Breland v. Schilling*, 550 So. 2d 609, 614 (La. 1989))); *United Servs. Auto. Ass'n v. Elitzky*, 517 A.2d 982, 988 (Pa. Super. Ct. 1986) ("Our interpretation affords maximum coverage to insured persons as coverage is precluded only for harm of the same general type as that which they set out to inflict.").

## 2. Objective v. Subjective Standard

When analyzing the policyholder's intentions and expectations, should a subjective or an objective standard be used? The clear majority rule is that the insurer must prove that the policyholder subjectively expected or intended to cause the injury or damage, as opposed to objectively should have expected or intended to cause the injury damage at issue.<sup>37</sup>

In the minority of jurisdictions that apply an objective standard, there are a few variations of the test. Under one variation, the question is whether a "reasonable" person would have expected the injury at issue.<sup>38</sup> Under another

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37. Compare *U.S. Fid. & Guar. Co. v. Armstrong*, 479 So. 2d 1164, 1167 (Ala. 1985) ("[T]he legal standard to determine whether the injury was either expected or intended . . . is a purely subjective standard."), and *Fire Ins. Exch. v. Berray*, 694 P.2d 191, 194 (Ariz. 1984) (explaining that the court looks "from the standpoint of the insured" to determine whether the insured "expected or intended" to cause injury), and *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 861 (Cal. Ct. App. 1993) (rejecting the objective "should have known" meaning of "expect" and instead adopting the word's "plain meaning"), and *State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785, 794 (Colo. 1996) (rejecting the insurer's "objective viewpoint" argument and addressing the issue from the viewpoint of the insured), and *Great Am. Ins. Co. v. Gaspard*, 608 So. 2d 981, 985 (La. 1992) ("[T]he subjective intent of the insured is the key and not what the average or ordinary reasonable person would expect or intend."), and *Quincy Mut. Fire Ins. Co. v. Abernathy*, 469 N.E.2d 797, 800 (Mass. 1984) ("Our cases have concluded that an injury is nonaccidental only where the result was actually, not constructively, intended . . ."), and *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 892 (Me. 1981) (adopting a subjective standard and recognizing it as the majority standard), and *Espinete v. Horvath*, 597 A.2d 307, 309 (Vt. 1991) (upholding a subjective standard and rejecting the use of an objective standard with respect to "inherently dangerous activity" where such activity was not explicitly excluded by the insurance policy), and *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 882 P.2d 703, 714 (Wash. 1994) (holding that a subjective standard applies), and *Farmers & Mechs. Mut. Ins. Co. of W. Va. v. Cook*, 557 S.E.2d 801, 807 (W. Va. 2001) ("[C]ourts must use a subjective rather than objective standard for determining the policyholder's intent."), with *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1058-59 (8th Cir. 1979) (using an objective standard of "knew or should have known" in determining if a result was "expected"), and *In re Tex. E. Transmission Corp.*, 870 F. Supp. 1293, 1321 (E.D. Pa. 1992) ("Texas law determines an insured's intention 'objectively' and not 'subjectively.'"). See also OSTRAGER & NEWMAN, *supra* note 25, § 8.03[c], at 496-501 (12th ed. 2004) (discussing the objective "reasonable man" standard with regard to expectation and intentment).

38. See, e.g., *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 717 n.2 (8th Cir. 1981) ("[I]n determining whether the damages were expected under the terms of the policy the appropriate standard to be applied is an objective one, i.e., whether a reasonable man in the position of the insured would have expected the damage to occur."); *City of Carter Lake*, 604 F.2d at 1059 (asking, for purposes of determining coverage, "[i]f the insured knew or should have known that there was a substantial probability that certain results would follow his acts or omissions . . ."); *In re Tex. E. Transmission Corp.*, 870 F. Supp. at 1321 (applying Texas law and explaining that the objective standard focuses on "what the insured knew or should have known."). More discussions can be found in OSTRAGER & NEWMAN,



variation, the question is whether the policyholder knew or should have known that there was a “substantial probability” his or her actions would result in the injury at issue.<sup>39</sup> “Substantial probability” has been defined as whether “a reasonably prudent man” would be aware that the adverse “results are highly likely to occur.”<sup>40</sup>

In order for a court to adopt an objective standard, it must ignore the actual policy language that expressly states a subjective standard applies.<sup>41</sup> Specifically, the “expected or intended” exclusion provides that, in order for the policyholder to lose coverage, the injury or damage must be “expected or intended *from the standpoint of the insured*.”<sup>42</sup> The exclusion does not state that coverage is lost if a “reasonable” person would have expected or intended the resulting injury or damage. Nor does it state that coverage is lost if the policyholder should have known there was a “substantial probability” or a “high likelihood” that the injury or damage would result.

Further, a “should have known” standard would eliminate coverage for many negligence claims because many accidents are reasonably foreseeable. Eliminating coverage for negligence claims would be inconsistent with one of the primary purposes of liability insurance. In the words of Justice Cardozo, “[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.”<sup>43</sup> Or, as stated by the Second

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*supra* note 25, § 8.03[c], at 496-501 (12th ed. 2004).

39. See OSTRAGER & NEWMAN, *supra* note 25, § 8.03[c], at 496 – 497 (12th ed. 2004) (reviewing judicial precedent to establish the meaning of “substantial probability”).

40. City of Carter Lake, 604 F.2d at 1059 n.4. See also King v. Hartford Life & Accident Ins. Co., 414 F.3d 994, 1002 (8th Cir. 2005) (distinguishing between standards of “reasonably foreseeable” and “substantial probability” and expressing, “the latter requires not only that a reasonably prudent person would be alerted to the possibility of results occurring, but that such a reasonable person would be forewarned that the results are ‘highly likely to occur.’” (quoting *City of Carter Lake*, 604 F.2d at 1059 n.4)).

41. See, e.g., Aetna Cas. & Sur. Co. v. Dichtl, 398 N.E.2d 582, 588 (Ill. App. Ct. 1980) (rejecting insurance company’s argument to read in a “reasonableness standard,” noting that if the insurer, who drafted the policy language, “wanted an objective standard to apply, it could have drafted its policy accordingly.”); James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 279 (Ky. 1991) (“[P]olicies do not define ‘expected’ and ‘intended’ but those are common words and they clearly indicate subjective awareness.”); United Servs. Auto. Ass’n v. Elitzky, 517 A.2d 982, 991 (Pa. Super. Ct. 1986) (explaining that the common meaning of “expected” “connote[s] an element of conscious awareness on the part of the insured.”).

42. Ins. Servs. Office, Inc., Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), *supra* note 2, app. J, § I(2)(a), at 467 (emphasis added).

43. Messersmith v. Am. Fid. Co., 133 N.E. 432, 432 (N.Y. 1921). Employing an objective standard to exclude coverage for negligence claims arguably would also be inconsistent with the reasonable expectations doctrine. See, e.g., United Servs., 517 A.2d at 991 (“We do not believe that a layman would reasonably expect that as a result of the inclusion of such a phrase [i.e., “expected or intended”] in his insurance contract he might not be insured for negligent acts. These are the very acts which insurance is purchased to

Circuit sixty years later, “to exclude all losses or damages which might in some way have been *expected* by the insured, could expand the field of exclusion until virtually no recovery could be had on insurance.”<sup>44</sup>

Consequently, the majority view is that a subjective standard should be applied.<sup>45</sup> Under this approach, the actual intent of the policyholder is examined rather than what some fictitious “reasonable person” knew or should have foreseen. Thus, coverage is only precluded where the insurer can prove the policyholder actually expected or intended to cause the damage at issue.

### III. THE COURTS’ APPROACHES TO THE ISSUE OF WHETHER CONSTRUCTION DEFECTS ARE OCCURRENCES

#### A. *The Seminal Weedo Case*

Historically, the seminal case regarding the issue of whether construction defects are covered under CGL policies is the New Jersey Supreme Court’s 1979 opinion in *Weedo v. Stone-E-Brick, Inc.*<sup>46</sup> In *Weedo*, a subcontractor was hired to pour a concrete floor on a veranda and to apply stucco to the exterior of a home.<sup>47</sup> Soon after the job was completed, cracks in the stucco appeared and “other signs of faulty workmanship” manifested such that the homeowner had to replace the stucco.<sup>48</sup> The homeowner sued the contractor, and the contractor tendered the claim to its CGL insurer.<sup>49</sup> The insurer denied coverage on the basis that CGL policies allegedly do not cover claims for faulty workmanship.<sup>50</sup>

The CGL policy at issue stated that the insurer agreed to pay “on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of \* \* \* bodily injury \* \* \* or *property damage to which this insurance applies*, caused by an occurrence \* \* \*.”<sup>51</sup> The policy also contained the 1973 standard form business risk exclusions:

This insurance does not apply:

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protect against.”).

44. *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989). *See also* *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 n.6 (Minn. 1997) (rejecting a “purely objective test” because it is inconsistent with the prior interpretations of the term “unexpected” and would “undermine coverage for injuries caused by simple negligence, a result we sought to avoid in prior cases.”).

45. *See supra* note 37 and accompanying text (reviewing judicial precedent throughout the states and determining that a majority of state courts use the subjective standard when determining intent).

46. 405 A.2d 788 (N.J. 1979).

47. *Id.* at 789.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 790.

- (n) to property damage to the named insured's products arising out of such products or any part of such products;
- (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.<sup>52</sup>

In rejecting the contractor's claim for coverage, the court reasoned:

Regardless of the existence of express warranties, the insured's provision of stucco and stone "generally carries with it an implied warranty of merchantability and often an implied warranty of fitness for a particular purpose." . . . Where the work performed by the insured-contractor is faulty, either express or implied warranties, or both, are breached. As a matter of contract law the customer did not obtain that for which he bargained . . . . [A] principal justification for imposing warranties by operation of law on contractors is that these parties are often "in a better position to prevent the occurrence of major problems" in the course of constructing a home than is the homeowner . . . . The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers.<sup>53</sup>

To support its decision, the court cited to and relied on a 1971 law review article by a law professor at the University of Nebraska, Roger C. Henderson, regarding the changes made in 1966 to the standard CGL policy form with respect to the business risk exclusions for products liability and completed operations.<sup>54</sup> In particular, the court quoted the portion of the article in which Professor Henderson opined:

"The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable."<sup>55</sup>

The court also pointed to the business risk exclusions in the policy at issue in the case and stated that "given the precise and limited form of damages which form the basis of the claims against the insured, either exclusion is,

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52. *Id.* at 792.

53. *Id.* at 790-91 (citations omitted).

54. *Id.* (citing Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 418, 441 (1971)).

55. *Id.* at 791 (quoting Henderson, *supra* note 54, at 441).

or both are, applicable to exclude coverage. In short, the indemnity sought is not for ‘property damage to which this insurance applies.’”<sup>56</sup>

For numerous reasons, the *Weedo* decision is obsolete and of little value today in analyzing whether construction defects can constitute occurrences. One, the court did not analyze the definition of “occurrence” in the policy at issue and did not even address whether the faulty stucco work constituted an occurrence.<sup>57</sup> Two, the court did not analyze the definition of “property damage” in the policy at issue and did not address whether the faulty stucco work was property damage or caused property damage.<sup>58</sup> Three, Professor Henderson’s law review article, on which the court relied, did not analyze or address the issues of whether construction defects constitute occurrences or property damage.<sup>59</sup> Instead, Professor Henderson’s article focused on the business risk exclusions contained in the 1966 CGL policy form, and he then offered his own unsupported conclusions regarding the intent of the exclusions.<sup>60</sup> Four, as discussed in Part I.C., the business risk exclusions at issue in the case were redrafted in 1986 to provide much narrower reductions in coverage than the earlier versions of such exclusions. Thus, Professor Henderson’s 1971 law review article and the *Weedo* decision itself are of little value today in understanding or applying the current business risk exclusions or determining whether construction defects can constitute occurrences.

Following the 1986 changes to the business risk exclusions, one would expect that the *Weedo* decision and Professor Henderson’s 1971 law review article would be cited by courts only as a historical note regarding the evolution of the policy language and law in this area. Surprisingly, however, as is discussed in Part III.C below, the *Weedo* decision and Professor Henderson’s article continue to be relied upon by some courts from time to time, particularly in decisions where the court misinterprets the issue before it.<sup>61</sup>

*Weedo*’s enduring legacy, however, may finally be at an end. On August 4, 2016, the New Jersey Supreme Court effectively overruled *Weedo* in *Cypress Point Condominium Assoc. v. Adria Towers, LLC*.<sup>62</sup> In *Cypress Point*, a

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56. *Id.* at 792 (quoting George H. Tinker, *Comprehensive General Liability Insurance – Perspective and Overview*, 25 FED’N INS. COUNS. Q. 217, 233 (1975)).

57. *See id.* at 790 n.2 (explaining that the court would not address whether, in light of the policy’s stated exclusions, coverage extended to the claims at issue, because the insurer had already conceded that “but for the exclusions in the policy, coverage would obtain.”).

58. *See id.* at 790, 792 (only briefly addressing that there were no allegations that the work caused additional property damage).

59. For more information, see Henderson, *supra* note 54.

60. *Id.* at 438-41 (advancing Professor Henderson’s opinion that “[t]he insurance industry evidently feels that the risks of bodily injury or property damage arising from the planning stage of business are a business risk of the insured.”).

61. *See, e.g.*, *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 n.10 (Pa. 2006) (citing to Henderson’s article).

62. 143 A.3d 273 (N.J. 2016).

condominium association sued a developer, the developer's subcontractors, and the developer's insurers regarding allegedly faulty workmanship with respect to, among other things, the installation of the roof, gutters, windows, and doors.<sup>63</sup> The allegedly defective work was done by subcontractors.<sup>64</sup> The allegedly faulty workmanship caused damage to common areas and unit owners' property, including damage to steel supports, drywall, and insulation.<sup>65</sup>

The CGL policy at issue was a standard form ISO policy that defined "occurrence" and "property damage" as set forth above in Part I.B.<sup>66</sup> The developer was not seeking coverage for the cost to repair the allegedly defective workmanship, but rather, only for the consequential damages caused by the defective workmanship.<sup>67</sup> Nonetheless, the insurers denied coverage on the ground that there was no "property damage" or an "occurrence" that was covered under the policy on the basis of *Weedo*.<sup>68</sup>

The trial court agreed with the insurers and granted summary judgment in their favor.<sup>69</sup> On appeal, the intermediate appellate court distinguished *Weedo* and then reversed the trial court's ruling, concluding "consequential damages caused by the subcontractors' defective work constitute[d] 'property damage' and an 'occurrence' under the polic[ies]."<sup>70</sup>

In affirming the intermediate appellate court's ruling, the New Jersey Supreme court held, "the consequential damages caused by the subcontractors' faulty workmanship constitute 'property damage,' and the event resulting in that damage – water from rain flowing into the interior of the property due to the subcontractors' faulty workmanship – is an 'occurrence' under the plain language of the CGL policies at issue here."<sup>71</sup> In reaching its holding, the court noted there were a number of differences between the 1973 CGL policy form at issue in *Weedo* and the policy form at issue in the case before it, including the subcontractor exception to the business risk exclusions, which the New Jersey Supreme Court previously had not considered.<sup>72</sup> The court also noted that the *Weedo* court had not addressed the issues of whether construction defects could constitute "occurrences" or cause "property damage" because the *Weedo* court based its ruling on the 1973 business risk exclusions that were replaced in

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63. *Id.* at 276-77.

64. *Id.* at 276.

65. *Id.* at 277.

66. *Id.* at 276-77.

67. *Id.* at 277.

68. *Id.* at 278.

69. *Id.*

70. *Id.* at 278 (quoting *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC*, 118 A.3d 1080, 1083 (N.J. Super. Ct. App. Div., 2015)) (brackets omitted).

71. *Id.* at 276.

72. *Id.* at 281-82.

1986.<sup>73</sup> The court also reviewed the existing non-New Jersey case law on the issues, which “represent ‘a strong recent trend in the case law [of most federal circuit and state courts] interpret[ing] the term “occurrence” to encompass unanticipated damage to nondefective property resulting from poor workmanship.’”<sup>74</sup> The court then concluded that damage caused by defective workmanship is “property damage:”

[P]ost-construction consequential damages resulted in loss of use of the affected areas by [the Policyholder] residents and, we hold, qualify as “[p]hysical injury to tangible property including all resulting loss of use of that property.” Therefore, on the record before us, the consequential damages to [the Policyholder] were covered “property damage” under the terms of the policies.<sup>75</sup>

With respect to the issue of whether construction defects could be “occurrences,” the court concluded:

[T]he insurers’ argument fails to recognize that *Weedo* and its progeny were decided based upon exclusions contained within the pre-1986 CGL policy, rather than an interpretation of the policy’s terms granting coverage in the first instance . . . . In any event, under our interpretation of the term “occurrence” in the policies, consequential harm caused by negligent work is an “accident.” Therefore, because the result of the subcontractors’ faulty workmanship here – consequential water damage to the completed and nondefective portions of Cypress Point – was an “accident,” it is an “occurrence” under the policies and is therefore covered so long as the other parameters set by the policies are met.<sup>76</sup>

In sum, although the New Jersey Supreme Court may not have expressly overruled *Weedo*, it is questionable whether the *Weedo* decision has any remaining precedential value in New Jersey, and it is generally an obsolete decision with respect to the current CGL policy forms.

#### B. *The Current State of the Law*

When I originally addressed this subject in December 2011,<sup>77</sup> there was a split among the courts regarding whether construction defects do or can

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73. *Id.* at 283.

74. *Id.* at 285 (citation omitted).

75. *Id.* at 286.

76. *Id.* at 288-89.

77. See French, *supra* note 1, at 24 (noting that state courts varied in their holdings regarding the issue of whether construction defects can be “occurrences”).

constitute occurrences, with an emerging majority position that they do.<sup>78</sup> In the

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78. For further discussion, see French, *supra* note 1, at 24-27. Compare *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (“[A]n occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property.”), and *Architex Ass’n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1162 (Miss. 2010) (“[T]he term ‘occurrence’ cannot be construed in such a manner as to preclude coverage for unexpected or unintended ‘property damage’ resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss.”), and *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 885 (Fla. 2007) (concluding defective soil work done by a subcontractor that caused damage to homes was an occurrence under CGL policies), and *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 310 (Tenn. 2007) (“[D]efective installation [of windows] resulted in water penetration . . . [and] constitute[d] ‘property damage’ for purposes of the CGL.”), and *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007) (concluding that damage to the insured’s work, as well as damage to a third party’s property, can result from an occurrence as defined in the CGL policy, but that no basis exists in the definition of occurrence to distinguish between the two), and *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 493 (Kan. 2006) (“[D]amage occurring as a result of faulty or negligent workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur.”), and *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 70 (Wis. 2004) (holding that excessive settlement of soil, which occurred after the building was completed, and which caused the building’s foundation to sink, was “‘property damage’ caused by an ‘occurrence’ within the meaning of the CGL policies’ general grant of coverage”), and *Corner Const. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887, 894-85 (S.D. 2002) (construction defects resulting in ventilation problems constituted an accident that was covered by the policy at issue), and *Fejes v. Alaska Ins. Co.*, 984 P.2d 519, 522-23 (Alaska 1999) (improper or faulty workmanship constitutes an accident because “[w]e have defined the term ‘accident’ as ‘anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected’”), and *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474, 478 (N.H. 1994) (finding that property damage to condominium units caused by defective workmanship was an occurrence within the meaning of the CGL policy), and *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 932 (Ill. 1991) (concluding that damage to a building caused by installation of asbestos was a covered occurrence), and *Joe Banks Drywall & Acoustics, Inc. v. Transcon. Ins. Co.*, 753 So. 2d 980, 983 (La. App. 2d Cir. 2000) (finding that improper or faulty workmanship constitutes an occurrence within the meaning of a general commercial liability policy), and *Erie Ins. Exch. v. Colony Dev. Corp.*, 736 N.E.2d 941, 947 (Ohio Ct. App. 1999) (“[W]e find that the [insured’s] allegations of property damage caused by [the contractor’s] negligence in constructing and designing the condominium complex reasonably fall within the policy’s definition of property damage caused by an ‘occurrence,’ — *i.e.*, an accident.”), with *Burlington Ins. Co. v. Oceanic Design & Const., Inc.*, 383 F.3d 940, 948 (9th Cir. 2004) (applying Hawaiian law and explaining that “[g]eneral liability policies . . . are not designated to provide contractors and developers with coverage against claims their work is inferior or defective” (internal quotation marks omitted)), and *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 583 (6th Cir. 2001) (applying Kentucky law and declaring “there is no ‘occurrence’ to the extent that [a] complaint alleges property damage arising out of defective or faulty craftsmanship”), and *J.Z.G. Res., Inc. v. King*, 987 F.2d 98, 103 (2d Cir. 1993) (applying New York law for the proposition that “mere faulty workmanship, standing alone, cannot constitute an occurrence” (internal quotation marks omitted)), and *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 40-42 (N.D. 2006) (concluding that damages to a roof that a contractor was replacing were excluded from

past five years, however, there has been near unanimity by the courts that have addressed the issue. They have held that construction defects can constitute occurrences and contractors have coverage under CGL policies at least for the unexpected property damage caused by defective workmanship done by subcontractors.<sup>79</sup> Currently, the supreme courts of the states of Alabama,<sup>80</sup>

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coverage because to hold otherwise would convert the policy into a performance bond, but damages resulting from a defective roof to the apartment interior was covered under the policy), *and* Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 899 (Pa. 2006) (“[T]he definition of ‘accident’ required to establish an ‘occurrence’ under the policies cannot be satisfied by claims based upon faulty workmanship.”), *and* L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33, 37 (S.C. 2005) (finding that “faulty workmanship does not constitute an ‘occurrence’”), *and* Auto-Owners Ins. Co. v. Home Pride Cos., Inc., 684 N.W.2d 571, 578 (Neb. 2004) (“[A]lthough a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured’s work product, an unintended and unexpected event has occurred, and coverage exists.”), *and* Corder v. William W. Smith Excavating Co., 556 S.E.2d 77, 83 (W. Va. 2001) (“[C]ommercial general liability policies are not designed to cover poor workmanship.”), *and* Oak Crest Const. Co. v. Austin Mut. Ins. Co., 998 P.2d 1254, 1257 (Or. 2000) (“[T]here can be no ‘accident,’ within the meaning of a commercial liability policy, when the resulting damage is merely a breach of contract.”), *and* Pursell Const., Inc. v. Hawkeye-Sec. Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999) (“[D]efective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy.”), *and* Gen. Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co., 205 P.3d 529, 535 (Colo. App. 2009) (“[C]laims of poor workmanship, standing alone, are not occurrences that trigger coverage under CGL policies similar to those at issue here.”), *and* State Farm Fire & Cas. Co. v. Tillerson, 777 N.E.2d 986, 991 (Ill. App. Ct. 2002) (“Where the defect is no more than the natural and ordinary consequences of faulty workmanship, it is not caused by an accident.”), *and* Heile v. Herrmann, 736 N.E.2d 566, 568 (Ohio Ct. App. 1999) (concluding that faulty workmanship is not an “accident” and therefore not an occurrence), *and* U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co., 788 P.2d 1227, 1233 (Ariz. App. 1989) (“[M]ere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages.”).

79. See *Nat’l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 742 (Iowa 2016) (stating that faulty workmanship that causes damage to property other than the defective workmanship itself is covered); *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148, 158 (Ala. 2014) *reh’g denied* (June 27, 2014) (same); *Shane Traylor CabinetMaker, L.L.C. v. Am. Res. Ins. Co.*, 126 So. 163, 171 (Ala. 2013) (same); *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A. 3d 961, 981 (Conn. 2013) (same); *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.*, 746 S.E. 2d 587, 595 (Ga. 2013) (same); *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E.2d 781, 791 (S.C. 2013) (holding that the removal of defective signs was an occurrence); *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508, 519 (W.Va. 2013) (overruling *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77, 83 (W. Va. 2001)); *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 979 N.E.2d 269, 275 (Ohio 2012) (holding that defective work itself is not covered, but citing with approval cases that held separate property damage caused by defective work is covered); *Town & Country Prop., L.L.C. v. Amerisure Ins. Co.*, 111 So. 3d 699, 710 (Ala. 2011) (finding that damage to property separate from the faulty workmanship itself is covered but not the faulty work itself); *Crossman Cmty of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 594



Alaska,<sup>81</sup> Connecticut,<sup>82</sup> Florida,<sup>83</sup> Georgia,<sup>84</sup> Indiana,<sup>85</sup> Iowa,<sup>86</sup> Kansas,<sup>87</sup> Minnesota,<sup>88</sup> Mississippi,<sup>89</sup> Montana,<sup>90</sup> New Jersey,<sup>91</sup> North Dakota,<sup>92</sup> Ohio,<sup>93</sup>

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(S.C. 2011) (upholding the constitutionality of statute acknowledging occurrence to include damage caused by defective work going forward); *Pulte Homes of N.M. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869, 878 (N.M. Ct. App. 2015) (holding that faulty workmanship that causes damage to property other than the defective workmanship itself is covered).

80. See *Town & Country Prop., LLC* 111 So.3d at 710 (damage to property separate from the faulty workmanship itself is covered but not the faulty work itself); *Shane Traylor CabinetMaker, LLC* 126 So.3d at 171 (same); *Owners Ins. Co.* 157 So.3d at 158 (same).

81. See *Fejes* 984 P.2d at 525 (“[A]n insured *has* coverage for his completed work when the damage arises out of work performed by someone other than the named insured, such as a subcontractor . . .” (omission in original) (quoting *Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648, 652 (9th Cir. 1988))).

82. See *Capstone Bldg. Corp.* 67 A.3d at 981 (finding that damage to property separate from the faulty workmanship itself is covered but not the faulty work itself).

83. See *U.S. Fire Ins. Co.* 979 So.2d at 888 (concluding that the “subcontractors’ defective soil preparation,” which caused damage to homes, was an occurrence under CGL policies).

84. See *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (“[A]n occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property.”).

85. See *Sheehan Const. Co. v. Cont’l Cas. Co.*, 935 N.E.2d 160, 171-72 (Ind. 2010) (concluding that the subcontractors’ defective work was a covered occurrence), *modified on other grounds*, 938 N.E.2d 685 (Ind. 2010).

86. See *Nat’l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 740, (Iowa 2016) (“[W]e conclude the defective work performed by the insureds’ subcontractors falls within the definition of ‘occurrence’ in the insuring agreement . . .”).

87. See *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d at 493-95 (Kan. 2006) (agreeing with the intermediate appellate court that the “damage occurring as a result of faulty or negligent workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur.” (quoting *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 104 P.3d 997, 1002 (Kan. Ct. App. 2005))).

88. See *Wanzek Const., Inc. v. Emp’rs Ins. of Wausau*, 679 N.W.2d 322, 325-27 (Minn. 2004) (acknowledging that earlier decisions based upon Professor Henderson’s 1971 law review article were incorrectly decided because the business risk exclusions were changed in 1986).

89. See *Architex Ass’n v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1162 (Miss. 2010) (concluding that “the term ‘occurrence’ cannot be construed in such a manner as to preclude coverage for unexpected or unintended ‘property damage’ resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss.”).

90. See *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 922 (Mont. 2009) (finding that claims against company that used a subcontractor to design a disposable sanitary bag that was defective were a covered “event” which was defined as an “accident,” an undefined term in the CGL policy).

91. *Cypress Point Condo. Assocs. v. Adria Towers, LLC*, 143 A.3d 273 (N.J. 2016) (finding that consequential damages caused by subcontractor’s defective workmanship are “property damage” caused by an “occurrence”).

92. See *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 829 N.W. 2d 724 (N.D. 2013)

South Carolina,<sup>94</sup> South Dakota,<sup>95</sup> Tennessee,<sup>96</sup> Texas,<sup>97</sup> West Virginia,<sup>98</sup> and Wisconsin<sup>99</sup> all have held that construction defects can constitute occurrences. Four states – Arkansas,<sup>100</sup> Colorado,<sup>101</sup> Hawaii,<sup>102</sup> and South Carolina<sup>103</sup> – have

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(finding that damage to house caused by subcontractor's faulty workmanship related to the house's foundation was a covered occurrence).

93. *See* *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 979 N.E.2d 269 (Ohio 2012) (holding that defective work itself is not covered, but citing with approval cases that held separate property damage caused by defective work is covered).

94. *See* *Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541, 545-46 (S.C. 2009) (finding that defectively installed stucco resulted in a covered occurrence); *Harleysville Mut. Ins. Co. v. State*, 736 S.E.2d 651 (S.C. 2012) (upholding the constitutionality of S.C. Code Ann. § 38-61-70 defining occurrence to include damage caused by defective work); *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E. 2d 781 (S.C. 2013) (holding damage caused by defective outdoor advertising signs was an occurrence). *See also* Act of May 17, 2011, No. 26, § 1, 2011 S.C. Acts 88, 88-89 (codified at S.C. CODE ANN. § 38-61-70) (providing that CGL “policies shall contain or be deemed to contain a definition of ‘occurrence’ that includes . . . property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.”).

95. *See* *Corner Constr. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887, 894-95 (S.D. 2002) (concluding that construction defects resulting in ventilation problems constituted an “accident” and such damage was covered by the policy at issue).

96. *See* *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 310 (Tenn. 2007) (concluding that the defective installation of windows causing alleged water damage “constitute[s] ‘property damage’ for purposes of the CGL”).

97. *See* *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8-9 (Tex. 2007) (explaining that damage to the insured's work as well as damage to a third party's property can result from an “occurrence” as defined in commercial general liability policy and that no basis exists in the definition of “occurrence” to distinguish between the two).

98. *See* *Cherrington v. Erie Ins. Prop. and Cas. Co.*, 745 S.E. 2d 508 (W.Va. 2013) (overruling *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77, 83 (W. Va. 2001), which held defective workmanship was not covered under CGL policies).

99. *See* *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 70 (Wis. 2004) (holding that excessive settlement of soil, which caused the building's foundation to sink, was “‘property damage’ caused by an ‘occurrence’ within the meaning of the CGL policies’ general grant of coverage.”).

100. *See* ARK. CODE ANN. § 23-79-155(a) (2016) (superseding *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 460 (Ark. 2008), (concluding that damages due to faulty workmanship are “foreseeable” and therefore, not covered).

101. *See* COLO. REV. STAT. § 13-20-808(3) (2016).

102. *See* HAW. REV. STAT. ANN. § 431:1-217 (2016). Hawaii's statute does not state that construction defects are occurrences. Rather, it states that “[t]he meaning of the term ‘occurrence’ shall be construed in accordance with the law as it existed at the time that the insurance policy was issued.” *Id.* Although the statute was passed in response to an intermediate appellate court decision that held a subcontractor's construction defects were not covered by the subcontractor's CGL insurance (*Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67 (Haw. Ct. App. 2010)), the existing Hawaii Supreme Court precedent on the issue held that construction defects are occurrences. *See* *Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894, 904 (Haw. 1994) (finding subcontractor's defects may be covered by CGL insurance and discussing what an “occurrence policy” entails).

103. *See* S.C. CODE ANN. §38-61-70(b)-(d) (2016) (requiring commercial general

passed statutes that effectively provide that construction defects are occurrences. Currently, under existing state supreme court precedent, there are only three states – Arkansas, Kentucky and Pennsylvania – in which construction defects generally are not considered occurrences.<sup>104</sup>

The reasoning of the courts that have addressed the issue of whether construction defects are occurrences generally can be divided into one or more of the following schools of thought: (1) construction defects are occurrences so long as the property damage was not expected or intended by the policyholder,<sup>105</sup> (2) construction defects are occurrences to the extent property other than the work performed by the policyholder is damaged,<sup>106</sup> or (3) construction defects are not occurrences because they are not “accidents.”<sup>107</sup>

### 1. Courts Holding Construction Defects Are Occurrences

The holding most favorable to policyholders is that both the defective workmanship itself and the damage caused by it can constitute a covered occurrence. Numerous courts have reached such a conclusion by applying the definition of “occurrence” contained in CGL policies to the facts at issue and

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liability insurance policies to include accidents and damage or injury from construction defects as part of the definition of “occurrence”).

104. See *Columbia Ins. Grp., Inc. v. Cenark Project Mgmt. Servs., Inc.*, 491 S.W. 3d 135 (Ark. 2016) (concluding that claims for breach of warranty due to faulty workmanship are not covered under CGL policies); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010) (explaining that construction defects are not fortuitous events); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (“[T]he definition of ‘accident’ required to establish an ‘occurrence’ under the policies cannot be satisfied by claims based upon faulty workmanship.”). The *Columbia* decision muddies Arkansas law on the issue because ARK. CODE ANN. § 23-79-155(a) expressly defines an “occurrence” under CGL policies to include defective workmanship. Nonetheless, in *Columbia*, the Supreme Court of Arkansas refused to answer the certified question presented to it of whether “faulty workmanship resulting in property damage to the work or work product of a third party (as opposed to the work or work product of the insured) constitutes an ‘occurrence.’” See 491 S.W. 3d at 136. Instead, based upon precedent predating ARK. CODE ANN. § 23-79-155(a), the court simply concluded that claims for breach of warranty for faulty workmanship are not covered by CGL policies even though that was not even one of the certified questions the court was asked to address. *Id.* In reaching its holding, the court declined to even address ARK. CODE ANN. § 23-79-155(a). Consequently, there appears to be an inconsistency between Arkansas’ statutory and case law on the issue.

105. This is further discussed in *infra* note 108.

106. For more details on this, see cases cited *infra* notes 122 and 157.

107. For more details on this, see cases cited *infra* note 158. The courts in this camp also often support their decisions with the additional arguments that: 1) construction defects should not be treated as “occurrences” because to hold otherwise would transform insurance into surety or performance bonds, and 2) construction defects should not be treated as “occurrences” because they are the result of intentional acts from which the resulting damage is a foreseeable consequence. *Id.*

determining it was undisputed that the policyholder did not expect or intend to do the work defectively or cause the resulting damage.<sup>108</sup> The Wisconsin Supreme Court's decision in *American Family Mutual Insurance Co. v. American Girl, Inc.*<sup>109</sup> is a seminal example of such a decision.

In *American Girl*, a warehouse owner sued its contractor when the soil underneath the building settled, which resulted in the building being demolished because it was unsafe.<sup>110</sup> A subcontractor did the soil work.<sup>111</sup> The insurers denied coverage for the contractor's claim based, among other reasons, on the arguments that: 1) the building owner's claim was not covered because it was a claim for breach of contract or warranty as opposed to a tort claim, 2) defective workmanship cannot be an occurrence, and 3) the business risk exclusions barred coverage.<sup>112</sup> To support their position, the insurers relied upon Professor Henderson's 1971 law review article and the *Weedo* decision.<sup>113</sup>

The Wisconsin Supreme Court rejected the insurers' arguments and held that the contractor's CGL insurance covered the building owner's claims.<sup>114</sup> In doing so, the court recognized that faulty workmanship can constitute an occurrence because defective work typically is done accidentally (i.e., unintentionally), relying upon Black's Law Dictionary definition of an "accident" as "an event which takes place without one's foresight or expectation."<sup>115</sup> In sum, the court reasoned:

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108. See, e.g., *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E. 2d 508, 521 (W.Va. 2013) ("[D]efective workmanship causing bodily injury or property damage is an occurrence under a policy of commercial general liability insurance."); *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 829 N.W. 2d 724 (N.D. 2013) (finding damage to house caused by subcontractor's faulty workmanship related to the house's foundation was a covered occurrence); *Architex Ass'n v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1162 (Miss. 2010) ("[T]he term 'occurrence' cannot be construed in such a manner as to preclude coverage for unexpected or unintended 'property damage' resulting from negligent acts or conduct of a subcontractor, unless otherwise excluded or the insured breaches its duties after loss."); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007) (concluding that damage to the insured's work, as well as damage to a third party's property, can result from an occurrence as defined in the CGL policy, but that no basis exists in the definition of occurrence to distinguish between the two); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 493 (Kan. 2006) ("[D]amage occurring as a result of faulty or negligent workmanship constitutes an occurrence as long as the insured did not intend for the damage to occur."); *Fejes v. Alaska Ins. Co.*, 984 P.2d 519, 522-23 (Alaska 1999) (finding that the subcontractor's defectively installed septic system was a covered occurrence under the contractor's CGL policy where the defective septic system was replaced rather than repaired).

109. 673 N.W.2d 65 (Wis. 2004).

110. *Id.* at 69-70.

111. *Id.* at 69.

112. *Id.* at 75-76.

113. 673 N.W.2d at 77.

114. *Id.* at 70-71.

115. *Id.* at 76.

The threshold question is whether the claim at issue here is for “property damage” caused by an “occurrence” within the meaning of the CGL policies’ general grant of coverage. We hold that it is. The CGL policies define “property damage” as “physical injury to tangible property.” The sinking, buckling, and cracking of the warehouse was plainly “physical injury to tangible property.” An “occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful condition.” The damage to the warehouse was caused by substantial soil settlement underneath the completed building, which occurred because of the faulty site-preparation advice of the soil engineering subcontractor. It was accidental, not intentional or anticipated, and it involved the “continuous or repeated exposure” to the “same general harmful condition.” Accordingly, there was “property damage” caused by an “occurrence” within the meaning of the CGL policies.<sup>116</sup>

The court also rejected the argument that CGL policies cannot cover breach of contract claims, noting that the insuring agreement in CGL policies and the definition of “occurrence” do not make a distinction between contract claims and tort claims, and that the term “tort” does not appear in the policy language.<sup>117</sup> Further, the court found the insurer’s reliance on Professor Henderson’s article and *Weedo* were misplaced because they addressed older versions of the business risk exclusions that were not at issue, and *Weedo* did not even address the issues of whether construction defects were occurrences or constituted property damage.<sup>118</sup> The court also noted that the business risk exclusions would be unnecessary and redundant if construction defects could not be occurrences.<sup>119</sup> Finally, the court held the business risk exclusions did not apply to the subcontractor’s work because of the subcontractor exception that was added in 1986.<sup>120</sup>

Numerous other courts have adopted the Wisconsin Supreme Court’s analysis and holding in *American Girl* or reached similar conclusions prior to when *American Girl* was decided.<sup>121</sup>

## 2. Courts Holding Construction Defects Are Occurrences If Property Other Than The Defective Work Itself Was Damaged

Many courts have held that construction defects can be occurrences, but only to the extent that property other than the defective work itself was damaged. This is becoming the majority position of the state supreme courts that have

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116. *Id.* at 70.

117. *Id.* at 77.

118. *Id.* at 77.

119. *Id.* at 78.

120. *Id.* at 83-84.

121. *See supra* note 108.

addressed the issue, with many of the decisions being issued since December 2011.<sup>122</sup> The Supreme Court of Florida's decision in *United States Fire Insurance Co. v. J.S.U.B., Inc.*<sup>123</sup> is a leading example of the reasoning of the courts that have adopted this position.

In *J.S.U.B.*, the policyholder was a contractor that built several houses in Florida.<sup>124</sup> After the houses were finished and the homeowners took possession of them, the homeowners discovered that there was damage to the houses' foundations, drywall, and other interior parts.<sup>125</sup> The parties agreed that the "subcontractors' use of poor soil and improper soil compaction and testing" was the cause of the damage to the houses.<sup>126</sup> The homeowners sued the general contractor asserting claims for "breach of contract, breach of warranty, negligence, strict liability, and violations of the Florida Building Code."<sup>127</sup>

The CGL policy at issue contained the standard form definitions of

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122. See *Town & Country Prop., LLC v. Amerisure Ins. Co.*, 111 So. 3d 699 (Ala. 2011) (holding that damage to property separate from the faulty workmanship itself is covered but not the faulty work itself); *Shane Traylor, LLC v. Am. Res. Ins. Co.*, 126 So. 3d 163 (Ala. 2013) (same); *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148 (Ala. 2014) (same); *Capstone Bldg Corp. v. Am. Motorists Ins. Co.*, 67 A. 3d 961 (Conn. 2013) (same); *Am. Empire Surplus Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) ("[A]n occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property."); *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.*, 746 S.E. 2d 587 (Ga. 2013) (same); *Nat'l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724 (Iowa 2016) (stating that faulty workmanship that causes damage to property other than the defective workmanship itself is covered); *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC*, 143 A.3d 273 (N.J. 2016) (explaining that property damage caused by subcontractor's defective work, as opposed to the defective work itself, is covered); *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 979 N.E.2d 269 (Ohio 2012) (holding that defective work itself is not covered, but citing with approval cases that held separate property damage caused by defective work is covered); *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474, 478 (N.H. 1994) (finding that property damage to condominium units caused by defective workmanship was an occurrence within the meaning of the CGL policy); *Pulte Homes of N.M. v. Indiana Lumbermens Ins.*, 367 P. 3d 869 (N.M. Ct. App. 2015) (finding that faulty workmanship that causes damage to property other than the defective workmanship itself is covered); *Crossman Cmtys., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011) (upholding the constitutionality of a statute defining occurrence to include damage caused by defective work going forward); *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E. 2d 781 (S.C. 2013) (holding that the removal of defective signs was an occurrence); *Corner Const. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887, 894-95 (S.D. 2002) (affirming the lower court's ruling that construction defects resulting in ventilation problems constituted an accident and that such damage was covered by the policy at issue); *Travelers Indem. Co. of Am. v. Moore & Assocs. Inc.*, 216 S.W.3d 302, 310 (Tenn. 2007) ("[D]efective installation [of windows] resulted in water penetration . . . [and] constitute[d] 'property damage' for purposes of the CGL.").

123. 979 So. 2d 871 (Fla. 2007).

124. *Id.* at 875.

125. *Id.*

126. *Id.*

127. *Id.*

“occurrence” and “property damage” quoted and discussed in Part I of this article.<sup>128</sup> Consequently, the term “accident” contained in the definition of “occurrence” was undefined.<sup>129</sup>

Although the insurer agreed to cover the personal property of the homeowners that was damaged due to the defective workmanship, the insurer argued that faulty workmanship itself “can never be an ‘accident’ because it results in reasonably foreseeable damages.”<sup>130</sup> The insurer also argued that “a breach of contract can never result in an ‘accident,’”<sup>131</sup> and that allowing recovery under insurance policies for defective construction work would convert “the policies into performance bonds.”<sup>132</sup> Finally, the insurer argued that it would be against public policy to allow recovery under insurance policies for construction defects because of “moral hazard” concerns to the effect that allowing CGL insurance to cover defective workmanship and the damage caused by it would create a disincentive for contractors to perform their work competently.<sup>133</sup>

The Supreme Court of Florida rejected all of the insurer’s arguments and held there was coverage for the claims, which did not include a request for the costs to repair the defective workmanship itself.<sup>134</sup> In doing so, the court first rejected the argument that the determination of whether the policyholder “expected or intended” the damage should be based on whether the damage was objectively foreseeable, stating as follows:

The policy . . . in this case define[s] an “occurrence” as an “accident” but leave[s] “accident” undefined. Thus, under [prior Florida precedent], these policies provide coverage not only for “accidental events,” but also injuries or damage neither expected nor intended from the standpoint of the insured. . . . We expressly rejected the use of the concept of “natural and probable consequences” or “foreseeability” in insurance contract interpretation . . . .<sup>135</sup>

Second, the court rejected the argument that damages resulting from a breach of contract cannot be an occurrence:

[T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is

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128. *Id.*

129. *Id.*

130. *Id.* at 876, 883.

131. *Id.* at 884.

132. *Id.* at 887.

133. *Id.* at 890.

134. *Id.* at 883-85.

135. *Id.* at 883.

covered by the CGL's initial grant of coverage. "Occurrence" is not defined by reference to the legal category of the claim. The term 'tort' does not appear in the CGL policy.<sup>136</sup>

Third, the court rejected the argument that allowing the policyholder to recover under its insurance policy would convert the insurance policy into a performance bond:

[W]e reject [the insurer's] contention that construing the term occurrence to include a subcontractor's defective work converts the policies into performance bonds. The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor. Thus, unlike an insurance policy, a performance bond benefits the owner of a project rather than the contractor. Further, a surety, unlike a liability insurer, is entitled to indemnification from the contractor.<sup>137</sup>

Fourth, the court rejected the "moral hazard" argument that allowing insurance recoveries for construction defects would increase the likelihood of contractors doing shoddy work:

In reaching this conclusion, we discern no public policy reason for precluding coverage. A subcontractor's defective work that is neither intended nor expected from the standpoint of the insured is not the type of intentional wrongful act that we have held was uninsurable as a matter of public policy. Even if a "moral hazard" argument could be made regarding the contractor's own work, the argument is not applicable for the subcontractors' work . . . . "[I]t is as a practical matter very difficult for the general contractor to control the quality of the subcontractor work. Only if the contractor has a supervisor at the elbow of each subcontractor at all times can quality control be relatively assured—but this would be prohibitively expensive."<sup>138</sup>

Fifth, the court rejected the argument that only third party property that has been damaged separate from the project done by the contractor is recoverable property damage:

[J]ust like the definition of the term "occurrence," the definition of "property damage" in the CGL policies does not differentiate between damage to the contractor's work and damage to other property.<sup>139</sup> [W]e reject a definition of occurrence that renders damage to the insured's own work as a result of a subcontractor's

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136. *Id.* at 884 (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 77 (Wis. 2004)).

137. *Id.* at 887-88.

138. *Id.* at 890 (quoting *STEMPEL*, *supra* note 18).

139. *Id.* at 889.



faulty workmanship expected, but renders damage to property of a third party caused by the same faulty workmanship unexpected.<sup>140</sup>

The court also stated in passing without explanation, however, that “[i]f there is no damage beyond the faulty workmanship or defective work, then there may be no resulting ‘property damage.’”<sup>141</sup>

Sixth, the court considered the *Weedo* decision and noted that the business risk exclusions at issue in that case were the pre-1986 business risk exclusions. Thus, the case generally was irrelevant.<sup>142</sup>

Finally, the court noted that the existence of the business risk exclusions themselves proves that construction defects may be occurrences:

If . . . losses actionable in contract are never CGL “occurrences” for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary. . . . Why would the insurance industry exclude damage to the insured’s own work or product if the damage could never be considered to have arisen from a covered occurrence in the first place?<sup>143</sup>

In short, the court held that property damage other than the defective workmanship itself caused by a subcontractor, including damage to the other portions of the project done by or for the contractor, constitutes an occurrence and is covered under a contractor’s CGL policies.

The Supreme Court of Connecticut’s decision in *Capstone Building Corp. v. American Motorists Insurance Co.*<sup>144</sup> is another recent example of a court holding that damage caused to property other than the defective workmanship itself constitutes a covered occurrence. In *Capstone*, the policyholder was a general contractor who was hired to build student housing for the University of Connecticut.<sup>145</sup> The policyholder hired a subcontractor to do the heating and air conditioning work, including the installation of hot water heaters.<sup>146</sup> Within a few years of the project’s completion, the owner of the building sued the general contractor regarding, among other things, carbon monoxide gases escaping into the building, mold contamination, and water damage as a result of defective workmanship.<sup>147</sup>

When the policyholder tendered the claims to its insurer, the insurer denied

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140. *Id.* at 885.

141. *Id.* at 889.

142. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 881-83 (Fla. 2007).

143. *Id.* at 886-87 (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 78 (Wis. 2004)).

144. 67 A.3d 961 (Conn. 2013).

145. *Id.* at 968.

146. *Id.* at 984.

147. *Id.* at 971, 978.

coverage, arguing “that defective construction lacks the element of ‘fortuity’ necessary for an accident” to qualify as an occurrence.<sup>148</sup> The insurer also argued that CGL policies do not cover any of the repair costs associated with the policyholder’s work because such costs are not for property damage.<sup>149</sup> The insurance policies at issue were standard form CGL policies that contained the same definitions of “occurrence” and “property damage” quoted and discussed in Part I of this article.<sup>150</sup>

In analyzing the coverage claim, the court distinguished between costs to fix the defective workmanship itself and costs to fix work that was not done defectively but that was damaged due to the defective workmanship.<sup>151</sup> With respect to the defective workmanship itself and the other damage caused by it, the court held both could constitute an occurrence because “[a]n accident is an event that is unintended from the perspective of the insured” and negligent work done by the policyholder typically is unintentional.<sup>152</sup> The court concluded, however, that although damage caused by defective workmanship was property damage, the defective workmanship itself was not.<sup>153</sup>

In reaching its decision, the court failed to explain why defective workmanship that has to be repaired or replaced is not property damage, while non-defective work that has to be repaired or replaced because it has been damaged was property damage. Instead, the court simply quoted other cases that had reached such a result by analogizing defective workmanship to the installation of a defective component, which is not considered property damage unless the defective component causes damage to the rest of the product:

[A] claim “in which the sole damages are for replacement of a defective component or correction of a faulty installation” was not within the policy’s definition of property damage. “Without more, this alleged defect is the equivalent of the ‘mere inclusion of a defective component’ . . . and no ‘property damage’ has occurred.”<sup>154</sup>

This conclusory statement does not really explain how non-defective work that needs to be repaired or replaced due to defective workmanship is property damage, while the defective workmanship itself that also needs to be repaired or replaced is not property damage. Indeed, the court even acknowledged that the definition of “property damage” does not make a distinction between the

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148. *Id.* at 975.

149. *Id.* at 978.

150. *Id.* at 974, 976.

151. *Id.* at 980-81.

152. *Id.* at 975-76.

153. *Id.* at 980-81.

154. *Id.* (quoting *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 310 (Tenn. 2007)).

construction project itself and other property:

[W]e see no basis in the language of the policy for limiting coverage to liability for harm to third parties. “[J]ust like the definition of the term ‘occurrence,’ the definition of ‘property damage’ in the [CGL policy] does not differentiate between damage to the contractor’s work and damage to other property.”<sup>155</sup>

Nor does the definition of “property damage” distinguish between defective workmanship and any other property. To the contrary, “property damage” is defined simply as: “physical injury to tangible property, including all resulting loss of use of that property.”<sup>156</sup> Consequently, contrary to the court’s holding, if the work is defective and needs to be repaired or replaced, then it is at least reasonable to conclude that there has been “physical injury to” or the “loss of use” of the property because the property cannot be used in its defective condition. If such an interpretation is reasonable, then *contra proferentum* dictates that it should be accepted by the court.

In sum, the courts holding defective work itself cannot be viewed as property damage have not offered a satisfying explanation why non-defective work that has been damaged and needs to be repaired or replaced because of defective workmanship constitutes property damage but the defective work itself that also needs to be repaired or replaced does not constitute property damage. In both instances, the property is unusable or damaged in its current state. Nonetheless, cases such as *J.S.U.B.* and *Capstone* represent the emerging majority view of state supreme courts – CGL policies allow the contractor to recover for property that is unexpectedly damaged as a result of faulty workmanship by a subcontractor, including other portions of the contractor’s work, but not for the faulty workmanship itself.<sup>157</sup>

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155. *Id.* at 976 (quoting *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 889 (Fla. 2007)).

156. *Ins. Servs. Office, Inc.*, Form No. CG 00 01 12 07, Commercial General Liability Coverage Form (2007), *supra* note 2, app. J, § V(17), at 480.

157. For more information on this emerging majority view, see *supra* note 122 and accompanying text. See also S.C. CODE ANN. § 38-61-70 (2011) (providing that CGL “policies shall contain or be deemed to contain a definition of ‘occurrence’ that includes . . . property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.”); *Lexicon, Inc. v. ACE Am. Ins. Co.*, 634 F.3d 423, 427 (8th Cir. 2011) (explaining that “collateral damage” resulting from construction defects is considered an occurrence); *Pennsylvania Nat’l Mut. Cas. Ins. Co. v. Parkshore Dev. Corp.*, 403 F. App’x 770, 772 (3d Cir. 2010) (“[C]onstruction defects resulting in consequential damage to the property itself could qualify as an ‘occurrence.’”); *Stanley Martin Cos., Inc. v. Ohio Cas. Grp.*, 313 F. App’x 609, 614 (4th Cir. 2009) (concluding that any damage a subcontractor’s defective work caused to non-defective work constituted an occurrence); *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207, 218 (5th Cir. 2009) (applying Texas law and holding that the exclusion “bars coverage only for property damage to parts of a property

### 3. Courts Holding Construction Defects Are Not Occurrences Because They Are Not “Accidents”

The minority position adopted by the Supreme Courts of Arkansas, Kentucky, and Pennsylvania is that construction defects cannot be “accidents” and thus, they should not be viewed as occurrences under the terms of CGL policies.<sup>158</sup> There are also a number of decisions by other courts that have applied such reasoning, but they are not controlling precedent in their states because they were either decided before the supreme courts in their states addressed the issue, or their state legislatures have passed statutes effectively

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that were themselves the subjects of defective work, and not for damage to parts of a property that were the subjects of only nondefective work by the insured and were damaged as a result of defective work by the insured on other parts of the property.”); *OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.*, 242 F. App’x 936, 940 (4th Cir. 2007) (applying Maryland law and holding that “coverage exists only to remedy unexpected and unintended property damage to the contractor’s otherwise nondefective work-product caused by the . . . defective workmanship.” (internal quotation marks omitted)); *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241, 1249 (Fla. 2008) (concluding that a policy provided coverage for costs to repair damage to windows caused by a subcontractor’s defective installation but not if the windows were defective prior to being installed); *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 932 (Ill. 1991) (concluding that damage to a building caused by the installation of asbestos in the building was a covered occurrence); *Auto-Owners Ins. Co. v. Home Pride Cos., Inc.*, 684 N.W.2d 571, 577 (Neb. 2004) (“[A]lthough faulty workmanship, *standing alone*, is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence.”); *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474, 477-78 (N.H. 1994) (explaining that faulty work in and of itself does not constitute an occurrence due to foreseeability, but damage resulting as a consequence of faulty work is covered under the policy); *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 40, 42 (N.D. 2006) (concluding that damages to a roof that a contractor was replacing were excluded from coverage because to hold otherwise would convert the policy into a performance bond, but damages resulting from the defective roof to the interior of the apartment was covered under the policy); *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E.2d 781, 791 (S.C. 2013) (holding that the removal of defective signs was an occurrence); *Harleysville Mut. Ins. Co. v. State*, 736 S.E.2d 651, 655-59 (S.C. 2012) (upholding the constitutionality of S.C. CODE ANN. § 38-61-70 which defines an occurrence to include damage caused by defective work).

158. *See Columbia Ins. Grp., Inc. v. Cenark Project Mgmt. Servs., Inc.*, 491 S.W.3d 135, 145-46 (Ark. 2016) (concluding that claims for breach of warranty due to faulty workmanship are not covered under CGL policies); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 76 (Ky. 2010) (holding construction defects are not occurrences because they are not fortuitous events); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (“[T]he definition of ‘accident’ required to establish an ‘occurrence’ under the policies cannot be satisfied by claims based upon faulty workmanship.”). *See supra* note 104 (concluding that the law in Arkansas on this issue has become unclear because ARK. CODE ANN. § 23-79-155(a) is inconsistent with the *Columbia* decision and the Supreme Court of Arkansas did not attempt to reconcile its opinion with the terms of the statute).

rejecting the minority position.<sup>159</sup>

In Pennsylvania, the controlling case is *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co.*<sup>160</sup> In *Kvaerner*, a manufacturing company entered into a contract to construct a coke oven battery for a steel company.<sup>161</sup> The coke oven battery allegedly had numerous problems that the manufacturer failed to remedy, thereby resulting in a lawsuit.<sup>162</sup> The coke oven battery manufacturer notified its insurer of the lawsuit and sought coverage under its CGL policies.<sup>163</sup> The insurer denied coverage.<sup>164</sup>

The CGL policies at issue contained the standard form definitions of “occurrence” and “property damage” discussed in Part I of this article.<sup>165</sup> In denying coverage, the insurer argued that:

(1) the Policies only permitted coverage for allegations of “property damage” caused by an “occurrence,” which was defined by the Policies as an accident, and [the steel company] had not alleged that the [coke oven] Battery was damaged by such an occurrence, and (2) even if [the steel company] alleged property damage caused by an occurrence, such damages were excluded under various “business risk/work product” exclusions in the Policies.<sup>166</sup>

The court agreed with the insurer’s first argument.<sup>167</sup> Because “accident” was not defined in the policy, the court looked to *Webster’s* dictionary to understand the meaning of the term and then concluded that faulty workmanship is not an accident:

Words of common usage in an insurance policy are construed according to their natural, plain, and ordinary sense. We may

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159. See, e.g., *Lyerla v. Amco Ins. Co.*, 536 F.3d 684, 689 (7th Cir. 2008) (using reasoning based upon old Illinois case law and stating that “damage to a construction project resulting from construction defects is not an ‘accident’ or ‘occurrence’ because it represents the natural and ordinary consequence of faulty construction.”); *Hathaway Dev. Co., Inc. v. Illinois Union Ins. Co.*, 274 F. App’x. 787, 791 (11th Cir. 2008) (applying old Georgia law and holding that the subcontractors’ faulty work was “an injury accidentally caused by intentional acts.”); *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 460 (Ark. 2008) (being decided prior to the passage of ARK. CODE ANN. § 23-79-155(a)(2) (2011), and holding that “[f]aulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work.”).

160. 908 A.2d 888 (Pa. 2006).

161. *Id.* at 891.

162. *Id.*

163. *Id.* at 891-92.

164. *Id.* at 892.

165. *Id.* at 897.

166. *Id.* at 892.

167. *Id.* at 899.

consult the dictionary definition of a word to determine its ordinary usage. Webster's II New College Dictionary 6 (2001) defines "accident" as "[a]n unexpected and undesirable event," or "something that occurs unexpectedly or unintentionally." The key term in the ordinary definition of "accident" is "unexpected." This implies a degree of fortuity that is not present in a claim for faulty workmanship.<sup>168</sup>

In reaching its decision, the court cited and relied on Professor Henderson's 1971 law review article dealing with the 1966 business risk exclusions.<sup>169</sup> Those exclusions, however, had not been used in CGL policies for over two decades and were not at issue in the case. Thus, the court did not actually address the business risk exclusions that were at issue.<sup>170</sup> The court also did not address the relevant issue under an occurrence analysis — whether the coke battery manufacturer expected or intended to manufacture a defective piece of equipment.

The continuing vitality of the *Kvaerner* decision in Pennsylvania currently is in question. The continuing precedential effect of *Kvaerner* is in doubt not only because it is based on poor reasoning and is inconsistent with almost all of the decisions of other state supreme courts, but also because, in 2013, an intermediate Pennsylvania appellate court effectively refused to follow the decision by interpreting it very narrowly and then holding the insurer's duty to defend was triggered by the construction defect claim at issue.<sup>171</sup> Then, the Pennsylvania Supreme Court effectively affirmed the intermediate appellate court's decision by declining to hear the appeal in the case.<sup>172</sup> As was the case in New Jersey with *Cypress Point*, the Supreme Court of Pennsylvania may be willing to revisit its position on the issue when the right case is presented.

In Kentucky, the leading precedent is *Cincinnati Insurance Co. v. Motorists Mutual Insurance Co.*<sup>173</sup> In *Cincinnati Insurance*, the policyholder was a homebuilder who was sued by a homeowner for building a house that allegedly was built so poorly that it needed to be razed.<sup>174</sup> The CGL policy contained the same provisions regarding "occurrence" and "property damage" discussed in Part I of this article, and the insurer denied coverage for the claim on the basis

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168. *Id.* at 897-98 (alteration in original) (citations omitted).

169. *Id.* at 899 n.10 (citing Henderson, *supra* note 54, at 441).

170. *Id.* The court also incorrectly concluded that a finding of coverage would convert the policy into a performance bond. *Id.* at 899.

171. *Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 83 A.3d 418, 424-25 (Pa. Super. Ct. 2013) (interpreting *Kvaerner* narrowly and holding the insurer's duty to defend a construction defect case was triggered), *appeal denied*, 99 A.3d 926 (Pa. 2014).

172. *Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 99 A.3d 926 (Pa. 2014).

173. 306 S.W.3d 69 (Ky. 2010).

174. *Id.* at 71.

that construction defects cannot be occurrences that cause property damage.<sup>175</sup> In a case of first impression in Kentucky, the Kentucky Supreme Court agreed with the insurer. In explaining its decision, the court stated:

The majority viewpoint . . . appears to be that claims of faulty workmanship, standing alone, are not “occurrences” under CGL policies. Because we believe the majority viewpoint is correct, we adopt it. Since the term *accident* is not defined in the policy, we must afford it its ordinary meaning, if that meaning is not ambiguous . . . . Inherent in the plain meaning of “accident” is the doctrine of fortuity. Indeed, “[t]he fortuity principle is central to the notion of what constitutes insurance. . . .” We recently recognized that the concept of fortuity is “inherent in all liability policies[,]” and explained that a loss was fortuitous if it was “not intended. . . .” So “a loss or harm is not fortuitous if the loss or harm is caused intentionally by [the insured].” As [the homebuilder] asserts, it is highly unlikely that [the homebuilder] subjectively intended to build a substandard house . . . . So adoption of [the homebuilder’s] viewpoint would mean that insurance policies would become performance bonds or guarantees because any claim of poor workmanship would fall within the policy’s definition of an accidental occurrence so long as there was not proof that the policyholder intentionally engaged in faulty workmanship. This is a point made by other courts. Instead, we agree with the Supreme Court of South Carolina that refusing to find that faulty workmanship, standing alone, constitutes an “occurrence” under a CGL policy “ensures that ultimate liability falls to the one who performed the negligent work . . . instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.”<sup>176</sup>

The *Cincinnati Insurance* decision is laden with errors and poor reasoning. First, the court erroneously stated that it was adopting the majority position that construction defects cannot be occurrences.<sup>177</sup> As discussed above, every state supreme court to address this issue other than Arkansas and Pennsylvania currently holds construction defects can constitute occurrences so long as some property damage apart from the defective work itself exists.<sup>178</sup>

Second, to support its position the court relied upon precedents that

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175. *Id.* at 72.

176. *Id.* at 73-75 (citations omitted).

177. *Id.* at 73.

178. See cases cited in *supra* notes 108 and 122 and accompanying text.

subsequently have been overruled or superseded.<sup>179</sup> For example, the court relied upon decisions in Colorado and South Carolina.<sup>180</sup> Both of those states subsequently passed statutes that provide construction defects are occurrences.<sup>181</sup> Thus, the court's decision was based upon precedents that are no longer good law.

Third, the court incorrectly concluded that defective workmanship cannot be accidental.<sup>182</sup> How the court got to that erroneous conclusion is curious. The court started its analysis by correctly making two points: 1) inherent in the definition of the term "accident" is the idea that the loss or harm must not be intentionally caused by the policyholder and 2) it is highly unlikely that the contractor intended to do the work defectively or to cause a loss or damage.<sup>183</sup> From those correct statements, however, the court then mistakenly concluded that construction defects cannot be occurrences because that would mean that any time construction work is unintentionally done poorly by a subcontractor, and the defective work causes damage, there would be coverage unless an exclusion in the policy otherwise eliminates coverage.<sup>184</sup> That is exactly what it means and, as quoted by Justice Cardozo above, that is one of the primary reasons why people and businesses buy insurance – to protect themselves against liability for injuries unintentionally caused by their negligence.<sup>185</sup>

Fourth, the court mistakenly concluded that allowing CGL policies to cover damage caused by construction defects would convert insurance policies into performance bonds and that the "ultimate liability [should fall] to the one who performed the negligent work . . . instead of the insurance carrier."<sup>186</sup> Transferring financial responsibility from the policyholder to an insurer for injuries or damage caused by the policyholder's negligence is one of the principal purposes of insurance. Although performance bonds are another type of risk spreading instrument, they are fundamentally different from liability insurance.<sup>187</sup> Performance bonds protect the property owner, while liability

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179. *Cincinnati Insurance*, 306 S.W.3d at 73.

180. *Id.*

181. For details on how occurrences are defined in the statutes, see COLO. REV. STAT. § 13-20-808(3) (2016) and S.C. CODE ANN. §38-61-70(b)-(d) (2016).

182. *Cincinnati Insurance*, 306 S.W.3d at 76.

183. *Id.* at 74.

184. *Id.* at 75.

185. See *supra* note 42 (pointing out the very reason for which the insurance is obtained).

186. *Cincinnati Insurance*, 306 S.W.3d at 75 (quoting *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33, 37 (S.C. 2005), which was subsequently overruled by S.C. CODE ANN. § 38-61-70 (2011)).

187. See, e.g., *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 887-88 (Fla. 2007) (explaining that a performance bond's purpose is to guarantee the completion of the contract, which benefits the owner of the project, and is therefore different from liability insurance, which protects the contractor).



insurance protects the contractor.<sup>188</sup> And, unlike insurance policies, the issuer of a performance bond has a subrogation right against the contractor so that the ultimate liability for the defective work remains with the contractor under a performance bond.<sup>189</sup>

#### IV. AN ANALYTICAL FRAMEWORK IN WHICH COURTS CAN DECIDE WHETHER CONSTRUCTION DEFECTS ARE OCCURRENCES

##### A. *The “Moral Hazard” Problem*

As noted in the *J.S.U.B.* case, the “moral hazard” problem in the context of insuring a contractor against liability for construction defects is a theoretical concept used to support the argument that defective workmanship should not be viewed as an occurrence.<sup>190</sup> Moral hazard is a term that originated in insurance law originally to describe “the risk an insured or insurance beneficiary would deliberately destroy the subject matter that was insured in order to obtain payment of an insurance benefit.”<sup>191</sup> Today, the term also is used to encompass the idea that people who have insurance are less likely to take steps to avoid or minimize losses because the losses will be paid by someone else – in this instance, the insurer.<sup>192</sup> One commentator has described moral hazard as follows: “What moral hazard means is that, if you cushion the consequences of

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188. *Id.*

189. *Id.*

190. *Id.* at 890.

191. KENNETH ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 7 (6<sup>th</sup> ed. 2015). Numerous scholars have written articles regarding moral hazard and offered similar descriptions of the concept. *See, e.g.*, ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 12 (5<sup>th</sup> ed. 2012) (“[T]he existence of insurance can have the perverse effect of increasing the probability of loss. . . . This phenomenon is called *moral hazard*.”); Scott E. Harrington, *Prices and Profits in the Liability Insurance Market*, in *LIABILITY: PERSPECTIVES AND POLICY*, 42, 47 (Robert E. Litan & Clifford Winston ed., 1988) (“Moral hazard is the tendency for the presence and characteristics of insurance coverage to produce inefficient changes in buyers’ loss prevention activities, including carelessness and fraud . . . .”); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1547 (1987) (“Moral hazard refers to the effect of the existence of insurance itself on the level of insurance claims made by the insured. . . . *Ex ante* moral hazard is the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance.”); Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 *CORNELL L. REV.* 313, 338 n.117 (1990) (“‘Moral hazard’ is sometimes distinguished from ‘morale hazard’, the former referring to deliberate acts like arson, the latter to the mere relaxation of the defendant’s discipline of carefulness.”) (citing C. ARTHUR WILLIAMS, JR. & RICHARD M. HEINS, *RISK MANAGEMENT AND INSURANCE* 217 (4<sup>th</sup> ed. 1981)).

192. *See supra* note 191 (noting the moral hazard that may be inherent in how insurance works).

bad behavior, then you encourage that bad behavior. The lesson of moral hazard is that less is more.”<sup>193</sup> In the context of construction defects, the basic idea is that a contractor would have little incentive to perform his work well if insurance covered the damage his defective work causes.

The argument has no more force in the construction defect context than it does in any other liability context where the policyholder is not personally at risk of harm from his own conduct.<sup>194</sup> To some extent, insurance does buffer the policyholder from the financial consequences of his or her negligent behavior. That does not necessarily mean, however, that a person who has insurance will take more or less care than someone who does not.<sup>195</sup> Indeed, proponents of the moral hazard theory do not point to any empirical evidence that a contractor actually reviews his or her insurance policy to determine whether the insurance will cover the resulting damage before proceeding to do a job sloppily.

Moral hazard arguments also overlook a number of factors. One, most people take pride in doing good work. Two, contractors have incentives to do good work, despite the existence of liability insurance. If the work is not done right, the contractor will not be paid. Nor will the contractor be hired again. And, even if the contractor were able to eventually recover from his insurer as a result of litigation, very few litigants would describe litigation as a pleasant or valuable use of their time, particularly while they are trying to run a profitable construction business. In short, moral hazard arguments in the context of construction defect claims are based solely on theory, not empirical facts.

With that said, if the only goal were to maximize incentives for parties to take care and to avoid causing harm, then liability insurance theoretically should never be allowed because, at some level, its presence may be a disincentive to be as careful as possible. Liability insurance is allowed despite this theoretical concern, however, because there are numerous other competing public policy considerations in play with respect to insurance.

One such consideration is the compensation of injured parties. Public policy favors compensating innocent victims.<sup>196</sup> Thus, in situations where a

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193. James K. Glassman, *Drop Budget Fight, Shift to Welfare*, ST. LOUIS POST-DISPATCH, Feb. 11, 1996, at B3.

194. Moral hazard arguments have little force in situations where the policyholder could be hurt by the very conduct that gives rise to his liability. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 191, at 8 (“[G]iven drivers’ instinct for self-protection, having auto liability insurance probably does not significantly influence driving behavior.”).

195. See, e.g., Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004) (arguing that the adverse selection problem of only high risk people buying insurance, which is problem theoretically similar to moral hazard, has been overstated).

196. See, e.g., *Yousuf v. Cohlma*, 718 F. Supp. 2d 1279, 1288 (N.D. Okla. 2010) (explaining that compensating a wrongdoer’s innocent victims outweighs the concern that the wrongdoer would unjustly benefit); *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 164-65 (E.D. Va. 1993) (concluding that compensating innocent victims, where

homeowner would go uncompensated in the absence of the contractor's insurance (e.g., the contractor is insolvent or judgment proof),<sup>197</sup> public policy favors allowing the homeowner to recover insurance proceeds from the contractor's insurer regardless of whether the contractor could have or should have done the work right in the first place. Indeed, ensuring that injured parties will be compensated is the primary reason automobile insurance is mandatory in this country.<sup>198</sup>

Another competing public policy is the enforcement of the terms of contracts.<sup>199</sup> As one court has noted with respect to the multiple public policies at issue with respect to insurance, "[o]ne such policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation."<sup>200</sup> Because insurers draft the language contained in their policies, they do not need to resort to theoretical moral hazard arguments to avoid honoring the deals they have entered or to avoid insuring certain types of claims. Insurers have the right and ability to clearly state in their insurance policies the specific types of claims that are excluded from coverage. Because insurers accept substantial premiums from contractors for CGL policies that cover all risks of loss that are not expressly excluded, and CGL policies do not

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the insurance policy does not explicitly exclude coverage of intentional acts, outweighs public policy of not permitting coverage of intentional action); Grinnell Mut. Reins. Co. v. Jungling, 654 N.W.2d 530, 541 (Iowa 2002) ("Compensating . . . innocent victims . . . outweighs the concern that [the wrongdoer] will unjustly benefit from coverage."); Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982) ("[T]here is great public interest in protecting the interests of the injured party.").

197. See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006) (discussing the reasons why judgments against most people are uncollectible); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375 (1994) (discussing the impact insurance has on the judgment proof problem); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986) (analyzing the problems that result from judgment proof individuals).

198. See, e.g., JERRY & RICHMOND, *supra* note 191, at 924-25 (stating that the obvious purpose of mandatory auto insurance is to provide victims of automobile accidents with access to funds to cover their losses); Jeffrey W. Stempel, *Insurance as a Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1498 (2010) (noting that every state effectively requires auto insurance in order to license a car).

199. Sch. Dist. for the City of Royal Oak v. Cont'l Cas. Co., 912 F.2d 844, 848-49 (6th Cir. 1990) (explaining that public policy favors enforcing the terms of insurance policies and "common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency the insurance might have."); Nw. Nat'l. Cas. Co. v. McNulty, 307 F.2d 432, 444 (5th Cir. 1962) (Gewin, J., concurring) (noting the public policy favoring the enforcement of contracts); Union Camp Corp. v. Cont'l Cas. Co., 452 F. Supp. 565, 568 (S.D. Ga. 1978) ("Exercise of the freedom of contract is not lightly to be interfered with. It is only in clear cases that contracts will be held void as against public policy.").

200. Creech v. Aetna Cas. & Sur. Co., 516 So. 2d 1168, 1174 (La. App. 1987).

clearly state that construction defect claims are excluded, the public policy of enforcing contracts favors a finding that construction defect claims are covered.

*B. Application of the Rules of Insurance Policy Interpretation*

When one applies the relevant rules of insurance policy interpretation to the issue of whether construction defects constitute occurrences, the inescapable conclusion is that construction defects are occurrences unless the insurer can prove the policyholder actually expected or intended to do the construction work at issue defectively and expected or intended that it would cause damage. The key term in the definition of “occurrence” – “accident” – is not defined in standard form CGL policies. Under the doctrine of *contra proferentem*, to the extent there is any ambiguity in the meaning of “accident,” the courts should resolve those ambiguities in favor of the policyholder.<sup>201</sup> Although the term can be interpreted in multiple ways, the common law definition of “accident” is an event that unexpectedly and unintentionally gives rise to injury or damage.<sup>202</sup> Contractors generally do not expect or intend to do their work defectively so it is easy to conclude that most construction defects are accidental.

The “expected or intended” exclusion contained in standard form CGL policies also supports the conclusion that property damage caused by defective workmanship is covered unless the damage is subjectively expected or intended by the policyholder.<sup>203</sup> The exclusion does not state that coverage is forfeited if property damage is a reasonably foreseeable consequence of the policyholder’s actions. To the contrary, it states that coverage is excluded if the damage is “expected or intended from the standpoint of the insured.”<sup>204</sup> Whether the damage is reasonably foreseeable should not be part of the analysis because reasonable foreseeability is not the standard set forth in the “expected or intended” exclusion found in CGL policies. The test is subjective, not objective, and the issue is whether the damage was actually “expected or intended” by the policyholder, not whether the damage was reasonably foreseeable.<sup>205</sup>

The “reasonable expectations” doctrine arguably also favors a finding that construction defects are occurrences.<sup>206</sup> It is reasonable to conclude that a primary reason a contractor buys CGL insurance is to obtain protection against claims related to his construction business. Consequently, it is not difficult to conclude that a contractor reasonably expects that he will be covered for

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201. For more discussion on this doctrine, see *supra* Part II.A.

202. See, e.g., *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 883 (Fla. 2007) (referencing a previous ruling that defined “accident” to include unexpected and unintended injuries or damages).

203. For further discussion, see *supra* Parts I.A and II.D.2.

204. For further discussion, see *supra* Part I.B.

205. For further discussion, see *supra* Part II.D.2.

206. For further discussion, see *supra* Part II.B.

construction defect claims brought against him because construction defect claims are among the most common types of claims asserted against contractors. To hold otherwise would render the coverage provided under CGL policies largely illusory for contractors.

Construing CGL policies as a whole also leads to the conclusion that construction defects can be occurrences. When one construes the provisions of CGL policies as a whole, instead of in parts, construction defects must potentially be occurrences in order for the business risk exclusions to have any purpose. If construction defects cannot be occurrences, then what purpose do the business risk exclusions serve with respect to contractors? There would be no need to exclude coverage for “defects” in “your work” or to include a subcontractor exception to the exclusion if construction defects were not covered occurrences under the basic insuring agreement language.<sup>207</sup>

Finally, the question of whether a contractor reasonably should expect to be held liable for negligently inflicted injuries is simply irrelevant. Of course contractors, like everyone else, should expect to be held liable if their negligence causes injuries or damage. Indeed, that is one of the main reasons people buy insurance. Insurance is intended to cover the policyholder’s liabilities for injuries and damages that result from the policyholder’s negligence. If liabilities that are reasonably foreseeable were not covered by CGL policies, then liability insurance would only provide illusory coverage in many situations because it is often reasonably foreseeable that negligent actions will lead to accidents, property damage, and ultimately liability. In the words of Justice Cardozo, “[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow.”<sup>208</sup>

### CONCLUSION

In determining whether there is an occurrence in the context of defective workmanship, the analysis should focus on whether the defects in the workmanship that gave rise to property damage was accidental and whether the contractor expected or intended his work to cause damage. After years of misunderstanding this issue as a result of the *Weedo* decision, over the past decade, the overwhelming majority of state supreme courts, including the New Jersey Supreme Court that issued the *Weedo* opinion nearly forty years ago, have adopted this approach when addressing the issue. They have concluded that unless the insurer can prove that the contractor expected or intended its workmanship to be defective and cause property damage, the faulty workmanship is an occurrence. Thus, in most cases, whether the damage

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207. See, e.g., *J.S.U.B.*, 979 So. 2d at 886-87 (discussing the reasons why faulty workmanship can be an occurrence); see also *supra* Part I.C.

208. *Messersmith v. Am. Fid. Co.*, 133 N.E. 432, 432 (N.Y. 1921).

associated with the defective workmanship is actually covered by CGL insurance should be determined based on an analysis of whether any of the business risk exclusions apply.