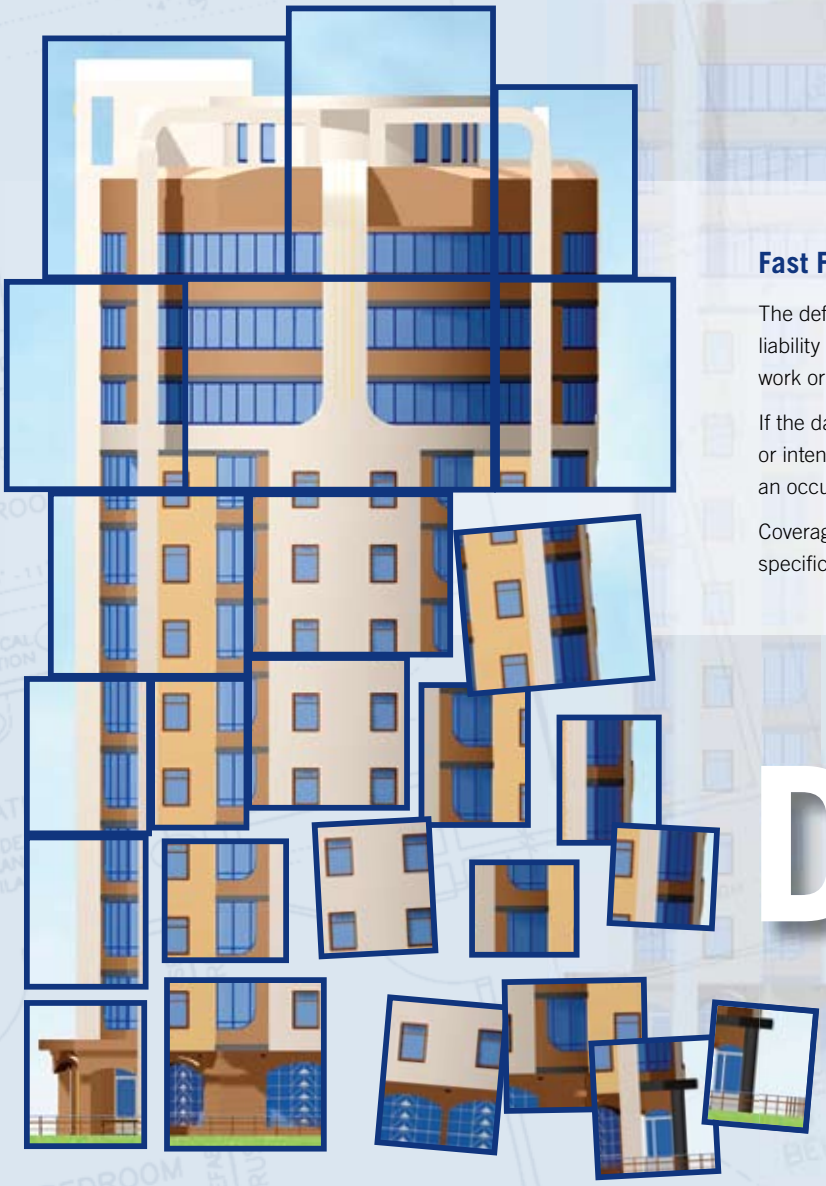

Fast Facts

The definition of "property damage" in a commercial general liability (CGL) policy does not require damage to someone else's work or property.

If the damage caused by a construction defect was not expected or intended by the insured, then the accidental conduct—an occurrence—is covered under a CGL policy.

Coverage for construction defect claims should be decided by specific work-related exclusions in the CGL policy.

Construction Defect Claims

Strategies to Maximize Insurance Coverage (From the Policyholder's Perspective)

By J. James Cooper

Introduction

Insurance companies have dealt the construction industry a significant blow. While insurance premiums steadily climb for building contractors and their subcontractors, insurance companies doggedly urge courts across the nation to restrict coverage under commercial general liability (CGL) policies for construction-related accidents. Despite the fact that the standard CGL policy form specifically anticipates the accidental "occurrence" of damage caused by faulty workmanship and then narrows the scope of this insurance coverage with construction-specific policy exclusions, insurance carriers continue to argue that construction defects do not give rise to an occurrence. And, notwithstanding the broad definition of "property damage" in most CGL policies covering "physical injury to tangible property," insurers continue to argue that the "physical injury" needs to be inflicted on something other than the insured's own work or product.

Sadly, some courts have agreed. This article addresses—from the policyholder's perspective—the arguments for and against coverage in construction defect cases and discusses how courts from across the country have ruled on these significant insurance coverage issues.

Why Coverage Exists for Construction-Related Defects

The Policy Definitions of "Occurrence" and "Property Damage" Include the Type of Damage Caused by Inadvertent Construction Defects or Faulty Workmanship

The insuring agreement in a standard CGL insurance policy states, in relevant part:

> 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"; and
>
> (2) the "bodily injury" or "property damage" occurs during the policy period.

The policy will typically define "occurrence" as "an accident, including the continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as "physical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured."

The definition of occurrence is not limited to particular types of risks or damages; all that is required is that the property damage be caused by an accident. In Texas, an event is accidental within the meaning of the policy coverage if it is "an effect that cannot be reasonably anticipated from the use of [the means that produced it], an effect which the actor did not intend to produce and which he cannot be charged with the design of producing."[1] This standard is accepted in other states as well.[2]

The determination of whether damages are accidental, and thus an occurrence, is made from the standpoint of the insured.[3] If the insured did not expect or intend the property damage caused by the insured's construction work, then there should be an accident, and thus an occurrence, under the CGL policy. Nonetheless, some insurers routinely argue that claims for damages from defective workmanship are per se outside of the policy definition of occurrence and, unfortunately, some courts have agreed.[4] However, according to a survey conducted by the International Risk Management Institute during the summer of 2007, a majority of states—21 to 15 at the time—are considered "pro-insured" on the issue of whether defective work can result in an occurrence.[5] Some courts inaccurately report the opposite trend.[6]

One important case that stands out for its detailed analysis of the issues involved in this controversy—and has also been cited with approval by the supreme courts of Florida,[7] Tennessee,[8] and Texas[9]—is *Lennar Corp v Great American Ins Co.*[10] Lennar, the insured, built many homes in the Houston area in the 1990s with defectively designed synthetic stucco (commonly known as EIFS), which trapped water behind the stucco, inevitably leading to wood rot, mold, and related problems. At the time of the product installation, Lennar possessed no knowledge of the product's defective nature. Lennar ultimately sought indemnification under its general liability policies for the costs it incurred to repair the water damage and remove and replace the defective EIFS from all the homes, as well as overhead, inspection, and personnel costs incurred in addressing the homeowners' claims. When the insurance carriers refused to pay, Lennar sought a declaratory judgment that the carriers owed a duty to indemnify Lennar, had violated the Texas Insurance Code, and had breached the insurance policy contracts. The trial court granted the insurance carriers' cross-motions for summary judgment finding no coverage for Lennar's damages. Lennar appealed to the intermediate appellate court.

After first holding that defective construction constitutes an occurrence,[11] the court initially agreed with Lennar that many of the homeowners had suffered property damage to their homes that was covered under Lennar's CGL policies. Significantly, the court did not adopt the insurers' contention that property damage must occur to something other than the insured's work, i.e., the homes, to have a covered loss. Instead, the court classified Lennar's damages into three categories: (1) costs to repair water damage to the homes, including wood rot, damage to substrate, sheathing, framing, insulation, sheetrock, wallpaper, paint, carpet, carpet padding, wooden trim and baseboards, mold damage, and termite infestation; (2) costs to remove and replace the defective EIFS solely as a preventative measure; and (3) overhead, inspection, and personnel costs incurred as a result of the homeowners' claims.[12] The court then examined whether each category met the definition of property damage for which the carriers owed a duty to indemnify Lennar.

The first category of damages easily met the definition of property damages and was recoverable under the general liability policies.[13] The court also allowed the policyholder to recover the cost to remove the defective EIFS to determine the scope of the water damage, and to access and repair that damage.[14] The second and third categories of damages were not recoverable under Lennar's CGL policies. The court held that replacing the defective EIFS purely as a preventive measure did not constitute property damage. Since the EIFS did not change from a satisfactory state into an unsatisfactory state or otherwise become physically altered by any actions of Lennar or its subcontractors, the defective EIFS itself did not constitute property damage.[15] Therefore,

Survey showed…a majority of states are "pro-insured" on the issue of whether defective work can result in an occurrence. Some courts inaccurately report the opposite trend.

removing the defective product solely "as a good business decision" did not create a covered loss. Finally, the court found that Lennar's overhead, inspection, and personnel costs were not covered by the insuring agreement which, according to the court, requires the insured to become "legally obligated to pay" the *claimant's damages.*[16]

In another EIFS case, a Missouri federal judge also found coverage for allegations of defective workmanship against a builder; the claims satisfied both the property damage and occurrence requirements under the insured's CGL policy. In *Amerisure Mutual Ins Co v Paric Corp, et al,*[17] the insured entered into contracts to build three hotels in Missouri. When defects surfaced after the construction, the insured was sued for breach of contract, breach of express warranty, breach of implied warranty, and negligence. The claims generally asserted that the insured was under an obligation to build the hotels with due care, in a workmanlike manner, and in accordance with acceptable building codes, plans, and specifications.[18]

The court initially turned to the occurrence question. Interpreting Missouri law, the court observed that it must determine whether the allegations as a whole, and not simply the names of the causes of action or the character of the behavior, revealed an unexpected or undesigned event that the insured did not intend.[19] Looking to the alleged facts in the case, the court ruled in favor of coverage. Given the hidden nature of the defects in the EIFS and the windows, in addition to the fact that the hotel owner and not the insured chose the EIFS and the windows, the court ruled that the insured did not intend, expect, or desire that the EIFS or the windows would leak, thus damaging the hotels. The underlying actions alleged the possibility of an accident, and thus an occurrence.

The court then addressed property damage. In the underlying actions, the owners alleged that water leaking through the defective and poorly installed EIFS and windows caused damage to the EIFS, windows, sheathing, insulation, structural members, interior wall finishes, floors, and carpeting. Predictably, the insurer argued that damage to the different parts of the hotel were all part of the insured's product, and thus no physical damage to anything but the insured's product (i.e., no property damage).[20] The court rejected this contention. The court admirably rebuffed the insurer's attempt to confuse the "your work" exclusion with the definition of property damage: "the Court needs to address whether coverage exists before addressing any exclusions, and plaintiff [insured] has repeatedly stated that it is not relying on any exclusion."[21] Even if the court had accepted the insurer's coverage position, the court found allegations of physical injury both to the insured's product and "other property." The court noted that damage was alleged to have occurred to the EIFS and the windows, not to mention other interior aspects of the hotels. The owners allegedly selected and purchased the windows and the EIFS, thus making them the owner's property.[22]

Another case worth noting is the Wisconsin Supreme Court's decision in *American Family Mutual Ins Co v American Girl, Inc.*[23] In *American Family,* the Court held that the inadvertent faulty workmanship of a subcontractor can give rise to an occurrence within the meaning of a CGL policy. A general contractor constructed a warehouse for the owner, relying in part on faulty site-preparation advice from a soil engineering subcontractor. After completion, the foundation began to sink because of excessive settlement of the soil, and the structure began to buckle and crack. The owner sued the general contractor for breach of warranty and consequential damages, and the contractor's insurance carrier filed a declaratory judgment seeking a determination of no coverage for the claim. The trial court found coverage under some of the policies, but the appellate court reversed, finding no coverage. The general contractor appealed to the Wisconsin Supreme Court.

Wisconsin's highest court first concluded that the damage to the warehouse was "accidental," as "neither the cause nor the harm was intended, anticipated, or expected."[24] The Court then rejected the carrier's argument that the damage cannot be an occurrence because CGL policies do not cover breach of contract/breach of warranty claims arising out of the insured's defective work or product. The Court supported its conclusion with the following:

> [T]here is nothing in the basic coverage language of the CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is 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.[25]

The Court further explained that while CGL policies generally do not cover contract claims, it is because the business risk exclusion provisions narrow the scope of coverage, not because "a loss actionable in contract can never be the result of an 'occurrence' within the meaning of the CGL's initial grant of coverage."[26]

The rationale for coverage of claims arising from a subcontractor's work is that the subcontractor's performance is not within the builder's effective control and hence presents an insurable risk rather than a business risk.

The Insurer's View of the Policy Language is Inconsistent with Amendments to the Policy and Renders Parts of it Meaningless

The exclusions in a standard CGL policy exclude from coverage certain losses that are viewed as "business risks." The principal business risk exclusion is the "your work" exclusion, which provides:

> This insurance does not apply to:…"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.

In general, the "your work" exclusion places the burden on the builder, rather than on the builder's insurer, to cover the cost of repairing the builder's work if the work does not cause bodily injury or damage to other property.

But there is a significant exception to the "your work" exclusion. The exclusion does not apply—and the CGL policy provides coverage—if the damaged work or the work out of which the damage arises *was performed on behalf of the builder by a subcontractor.* The rationale for coverage of claims arising from a subcontractor's work is that the subcontractor's performance is not within the builder's effective control and hence presents an insurable risk rather than a business risk.[27]

As the *Lennar* court observed, it is important to understand the evolution of the subcontractor exception to the "your work" exclusion to appreciate why the occurrence and property damage requirements can encompass damage to the insured's own work.[28] Before 1986, most CGL policies excluded property damage to the builder's work (i.e., the house), whether the damage was caused by work done by the builder or by a subcontractor. In response to builder demand, in 1976 insurers began to offer an endorsement, known as the broad form property damage (BFPD) endorsement, which provided coverage for damage to the builder's work caused by a subcontractor.[29] In 1986, the insurance industry incorporated this aspect of the BFPD endorsement directly into the standard CGL policy by inserting the subcontractor exception into the "your work" exclusion.[30]

By trying to rewrite the policy's occurrence and property damage requirements, insurers attempt to effectively delete the subcontractor exception from the policy's "your work" exclusion. If faulty workmanship on a home (i.e., the homebuilder's "work") could never constitute property damage caused by an occurrence, then the "your work" exclusion in the CGL policy would be rendered meaningless—in violation of the bedrock principle that insurance policies are to be construed to give effect to all their provisions so that none will be rendered meaningless.[31]

In other words, the term "occurrence" may not be interpreted so broadly as to obviate the need for one or more of the policy's exclusions.[32] But that is exactly what certain insurers would do. There would be no need for the "your work" exclusion, because any defective work claims for property damage to the house itself, to which the exclusion would apply, would not survive the policy's occurrence requirement.[33] In this way, the insurers would also eliminate the coverage for defective workmanship that they added through the subcontractor exception to the "your work" exclusion.[34]

Importantly, because some courts have found coverage for construction defect claims based primarily on the existence of the subcontractor exception, the insurance industry has crafted two endorsements that remove the subcontractor exception to the "your work" exclusion. Forms CG 22 94 and CG 22 95 completely remove the subcontractor exception. The removal of the subcontractor exception conceivably leaves policyholders without coverage for most construction defect claims.[35]

That the insurance industry felt the need to craft these endorsements suggests that it believed this coverage had been provided under the industry's standard CGL form.[36] Moreover, these new endorsements run contrary to the insurance industry's arguments that defective work is not an occurrence or does not give rise to property damage as defined in the standard CGL policy.[37] If the standard CGL policy did not provide coverage for these types of claims, there would have been no need for the industry to craft these endorsements eliminating the subcontractor exception.

In any event, endorsements CG 22 94 and CG 22 95 represent a dramatic shift in the industry's position because, in the past, using the subcontractor exception, the industry had made a purposeful decision to include coverage for general contractors for the defective workmanship of their subcontractors that caused damage to the project.[38] Without the subcontractor exception, the construction industry likely will have a more difficult challenge in overcoming the "your work" exclusion in the standard CGL form.

How Michigan Courts Have Addressed Coverage for Construction Defect Claims

The Court of Appeals decision in *Groom v Home-Owners Ins Co*[39] is the latest word on this issue in Michigan. In *Groom,* the court engaged in a thoughtful discussion of both sides of the argument, concluding that—if it were writing on a clean slate—it would hold in favor of the policyholder on the occurrence question.[40] However, the court felt bound by prior precedent[41] and ruled instead that defective workmanship by itself does not constitute an occurrence under a CGL policy.[42] The Michigan Supreme Court has not yet addressed this issue.

Construction-Specific Exclusions

As previously discussed, coverage for construction defect claims, in most cases, should be decided by work/product-specific exclusions in the CGL policy. The following are the most commonly litigated exclusions in construction defect cases.

"Business Risk" Exclusions j(5) and j(6): "Real Property Being Worked On" and "Faulty Workmanship"

Insurance coverage lawyers commonly refer to the j(5) and j(6) exclusions as the "business risk exclusions." Exclusion j(5) excludes coverage for property damage to that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations. Exclusion j(6) excludes coverage for "that particular part of property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." "Your work" includes work performed by or on behalf of the insured.

The j(5) exclusion excludes only those damages arising from ongoing operations pursuant to the phrase "are performing operations" in the exclusion. For example, if a policyholder is still working on a job site when property damage results from an occurrence, those damages are at greater risk of falling within the j(5) exclusion. However, if those damages arise after the policyholder has completed its operations, then the j(5) exclusion does not apply because the policyholder is no longer "performing operations." By its own terms, any damage occurring after completion or occupancy would not fall within the scope of the exclusion. Likewise, some courts have held that damages to non-real property would fall outside of the exclusion.[43] And since the purpose of the exclusion is to negate coverage only for "that particular part" of the real property on which work is being performed by or on behalf of the insured, the exclusion should not apply to damage to adjacent property or to property on which the insured was not working.[44] Thus, despite the exclusion, coverage should exist for the repair, replacement, or restoration of otherwise non-defective work that is damaged as a result of defective construction.[45]

Exclusion j(6), the "faulty workmanship" exclusion, excludes coverage for "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Unlike exclusion j(5), the exclusion is not limited to "real property" and thus, in that sense, is broader than j(5). However, there are also exceptions to exclusion j(6). Exclusion j(6) "does not apply to 'property damage' included in the 'products-completed operations hazard.'" Standard CGL policies define the products-completed operations hazard to include all property damage arising out of the insured's work, except "work that has not been completed or abandoned." Thus, like j(5), exclusion j(6) applies only to work that has not been completed or abandoned.[46] Even if the damages at issue occur during the course of construction, the exclusion should not apply if the defective work causes damage to otherwise non-defective work. The damaged property must also have had faulty work performed on it. As with exclusion j(5), however, some courts have read the "that particular part" language broadly, concluding that it equates with the insured's contractual undertaking.[47]

In *Grinnell Mutual Reinsurance Co v Lynne,*[48] the North Dakota Supreme Court held that the business risk exclusions precluded coverage for damage indirectly resulting from faulty workmanship. A contractor agreed to construct a new foundation for a house, a process requiring the contractor to temporarily lift the house from its foundation. During the process of raising the house, the house slipped off the support jacks and fell three feet into the basement. Damage resulted to the house and to basement walls, which were currently being worked on by a subcontractor. The subcontractor brought an action against the owner and the contractor for work performed on the basement, partly for efforts unrelated to the house falling and the remainder for extra work to accommodate a different house purchased by the owner. The owner filed a cross claim, seeking to recover for damages to his house and for costs incurred in the removal and replacement of the house. The contractor filed a claim against his CGL policy, and the insurance carrier sought declaratory relief. The district court held that the insurance carrier had no duty to defend or indemnify; the contractor appealed.

The insurance carrier argued that the business risk exclusions—exclusions (j)(5) and (j)(6)—apply to preclude coverage of the contractor's claims. After analysis of the (j)(5)and (j)(6) exclusions and the district court's treatment of the same, the Court stated:

> The language of the policy indicates "[t]hat particular part of real property" on which [contractor] was working is subject to the exclusion. The *particular part of real property on which [contractor] was working was the house.* Thus, damage to the house resulting from [contractor's] work will not be covered by the policy due to the exclusions in the policy.[49] (Emphasis added.)

Numerous attempts were made by the contractor to persuade the Court that the business risk exclusions did not apply. The contractor argued that (1) the policy provisions excluding coverage were ambiguous and must be construed against the insurer; (2) the damage to the house did not "arise out of" the contractor's work, but rather was caused by the intervening act of high winds; (3) the exclusion should not apply to the house because it was

During the process of raising the house, the house slipped off the support jacks and fell three feet into the basement. …

… The subcontractor responsible for the disposal work began to dump the debris on the private property.

not "real property," as the "particular part" of real property the contractor was working on was the foundation, not the house; (4) the house was personal property rather than real property because it was not attached to the foundation at the time of damage; and (5) the policy should cover the subcontractor's claim, reasoning that the claims brought by the subcontractor were unrelated to the house falling. All of the arguments failed. The Court noted that the claims brought by the owner and subcontractor were part of the contractual obligations the contractor owed to the parties, and erroneously held that "a policy's business risk exclusions…do not provide coverage for breach of contract."[50]

The court in *Grinnell* also took a much more expansive view of "that particular part," deciding that all damages caused by the falling of the house were uninsurable, even though damage occurred to the work of a subcontractor that was unrelated to the contractor's work. This decision has blurred the boundary between business risks that are not insurable and insurable risks, and the *Grinnell* court has extended the j(5) exclusion beyond its intended application.

In *Standard Construction Co, Inc v Maryland Casualty Co,*[51] the Sixth Circuit, applying Tennessee law, held the (j)(5) exclusion does not prohibit coverage for physical injury to tangible property that is not the insured's work. As part of its contract, a paving contractor was required to remove debris from the construction area and dispose of it elsewhere. After obtaining written permission from six property owners and the daughter of a seventh property owner in the owner's name, the subcontractor responsible for the disposal work began to dump the debris on the private property. The property owner whose daughter had given permission filed suit, asserting claims for trespass and damage to the property. After settling the suit, the contractor sought a declaratory action that the insurers breached their duties to defend and indemnify. The trial court awarded the contractor defense and settlement costs; the insurers appealed.

The insurers argued that there was no coverage under the policies because the dumping was intentional. The court held that the dumping was an occurrence because "while the dumping was intentional, the fact that it was done without permission, thus making it wrongful, was not intended by the insured." The court also explained that the j(5) exclusion was not applicable. The real property on which the debris was dumped was not the insured's "work," nor was the property "physically damaged" by having the construction debris from the road-widening project dumped on it.

"Your Work"—Exclusion L

Exclusion L is often known as the "your work" exclusion. Insurance coverage lawyers hotly debate this exclusion, as it is perhaps the most important exclusion for purposes of determining coverage. This exclusion eliminates coverage for:

> "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.

This exclusion denies coverage for property damage to "your work," a term that is defined in relevant part as:

- Work or operations performed by you or on your behalf; and
- Materials, parts, or equipment furnished in connection with such work or operations.

The importance of the "your work" exclusion lies in the exception for coverage for defective work of subcontractors. When properly applied, the subcontractor exception provides significant coverage for insured contractors.

In *American Family,* discussed previously, after concluding that the property damage to the warehouse was an occurrence within the meaning of the CGL policy, the Court further determined that the business risk exclusions do not eliminate coverage. The carrier argued that damage to the general contractor's work should not be covered pursuant to the "your work" exclusion. After a thorough review of the revisions to the CGL policy and interpretative caselaw, the Court rejected this argument, finding that the "your work" exclusion in the 1986 revisions "specifically restores coverage when the property damage arises out of work performed by a subcontractor." Because the damage to the warehouse was caused by the subcontractor's negligent soil engineering work, the subcontractor exception to the business risk exclusion applied, resulting in coverage that otherwise would have been excluded.

The importance of the "your work" exclusion lies in the exception for coverage for defective work of subcontractors. When properly applied, the subcontractor exception provides significant coverage for insured contractors.

Conclusion

The majority of courts around the country have concluded that construction defect claims are covered under the insuring clause of a CGL policy (i.e., constitute an "occurrence" and "property damage"). The national trend is also favorable to policyholders. However, the key to maximizing insurance coverage in this area is vigilance both at the time the policy is procured and also during the claims submission process. Policyholders, and their brokers, should pay close attention to the exclusions that are added by insurers—by way of endorsement—to the standard CGL policy form, and reject any endorsements that significantly impair recovery for work-related damage. Additionally, policyholders should carefully review an insurer's reservation of rights or denial letter and, with the assistance of coverage counsel, challenge unfounded conclusions and inaccurate statements about the law. Most courts will presume that policyholders read their policies when they get them—don't miss a good opportunity to maximize your coverage by waiting to read your policy until after a loss arises.

For the latest cases state-by-state, please visit http://www.gardere.com/Attorneys/Attorney_Bio/?id=631. ■

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FOOTNOTES

1. *Trinity Universal Ins Co v Cowan,* 945 SW2d 819, 827–828 (Tex, 1997) (quoting, approving, and distinguishing *Republic National Life Ins Co v Heyward,* 536 SW2d 549 (Tex, 1976)).
2. See, generally, *Anthem Electronics, Inc v Pacific Employers Ins Co,* 302 F3d 1049 (CA 9, 2002). See also *American Family Mut Ins Co v American Girl, Inc,* 673 NW2d 65 (Wis, 2004) ("accident" means an event that takes place without one's foresight or expectation); *Standard Const Co, Inc v Maryland Cas Co,* 359 F3d 846, 850 (CA 6, 2004) ("[I]f the resulting damages are unintended, the resulting damage is accidental even though the original acts were intentional") (quoting *State Farm Fire and Cas Co v CTC Development Corp,* 720 So 2d 1072, 1075 (Fla, 1998)). In short, the issue is whether the damage, not the accident, was neither expected nor intended. *Union Pac Res Co v Aetna Cas & Sur Co,* 894 SW2d 401, 404 (Tex App, 1994). Under Texas law, an accident involves (1) an action, and (2) resulting damage. *Harken Exploration Co v Sphere Drake Ins PLC,* 261 F3d 466, 472 (CA 5, 2001). The two elements have in common the question of (1) intent or design, and (2) "expectability" or foreseeability. *Id.* No "accident" occurs if the action is intentional and performed in such a manner that it is an intentional tort, regardless of whether the effect was unintended or unexpected. *Id.* (Citing *Argonaut Southwest Ins Co v Maupin,* 500 SW2d 633, 635 (Tex, 1973).) An intentional act that results in injuries that would ordinarily follow from, or could reasonably be anticipated from, the intentional act is not an "occurrence" within the policy definition. *Cowan,* 945 SW2d at 827–828.
3. See *King v Dallas Fire Ins Co,* 85 SW3d 185, 191–192 (Tex, 2002) (in determining whether there has been an "occurrence" the expectation or intent to cause the resulting injury must be viewed from the standpoint of the insured); *Cowan,* 945 SW2d at 827 ("whether an event is accidental is determined by its effect… an effect that 'cannot reasonably be anticipated from the use of [the means that produced it], an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means' "); *Westchester Fire Ins Co v Gulf Coast Rod, Reel & Gun Club,* 64 SW3d 609, 613 (Tex App, 2001) (repeated exposure to water currents, caused by the policyholder's dredging, constituted an "occurrence" where the resulting erosion of the sand from the underlying plaintiffs' property was neither expected nor intended from the standpoint of the policyholder); *First Texas Homes, Inc v Mid-Continent Cas Co,* 2001 WL 238112, at *3 (ND Tex, March 7, 2001), aff'd 32 Fed Appx 127 (CA 5, 2002) (in determining whether there has been an occurrence, "the relevant inquiry is not whether the insured damaged his own work, but whether the resulting injury or damage was unexpected and unintended").
4. See, e.g., *Kvaerner Metals Div of Kvaerner US, Inc v Commercial Union Ins Co,* 908 A2d 888 (Pa, 2006) (an insured's faulty workmanship that resulted in a product failure was not an "occurrence").
5. The pro-insured states identified are WA, OR, CA, NV, AZ, AK, MT, CO, NM, ND, SD, NE, KS, MO, LA, WI, TN, AL, OH, NH, and ME, while those in the pro-insurer camp are WY, IA, AR, MS, IN, SC, NC, VA, WV, MD, DE, PA, HI, CT, and MA. See Exhibit VI.E.3, Elements of a Covered Loss, <http://www.irmi-online.com>. IRMI also identified nine states reaching "mixed results" on this issue (UT, OK, IL, KY, GA, MI, NY, NJ, and RI), and three states (TX, MN, and FL) having this issue "under review." *Id.* As discussed above, both Texas and Florida are now firmly positioned as pro-insured states on the issue of coverage for defective workmanship. All websites cited in this article were accessed April 28, 2009.

Most courts will presume that policyholders read their policies when they get them—don't miss a good opportunity to maximize your coverage by waiting to read your policy until after a loss arises.

6. See, e.g., *Selective Ins Co of the Southeast v Cagnoni Development, LLC,* 2008 WL 126950 (SD Ind, January 10, 2008) ("A majority of states have held that faulty workmanship is not accidental, and therefore also not an occurrence with respect to damage to the defective work product itself."); *Auto-Owners Ins Co v Home Pride Companies, Inc,* 684 NW2d 571, 576–577 (Neb, 2004) ("the majority of courts have determined that faulty workmanship is not an accident and, therefore, not an occurrence.").
7. *US Fire Ins Co v JSUB, Inc,* 979 So 2d 871 (Fla, 2007).
8. *Travelers Indemnity Co of America v Moore & Assoc, Inc,* 216 SW3d 302 (Tenn, 2007).
9. *Lamar Homes, Inc v Mid-Continent Cas Co,* 242 SW3d 1 (Tex, 2007).
10. *Lennar Corp v Great American Ins Co,* 200 SW3d 651 (Tex App, 2006).
11. The *Lennar* court thoroughly examined the plethora of Texas and national cases addressing whether defective construction resulting in damage to the insured's work can constitute an "occurrence" under a CGL policy. In doing so, the court perceptively observed that there would be no reason for insurers to include the subcontractor exception in the "your work" exclusion if they did not intend to cover some property damage resulting from defective construction. The court found persuasive this quote from a Wisconsin court of appeals decision:

    > [T]he [insurance] industry chose to add the [subcontractor] exception to the ["your work"] exclusion in 1986….We realize that under our holding a general contractor who contracts out all the work to subcontractors…can insure complete coverage for faulty workmanship. However, it is not our holding that creates this result: it is the addition of the new language to the policy. We have not made the policy closer to a performance bond for general contractors, the insurance industry has.

    Lennar, 200 SW3d at 674 (citing *Kalchthaler v Keller Constr Co,* 591 NW2d 169, 174 (Wis App, 1999)).
12. *Lennar,* 200 SW3d at 677.
13. *Id.* at 677–678.
14. *Id.* at 678, n 33. The *Lennar* court's decision on this issue is consistent with the holding by the South Carolina Supreme Court in *Auto Owners Insurance Co Inc v Newman,* 2008 WL 648546, at *5 (SC, March 10, 2008) ("Because this underlying moisture damage could neither be assessed nor repaired without first removing the entire stucco exterior, the trial court correctly concluded that the arbitrator's allowance for replacement of the defective stucco was covered by the CGL policy as a cost associated with remedying the other property damage that resulted from an 'occurrence.' ").
15. *Id.* at 679–680.
16. *Id.* at 680–681.
17. *Amerisure Mutual Ins Co v Paric Corp, et al,* 2005 WL 2708873 (ED Mo, October 21, 2005).
18. *Id.* at *3.
19. *Id.* at *5.
20. *Id.* at *6.
21. *Id.*
22. *Id.*
23. *American Family Mutual Ins Co v American Girl, Inc,* 673 NW2d 65 (Wis, 2004).
24. *Id.* at 76.
25. *Id.* at 77.
26. *Id.* at 76.
27. See generally O'Connor, *Commercial General Liability Coverage,* 19 The Construction Lawyer 5, 6 (April 1999).
28. *Lennar,* 200 SW3d at 672.
29. See *Mid-United Contractors, Inc v Providence Lloyds Ins Co,* 754 SW2d 824, 827 (Tex App, 1988) (claims against builder based on faulty workmanship are covered by builder's CGL policy with BFPD endorsement because the faulty work was done by a subcontractor); *Fireguard Sprinkler Sys, Inc v Scottsdale Ins Co,* 864 F2d 648, 651–654 (CA 9, 1988) (explaining rationale for the development of the BFPD endorsement, which covers losses caused by the work of subcontractors).
30. See *Lennar,* 200 SW3d at 672.
31. See *King v Dallas Fire Ins Co,* 85 SW3d at 192–193; *Kelley-Coppedge, Inc v Highlands Ins Co,* 980 SW2d 462, 464 (Tex, 1998); *Balandran v Safeco Ins Co,* 972 SW2d 738, 741 (Tex, 1998); *Betco Scaffolds Co v Houston United Cas Ins Co,* 29 SW3d 341, 344 (Tex App, 2000).
32. *King,* 85 SW3d at 192–193.
33. See, e.g., *American Family Mutual Ins Co v American Girl, Inc,* 673 NW2d 65, 78 (Wis, 2004) (coverage exists under a CGL policy where contractor constructed a warehouse for the owner, relying in part on faulty site-preparation advice from a soil engineering subcontractor, with a sinking foundation).
34. In addition, the "completed operations" exception to the j(6) exclusion provides coverage for property damage to the homebuilders' work that takes place after the work is completed. The insurer's broad interpretation of "occurrence" would also render the j(6) exclusion, and its exception for completed operations, meaningless.
35. See Shapiro, *Are You Covered? Insurance Products for Construction Projects,* American Bar Association (2005); Wielinski, *Full Circle Regression: The New ISO "Your Work" Endorsements,* International Risk Management Institute (January 2002), available at <http://www.irmi.com/expert/articles/2002/wielinski01.aspx>.
36. See Wielinski, *New Challenges to Insurance Coverage for Defective Construction,* 56 Fed'n Def & Corp Couns Q2 (Winter 2006).
37. *Id.*
38. See, e.g., *Kvaerner Metals Div of Kvaerner US, Inc v Commercial Union Ins Co,* 825 A2d 641, 656 (Pa Super, 2003) rev'd on other grounds, 908 A2d 888 (Pa, 2006); *O'Shaughnessy v Smuckler Corp,* 543 NW2d 99, 102–105 (Minn App, 1996).
39. *Groom v Home-Owners Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272840).
40. *Id.* at 2–4.
41. *Id.* at 4. See *Radenbaugh v Farm Bureau General Ins Co of Mich,* 240 Mich App 134, 136, 610 NW2d 272 (2000) (where defective workmanship results in damage to the property of others, an accident exists within the meaning of the CGL policy); *Hawkeye-Security Ins Co v Vector Constr Co,* 185 Mich App 369, 460 NW2d 329 (1990) (the insured's defective concrete work, standing alone, was not the result of an occurrence). Although not relied on by the *Groom* court, see also *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc,* unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 265621) at 5, lv den, 740 NW2d 303 (Mich, 2007) (court held that, since all the defects in the home resulted from poor workmanship or installation of defective materials and that those defects could be remedied by either replacing the defective materials or repairing the defective work, the damages were excluded from coverage because they were not occurrences under the CGL policy).
42. *Groom, supra at 5.*
43. See, e.g., *Evanston Ins Co v Adkins,* 2006 WL 2848054 (ND Tex, October 4, 2004).
44. See *Scottsdale Ins Co v Knox Park Constr, Inc,* 2003 WL 22519536 (ND Tex, November 6, 2003).
45. See *Gar-Tex Constr Co v Employers Cas Co,* 771 SW2d 639, 643–644 (Tex App, 1989). But see *Southwest Tank and Treater Mfg Co v Mid-Continent Cas Co,* 243 F Supp 2d 597, 604 (ED Tex, 2003) ("that particular part" language equates to the insured's contractual undertaking).
46. See *Luxury Living, Inc v Mid-Continent Cas Co,* 2003 WL 22116202 at *18 (SD Tex, September 10, 2003) ("[T]he property damage to the Wards' home is, by definition, part of the 'products-completed operations hazard,' as Luxury no longer owns or rents the Wards' residence and the work done on the house has long been completed."); *CU Lloyd's of Texas v Main Street Homes, Inc,* 79 SW3d 687, 696–697 (Tex App, 2002) (holding that exclusion j(6) was inapplicable because the house had been completed and sold to the claimant before the claimed damage).
47. See, e.g., *Essex Ins Co v Patrick,* 2006 WL 3779812 (WD Tex, October 16, 2006).
48. *Grinnell Mutual Reinsurance Co v Lynne,* 686 NW2d 118 (ND, 2004).
49. *Id.* at 126.
50. The better rule was adopted by the Texas Supreme Court in *Lamar Homes* (discussed above) and the California Supreme Court in *Vandenberg v Superior Court,* 982 P2d 229 (Cal, 1999). At issue in *Vandenberg* was "whether a [CGL] policy that provides coverage for sums the insured is 'legally obligated to pay as damages' may cover losses arising from a breach of contract." *Id.* at 233. Construing this language according to "the meaning a layperson would ascribe to [it]," the California Supreme Court concluded that the policy provided indemnity coverage for the contract claim. A contrary rule was unacceptable because it would "[p]redicat[e] coverage upon [the] injured party's choice of remedy or the form of action sought" and thereby "permit the injured…party to determine insurance coverage." *Id.* at 245.
51. *Standard Constr Co, Inc v Maryland Cas Co,* 359 F3d 846 (CA 6, 2004).