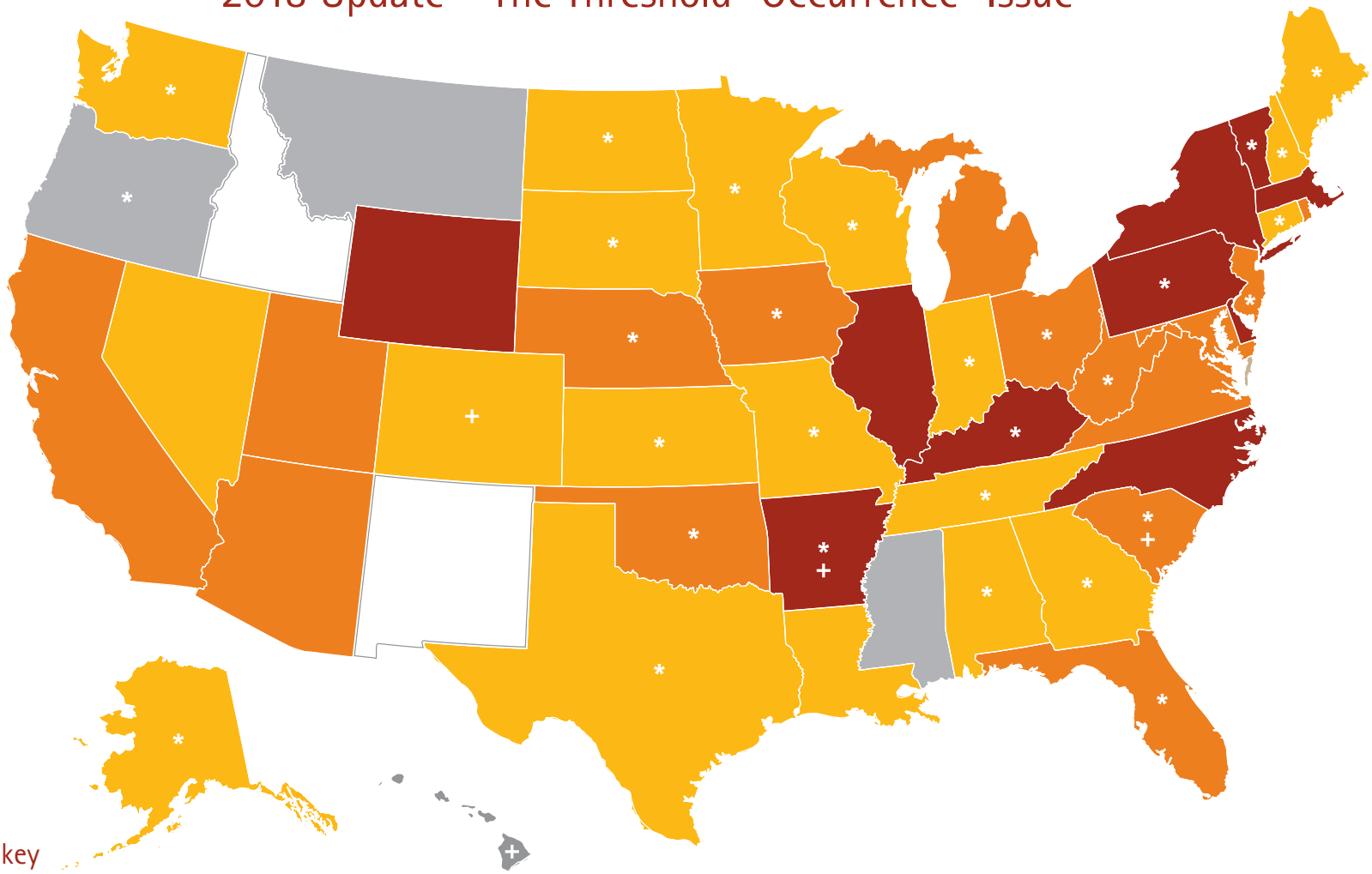
The Barnes & Thornburg Construction Law Practice Group

INSURANCE COVERAGE FOR CONSTRUCTION DEFECTS

50-STATE SURVEY - 2018 UPDATE
THE THRESHOLD "OCCURRENCE" ISSUE

Clifford J. Shapiro
Partner and Chair of the Construction Law Practice Group
Barnes & Thornburg LLP
Chicago, Illinois 60606
cshapiro@btlaw.com

2018 Update – The Threshold "Occurrence" Issue



Map color key

YELLOW	Unintentional defective construction is an "occurrence."
ORANGE	Defective construction "standing alone" is not an "occurrence," but faulty workmanship (by the insured or its subcontractors) that causes damage to property other than the defective work itself and/or other parts of the project is an "occurrence."
RED	Defective construction is not an "occurrence," and there can be no occurrence unless the defective work causes property damage to something other than the insured's entire scope of work, the building and/or the project.
GRAY	State of the law is unclear; inconsistent decisions.
WHITE	No judicial decisions to date.

* At least one state Supreme Court decision regarding the "occurrence" issue exists

\+ A state statute regarding the occurrence issue exists

COLOR KEY/NOTES

2018 Updates are indicated in the heading of each state that includes new or revised information.

The heading for each state classifies the state's law regarding the "occurrence" issue as follows:

YELLOW: Unintentional defective construction is an "occurrence."

ORANGE: Defective construction "standing alone" is not an "occurrence," but faulty workmanship (by the insured or its subcontractors) that causes damage to property other than the defective work itself *and/or* other parts of the project is an "occurrence."

RED: Defective construction is not an "occurrence," and there can be no occurrence unless the defective work causes property damage to something other than the insured's entire scope of work, the building and/or the project.

GRAY: State of the law is unclear; inconsistent decisions.

WHITE: No judicial decisions to date.

* = At least one state Supreme Court decision regarding the "occurrence" issue exists
+ = A state statute regarding the occurrence issue exists

Please note: The threshold "occurrence" determination is only one part of the larger legal analysis that is required to determine whether insurance coverage (including the duty to defend) exists for a construction defect claim. Whether insurance coverage actually exists for a particular claim will depend on additional legal analysis, including (a) whether the claim involves "property damage," (b) whether coverage is eliminated by one or more of the policy exclusions, and/or (c) whether the claim is barred by other policy terms and conditions (for example, notice requirements and/or "know loss" issues).

ALABAMA*

- Update 2016: Thankfully, the federal trial court decision reported in our 2015 update that denied coverage based on the contractual liability exclusion was reversed on appeal. In *Pennsylvania National Mutual Cas. Ins. Co. v. St. Catherine of Siena Parish*, 790 F.3d 1173 (11th Cir. 2015), the federal court of appeals held that, under Alabama law, the contractual liability exclusion bars coverage "only where the insured agreed to indemnify another party." *See Townsend Ford, Inc. v. Auto-Owners Ins. Co.*, 656 So.2d 360,364 (Ala. 1995). The decision also applies the Alabama Supreme Court's decision in *Jim Carr* to find all of the damages caused by the insured roofing contractor to be "property damage" caused by an "occurrence." The court included in coverage the cost to remove and replace certain of the defective work itself because that work was determined to be necessary to remedy other resulting property damage.

- Update 2015: In a dramatic change, the Alabama Supreme Court withdrew its September, 2013 *Jim Carr* decision on March 28, 2014, and replaced it with a unanimous decision that clarifies and expands the scope of insurance coverage available to Alabama policyholders for construction defect claims. *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So.3d 148,155-56 (Ala 2014). The new decision expressly rejects the view that the meaning of the term "occurrence" depends on the ownership, nature or location of the property damaged, finding instead that there is "no logical basis" for distinguishing between damage to the insured's work and damage to some third-party's work or property to decide whether there has been an "occurrence." The decision recognizes that the court's prior analysis could result in the CGL policy providing illusory coverage to an insured where the insured is responsible for the entire construction or complete renovation of a building. The new decision holds that an "occurrence" does *not* require property damage to real or personal property that is not part of the construction or repair process. While there must be "property damage," and not just a claim of faulty work, damage to non-faulty work within the insured's or its subcontractor's scope of work can constitute "property damage" caused by an "occurrence."

- Update 2015: Importantly, the re-issued *Jim Carr* decision also holds that the "your work" exclusion does not apply *at all* if the policyholder purchases "completed operations" coverage. According to the court, the "'your work' exclusion applies if and only if the Policy's declarations fail to show any coverage for 'products-completed operations.'" This part of the decision was critical to the outcome because the insured was a general contractor and the policy at issue did not include the standard "subcontractor exception" to the "your work" exclusion. To our knowledge, this is the only decision that has applied the "completed operations" terms of the CGL policy in this manner.

- Update 2014 (now rescinded): The Alabama Supreme Court held that there can be no "occurrence" unless there is damage to other property outside of the insured's scope of work. The court held that a general contractor has no coverage for alleged defects and resulting property damage to any part of a home the general contractor built. *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 2013 Ala. LEXIS 122, 2013 WL 5298575 (Ala. Sept. 20, 2013). The court clarified that cases involving damage to a homeowner's personal property and/or other parts of a house outside of a contractor's project could constitute an "occurrence" and possibly trigger insurance coverage. The court did not analyze policy language to distinguish between damage to the insured's project (which it held did not constitute an occurrence) and damage to other property or other parts of the

structure (which it held could constitute an occurrence). The court also did not consider the subcontractor exception to the "your work" exclusion, likely because the policy in question did not contain the subcontractor exception. (See footnote 4.) The new decision indicates that Alabama is a RED state.

- *See also Town & Country Prop., L.L.C. v. Amerisure Ins. Co.*, No. 1100009, 2012 WL 5374160 (Ala. Nov. 2, 2012). In that case, the court held that faulty construction work, standing alone, is not an occurrence, but may lead to an occurrence if the faulty work causes property damage to other property. Damage caused by a subcontractor's faulty construction to non-defective ceiling tiles was held to be property damage caused by an occurrence under the insured general contractor's CGL policy; *U. S. Fid. & Guar. Co. v. Warwick Dev. Co.*, 446 So. 2d 1021 (Ala. 1984) (faulty workmanship itself is not an occurrence); *Moss v. Champion Ins. Co.*, 442 So. 2d 26 (Ala. 1983) (occurrence existed where an insured roofing contractor's poor workmanship on plaintiff's roof resulted in damages to plaintiff's attic, interior ceiling, and some furnishings); *U.S. Fid. & Guar. Ins. Co. v. Bonitz Insulation Co.*, 424 So. 2d 569 (Ala. 1982) (negligent installation of roof held to be an occurrence during certain policy periods in the absence of evidence that the insured expected or intended roof to leak).

ALASKA*

- *Fejes v. Alaska Ins. Co.*, 984 P.2d 519 (Alaska 1999). Defective workmanship is an accidental occurrence under the CGL policy when it is not expected or intended by the insured. Unintentional defective installation of a curtain drain by subcontractor held to be an accidental occurrence under the general contractor's CGL policy.

ARIZONA

- Update 2014: *Desert Mountain Properties LP v. Liberty Mutual Ins. Co.*, 236 P.3d 421 (Ariz. App. 2010). This decision expands the holding in *Lennar* that the cost to repair defective work itself is not an insured loss under the CGL policy. The decision holds that costs incurred to remove or repair non-defective property in order to "get to" and repair defective work are also not an insured loss. (Separately, but importantly for construction attorneys, *Desert Mountain* also held (a) that costs incurred by a developer *before it was sued* to repair and remedy homes damaged by poor soil preparation were a covered loss, and (b) that damages based on a breach of contract claim are not necessarily excluded from coverage under the CGL insurance policy.)

- *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538 (Ariz. Ct. App. 2007). Affirming *U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co., Inc.*, 788 P.2d 1227 (Ariz. Ct. App. 1989). Faulty construction does not constitute an occurrence in itself, but property damage resulting from faulty work may constitute an occurrence. Here, the insured residential home developer's defective construction resulting in wall cracks, tile grout cracks and separation, baseboard separation, and sticking doors constituted an occurrence.

- *See also United States Fid. & Guaranty Corp. v. Advance Roofing & Supply Co.*, 788 P.2d 1227 (Ariz. Ct. App. 1989) (distinguishing between faulty workmanship "standing alone" and faulty workmanship that damages other property).

ARKANSAS *+

- Update 2017: Big/sad news. In *Columbia Ins. Grp., Inc. v. Cenark Project Mgmt. Servs., Inc.*, 2016 Ark. 185, 2016 WL 1732833 (Apr. 28, 2016), the Arkansas Supreme Court (in a split decision) went rogue (RED) by refusing to consider certified questions regarding the "occurrence" issue (see 2016 update below). Instead, citing another Arkansas Supreme Court decision, the majority opinion concludes that the claims at issue were for breach of contract, and that there could be no insurance coverage for these breach of contract claims under Arkansas law. *See Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc.*, 331 Ark. 211, 962 S.W.2d 735 (1998). On this basis, the court found the certified questions moot and declined to respond to them. A strong dissent argues that the form of the claim is not determinative for coverage under the CGL policy. Like many other jurisdictions, the dissent would have held that "faulty workmanship resulting in property damage to the work product of a third party (as opposed to the work or work product of the insured) constitutes an 'occurrence.'" The dissent points out that this holding would also be consistent with the Arkansas "occurrence" statute (see below) even though the statute did not apply because the claim at issue arose prior to enactment.

- Update 2017: More bad news. In *Auto-Owner's Insurance Company v. Hambuchen Construction, Inc.*, 2016 U.S. Dist. LEXIS 160364 (November 18, 2016), the federal district court held that a building general contractor's liability for defective workmanship that resulted in property damage only to the general contractor's own scope of work did not constitute an "occurrence" that could trigger coverage under a CGL policy. Because the general contractor was responsible for building the homes, the court held that property damage to any part of the homes caused by defective construction work was not an "occurrence." However, the court held that the insurer could still be obligated to provide coverage for collateral damage to other property, such as damaged sod. This analysis indicates that Arkansas is a RED state. But importantly, the CGL policy at issue in this case did *not* include the standard subcontractor work exception to the "your work exclusion." The decision therefore does not directly discuss or analyze whether property damage caused by the general contractor's subcontractors could be an "occurrence" under a policy that included this standard policy provisions.

- Update 2016: Big news! The Arkansas Supreme Court has agreed to answer the following two questions regarding insurance coverage for construction defect claims: 1. 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;" and 2. If such faulty workmanship constitutes an "occurrence," and an action is brought in contract for property damage to the work or work product of a third person, does any exclusion in the policy bar coverage for this property damage? *Columbia Ins. Group v. Cenark Project Management Services, Inc.*, No. 15-804 (Ark. Oct. 29, 2015). Importantly, the federal court that certified these questions stated that there is no controlling Arkansas Supreme Court precedent despite the case law discussed below. The certification and its acceptance also do not mention of the Arkansas statute discussed below, and it is unclear what effect, if any, it will have on the Court's decision. The law in Arkansas is now too unclear to predict, and we therefore changed Arkansas to GREY. We expect this state's law will be clarified during 2016.

- We previously considered Arkansas to be an ORANGE state based on the Arkansas Supreme Court's decision in *Essex Ins. Co. v. Holder*, 261 S.W.3d 456 (Ark. 2007) (holding that defective workmanship standing alone, resulting in damages only to the work product itself, is not an occurrence). *See also Lexicon, Inc. v. ACE Am. Ins. Co.*, 634 F.3d 423, 427 (8th Cir. 2011) (applying Essex to find damage to the work itself does not constitute an "occurrence" but faulty workmanship that damages other work to be an "occurrence"); *Cincinnati Ins. Cos. v. Collier Landholdings, LLC*, 614 F. Supp. 2d 960 (W.D. Ark. 2009) (no occurrence where water intrusion damage caused by defective construction).

- However, in 2011, Arkansas enacted Ark. Code. Ann. § 23-79-155 (2011). The statute provides, in relevant part, that CGL policies are required to contain a definition of "occurrence" that includes "[p]roperty damage … resulting from faulty workmanship." § 23-79-155(a)(2). It is unclear whether the statute is intended to include in the definition of "occurrence" damage to the insured's own work and/or damage to other non-defective work performed by the insured and/or its subcontractors. The statute states that it is not intended to restrict or limit the application of other policy exclusions.

- *J-McDaniel Construction Co., Inc. v. Mid-Continent Cas. Co.*, 761 F.3d 916 (8th Cir. 2014), holds that the Arkansas statute does not apply retroactively. 761 F.3d at 919 (citing *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.3d 39, 42 (1991)). *See also State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276, 281 (2004) (insurance policies are governed by statutes in effect at the time of the issuance of the policy and not afterwards). *J-McDaniel* applies the Arkansas Supreme Court decision in *Essex* (cited above) to find that claims against an insured general contractor for defects caused by its subcontractor during the construction of a home did not constitute an "occurrence."

CALIFORNIA (2018 UPDATE)

- Update 2018. In *Navigators Specialty Insurance Company v. Moorfield Construction, Inc.*, 6 Cal. App. 5th 1258 (Dec. 27, 2016), the court found that there was no accident and, therefore, no "occurrence" because the damage at issue was proven to have resulted from a defect that was known to the insured contractor but left uncorrected. The contractor directed its subcontractor to install floor tiles on top of a concrete slab that it knew emitted moisture vapor in excess of specifications. The court found no "occurrence" but "emphasize[d] that we need not and do not decide whether all construction defects are 'occurrences' under a standard CGL policy." The court explained that, regardless of the contractor's hope it would not cause damage, there was no accident "because it was a deliberate decision made with knowledge that the moisture vapor emission rate from the concrete slab exceeded specifications" and the resulting "damage was not produced by an additional, unexpected, independent, and unforeseen happening."

- Update 2015. This update changes our analysis of California law from "YELLOW" to "ORANGE." In *Regional Steel Corp. v. Liberty Surplus Ins. Corp.*, 226 Cal.App.4th 1377 (June 13, 2014), the California Second District Court of Appeal affirmed the trial court's entry of summary judgment in favor of Liberty Surplus Insurance Corporation ("Liberty") finding no duty to defend

Regional Steel Corporation ("Regional Steel"). Regional Steel was sued by JSM, the general contractor for the construction of an apartment complex, after Regional Steel failed to install horizontal reinforcement for a parking garage using 90 degree tie hooks instead of 135 degree seismic hooks as specified and required by the approved shop drawings and the building code. As a result of the incorrect installation, JSM was required by the City of Los Angeles to make repairs that required, among other things, opening concrete walls and installing reinforcement. Liberty denied coverage contending that the JSM cross-complaint against Regional Steel did not allege property damage, but rather purely economic losses caused by the need to re-open and remedy the tie hook problem. In addition, Liberty took the position that the tie hook problem did not constitute an "occurrence" and was otherwise excluded by the "impaired property" exclusion.

While the decision is based primarily on a finding of no "property damage," the analysis is very similar to that used in the determination of the "occurrence" issue found in other decisions. In affirming the trial court's grant of summary judgment to the insurance company, the Court of Appeal first recognized that California law is in conflict on whether construction defects that are incorporated into a whole properly constitute property damage for purposes of a commercial general liability (CGL) policy. One line of cases denies coverage for the cost of removing and replacing defective work or material, and considers such costs as economic loss, not physical injury to the property. Another line of cases suggests that incorporation of a defective part into a whole construction project constitutes property damage within the meaning of a CGL policy. The court resolved this conflict against coverage as follows:

"Here, however, *Armstrong and Shade* are inapposite because they involved contamination by hazardous materials that were incorporated into a whole, and did not involve the incorporation of defective workmanship in to a construction project. California cases consistently hold that coverage does not exist where the only property 'damage' is the defective construction, and damage to *other* property has not occurred. Under that thesis, there is no coverage for Regional's use of defective tie hooks. Indeed, Regional's attempts to bring the allegedly cracking concrete floors within the definition of 'other' property in order to obtain coverage fail because JSM made no allegations that Regional's installation of the tie hooks, rather than Webcor's pouring of the concrete, was the cause of out-of-level floors. The only allegations JSM made against Regional are that it failed to install the proper tie hooks, and its failure to do so necessitated demolition and repair of the affected areas – allegations squarely within the ambit of the rule of [*F&H Construction v. ITT Hartford Ins. Co.* (2004) 118 Cal.App.4th 364] that this type of repair work is not covered under a CGL policy." *(Editor's note: F&H Construction* held that to bring defective construction within the insuring clause, the "damage" must be damage to properly other than the property upon which the insured had worked.) In addition, the Court of Appeal found that the impaired property exclusion in the Liberty policy applied to bar coverage for the claim, including the coverage for loss of use sought by Regional Steel. This is one of the few decisions that discusses and applies this exclusion.

- *See also PMA Capital Ins. Co. v. Am. Safety Indem. Co.*, 695 F. Supp. 2d 1124 (E.D. Cal. 2010) (negligent work can be an occurrence but no coverage because faulty work completed before effective date of policy); *McGranahan v. Insurance Corp. of NY*, 544 F. Supp. 2d 1052, 1057–59 (E.D. Cal. 2008) (claim against insured subcontractor arising out of mold-contaminated sheet rock potentially an occurrence); *Legacy Partners, Inc. v. Clarendon Am. Ins. Co.*, 2008 WL 4482298, *2 (S.D. Cal. 2008).

COLORADO + (2018 UPDATE)

- Update 2018: We now have a case applying the Colorado "occurrence" statute. In *Peerless Indem. Ins. Co. v. Colclasure*, 2017 WL 633046 (D. Colo. Feb. 16, 2017), the court determined that Colo. Rev. Stat. 13-20-808 (2010) was applicable and resolved the dispute in favor of coverage. The court explained that the statute is not a guarantee of coverage, "but operates to shift the burden of proof away from the insured specifically as to the meaning of 'accident,' which falls within the Policy's definition of 'occurrence'; and to create a judicial presumption that an 'accident' (and therefore an 'occurrence') has been shown, unless or until a Policy exclusion eliminates coverage for that type of occurrence." In this case, because neither the contractor nor subcontractor intended or expected the damage, the court found that there was an accidental "occurrence." The court also held that the "your work" exclusion only excluded coverage for damage to the policyholder's own defective roofing work, and did not exclude consequential damages to portions of the property that the policyholder did not work on.

- Colo. Rev. Stat. 13-20-808 (2010). Colorado was the first state to pass legislation addressing whether defective construction is an occurrence. Among other things, the statute requires courts to "presume" that property damage to a contractor's own work is an "accident," and thus an occurrence, unless the insured intended the property damage to occur when the work that was performed. Colorado is therefore now a strong YELLOW state.

- However, the statute has been held to apply prospectively only, and Colorado common law therefore continues to apply to earlier issued policies. *Colorado Pool Sys., Inc. v. Scottsdale Ins. Co.*, No. 10CA2638, 2012 WL 5265981 (statute does not apply retroactively; rip and tear damage to non-defective third-party work held to be covered under existing Colorado common law).

- Prior Colorado law held that damage to third-party property was required in order for defective construction work to be an occurrence. Colorado therefore remains an ORANGE state for policies issued before the effective date of the statute, May 21, 2010. *See, e.g., Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011) (occurrence encompasses unforeseeable or unanticipated damage to non-defective property arising from faulty or poor workmanship).

CONNECTICUT*

- Update 2014: In *Capstone Building Corp. v. American Motorists Ins. Co.*, 308 Conn. 760, 67 A.3d 961 (Conn. 2013), the Connecticut Supreme Court, in a case of first impression, held that defective construction work can be an "occurrence" under the CGL policy, but emphasized that this is just the first step in the determining whether insurance coverage exists in a construction defect case. The decision contains a comprehensive discussion of the various parts of the analysis that are required to fully analyze whether there is insurance coverage for a construction defect claim, and is summarized below.

- *Capstone* involved the construction of a student housing complex at the University of Connecticut. Defects in the construction were discovered three years after completion, and included water infiltration and mold damage beyond the defective work itself, and elevated levels of carbon monoxide due to insufficient draft of the exhaust from water heaters. UConn sued the project

developer and general contractor who were insured under an owner controlled insurance program ("OCIP") that included general liability insurance coverage. The claims were settled, and the project developer and general contractor then sued the insurance carrier that had denied coverage for the claims.

- With respect to the "occurrence" issue, the court held that negligent work that is unintentional from the standpoint of the insured can constitute an "occurrence" under the CGL policy. It concluded that "defective workmanship can give rise to an 'occurrence' under the insuring agreement." The court also refused to distinguish between tort claims and breach of contract claims for purposes of the coverage grant "occurrence" analysis. Connecticut is therefore now clearly a YELLOW state regarding this threshold issue.

- With respect to "property damage," the court rejected the analysis found in other cases that distinguishes between damage to the contractor's own work and the work of others. The court observed that any such distinction is to be found in the policy exclusions, which are applied separately when there is a proper analysis of the initial coverage grant. The court therefore held that the coverage grant in the CGL policy covers damage caused by defective work, including property damage to the insured's own work and consequential costs for the necessary repairs and remediation. However, the court also concluded that defective work, without more, is not "property damage," and the CGL policy therefore does not cover the cover the cost to repair the defective work itself.

- The court then specifically determined that alleged water and mold damage beyond the defective work itself constituted "property damage," but that neither the alleged release of carbon monoxide nor the alleged defects in building code violations, defective construction and poor quality control could constitute "property damage" unless they resulted in damage to other, non-defective property.

- Finally, the decision evaluated several of the construction-specific policy exclusions. Most importantly, the court held that the "your work" exclusion applied to eliminate coverage for any property damage arising out of the insureds' own work, but did not apply to eliminate coverage for property damage arising out of the work of its subcontractors.

- After application of the policy exclusions, the court concluded as follows:
  - Defective construction that causes damage to non-defective property may constitute an "occurrence;"
  - But, if the property damage is the result of the insured's own work, there is no coverage; and
  - Property damage caused by a subcontractor's defective work may be covered under the subcontractor exception to the "your work" exclusion.

- Similarly, a few months before *Capstone*, the Second Circuit reversed its prior decision in *Jakobson Shipyard, Inc. v. Aetna Cas. & Surety Co.*, 961 F.2d 387 (2d Cir. 1992), to hold that the CGL policy "unmistakably include defects in the insured's own work

within the category of defects." The court therefore held that cracks in a pool installed by the insured contractor were an "occurrence," and remanded the case to the lower court to determine whether the "your work" subcontractor exclusion applied.

DELAWARE

- *Vari Builders, Inc. v. U.S. Fid. & Guar. Co.*, 523 A.2d 549 (Del. Super. Ct. 1986). Defective workmanship that causes damage to property other than the insured's own construction work can be an occurrence. However, Delaware courts do not appear willing to find the existence of an occurrence unless the resulting property damage is completely separate from the entire construction project. Accordingly, we classify Delaware as a RED state. Here, the court found no occurrence under the CGL policy when an insured general contractor failed to construct a home in a workmanlike manner.

- *Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co.*, 137 F. Supp. 2d 517 (D. Del. 2001). Damage to other property is required for there to be an occurrence. Here, defective installation of home waterproofing materials was not an occurrence because the damage to the home clearly was within the control of the insured general contractor and was not a fortuitous circumstance.

- *But see*, *AE-Newark Assocs., L. P. v. CNA Ins. Cos.*, No. CIV. A 00-C-05-186JEB, 2001 WL 1198930 (Del. Super. Ct 2001) (unpublished). The CGL policy exclusion for property damage to your work is not triggered where the property damage is caused by the work preformed of a subcontractor. Here, property damage resulting from a subcontractor's faulty roof installation constitutes an occurrence within the meaning of the insured general contractor's insurance policy.

FLORIDA*

- 2016 Update: We are changing Florida to an Orange state because recent federal decisions interpreting Florida law hold that there can be an "occurrence" if a subcontractor's defective work causes damage to something other than its own defective work. This is how the Florida courts are interpreting the Florida Supreme Court's decisions in *J.S.U.B.* and *Pozzi*. In addition, a recent federal decision holds that coverage can exist to repair the faulty work of an insured's subcontractors where in order to repair resulting damage to other non-defective work it is also necessary to repair the subcontractor's defective work.

  The federal court decisions include *Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240 (11th Cir. 2015) and *Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012). In *Amerisure*, the court held that a general contractor did not have coverage where its subcontractor defectively installed certain roof tiles that caused the entire roof to need to be replaced. Because a single sub-contractor built the roof, the entire roof was the relevant component for distinguishing between defective work and damage caused by defective work. The subcontractor did not cause damage to property other than the roof, so there was no coverage. *See also Core Construction Services Southeast v. Crum & Forster Specialty Ins. Co.*, 2015 U.S. Dist. Lexis 163695 (S.D. Fla. Dec. 7, 2015) (no coverage for general contractor where complaint only sought recovery for the costs to repair or replace defectively installed roofs, and did not allege damage to other property). This decision should be contrasted with *Carithers*. That decision first holds that policyholders bear the burden of proving that their subcontractors caused damage to property other than

own work. The decision then applies the analysis of *Amerisure* to find that only certain claims were covered because only certain claims were supported by evidence that a subcontractor's defective work caused damage to the work of another contractor.

More recently, in *Pavarini Construction Company v. ACE American Ins. Co.*, 2015 WL 6555434 (S.D. Fla. Oct. 29, 2015), a federal court found coverage to exist for a general contractor that was sued for defective work performed by subcontractors that caused damage to otherwise non-defective completed product. In addition, this decision finds coverage for the cost to repair *both* the subcontractor's defective work itself and the resulting property damage. The decision holds that where the faulty workmanship itself must be repaired in order to repair the resulting damage to other property, coverage extends to the cost to repair both the defective work and non-defective work that was damaged.

- *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007). Defective work performed by a subcontractor that causes damage to the insured contractor's project and is not expected or intended from the standpoint of the general contractor can constitute property damage caused by an occurrence. In this case, a subcontractor's defective soil preparation was not expected or intended by the general contractor and, thus, was an occurrence under the CGL policy. The case also holds that a subcontractor's faulty workmanship that results in damage to another contractor's work can constitute an occurrence. *See also Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008) (defective installation of windows, which builder did not intend or expect, was an occurrence).

GEORGIA*

- Update 2014: In *Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. 746 S.E.2d 587*, 2013 WL 3481555 (Ga. 2013), the Georgia Supreme Court expanded its 2011 decision in *American Empire* (see below) to hold that property damage to an insured's *own* work can constitute an "occurrence." The court held that an "occurrence" does *not* require damage to the property or work of someone other than the insured. The court also held that an "occurrence" can arise out of a breach of contract or warranty claim.

- The *Taylor Morrison* decision also holds that the "property damage" required for coverage may be found "only when the faulty workmanship causes physical injury to, or the loss of use of, nondefective property or work." Accordingly, even though Georgia is clearly a YELLOW state for the "occurrence" issue, coverage will depend on there being resulting "property damage" to something other than the defective work itself in order for coverage potentially to apply.

- *See also American Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.*, 707 S.E.2d 369 (Ga. 2011). A deliberate act, performed negligently, is an accidental occurrence within the meaning of a CGL policy if the effect is not the intended or expected result. Accordingly, a general contractor's claim against an insured subcontractor for negligent plumbing work that damaged surrounding properties was held to constitute an "occurrence" within the meaning of the subcontractor's CGL policy.

HAWAII+

- Haw. Rev. Stat. § 431:1-217. This statute provides that "the term 'occurrence' shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." The statute does not declare what the "the law" is now or what "the law" was at any time in the past. However, the preamble explains that the appellate court decision in *Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67 (Hawaii 2010) "invalidates insurance coverage that was understood to exist and that was already paid for by construction professionals," and that the purpose of the statute is to restore the coverage that was denied. The preamble to the legislation states: "Prior to the *Group Builders* decision ... construction professionals entered into and paid for insurance contracts under the reasonable, good-faith understanding that bodily injury and property damage resulting from construction defects would be covered under the insurance policy. It was on that premise that general liability insurance was purchased."

- It appears that the legislature's intent was to allow insurers to deny coverage under policies issued after May 19, 2010 to the extent permitted by the courts based on *Group Builders* and whatever further judicial decisions may follow, but to require application of the more favorable judicial interpretations of coverage for construction defects that the Hawaii legislature believes existed before that time. In other words, the Hawaii statute appears to be an attempt to preserve more favorable treatment of coverage for construction defect claims for projects currently underway which were insured under policies issued before *Group Builders* was decided in 2010.

- Unfortunately, the statute does not state what the law should or would be after its May 19, 2010 enactment. The statute still leaves it to the courts to interpret the applicable law with respect to any particular claim (i.e., the law that existed at the time the policy was issued). Thus, in a coverage dispute under a policy issued after the May 19, 2010 enactment date, a court could still hold that *Group Builders* remains the applicable law because no further Hawaii decisions have been issued to change the law. While such a holding could be seen as finding the statute meaningless, this may be the regrettable result of the Hawaii legislature's failure to state whether it intended the statute to change the existing law regarding coverage for faulty construction. Hawaii is therefore a GREY state.

- In two cases, the United States District Court for the District of Hawaii held that the statute has no effect on policies that were issued before the statute was enacted. *See Illinois Nat'l Ins. Co. v. Nordic PCL Construction, Inc.,* 2012 WL 1492399 (D. Haw. 2012); *State Farm Fire & Cas. Co. v. Vogelgesang,* 834 F.Supp.2d 1026, 1036–37 (D. Haw. 2011).

- Update 2014: According to a December 4, 2013 article authored by Tred R. Eyerly titled *Construction Defect Coverage in Hawaii – A Window Into The Nationwide Debate*, Hawaii law remains uncertain at best. Among other things, Mr. Eyerly observes as follows:

- The statute discussed above provides that "the term 'occurrence' shall be construed in accordance with the law as it existed at the time that the insurance policy was issued." Nevertheless, since the enactment of Act 83, certain decisions from the federal

district court for the District of Hawaii have not relied on or analyzed relevant decisions from the Hawaii supreme court despite the state legislative directive. These cases include *Evanston Insurance Co. v. Nagano*, 891 F. Supp. 2d 1179 (D. Haw. 2012), *Illinois National Insurance Co. v. Nordic PCL Construction*, 870 F. Supp. 2d 1015 (D. Haw. 2012), and *State Farm Fire & Casualty Co. v. Vogelgesang*, 834 F. Supp. 2d 1026 (D. Haw. 2011). These decisions all find no coverage for construction defect claims without analysis of Hawaii Supreme Court case decisions issued before the *Group Builders* decision.

- A different approach was taken in a fourth federal court case, where the district court judge rejected the insurer's argument "that *Group Builders* changed nothing about Hawaii insurance law." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Simpson Mfg. Co.*, 829 F. Supp. 2d 914 (D. Haw. 2011). Instead, the court found coverage to exist, noting that "the Hawaii legislature has specifically denounced *Group Builders* in very strong terms and has sought to eliminate the uncertainty caused by that decision. . . . The bill's excoriation of *Group Builder's* goes on for several pages."

- Not bound by the Ninth Circuit's prediction in *Burlington*, at least three state trial court judges have determined that the statute renders *Group Builders* nonbinding. S*ee Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Sunset Heights Haw., LLC*, No. 10-1-2184-10 (Haw. Cir. Ct. Oct. 24, 2012); *Coastal Constr. Co. v. N. Am. Specialty*, No. 11-1-0417-3 (Haw. Cir. Ct.); *Pinnacle Honolulu, LLC v. Am. Int'l Specialty Lines Ins. Co.*, No. 12-1-0526 (Haw. Cir. Ct. Dec. 4, 2012) ("the legislature instituted [Act 83] in 2011 because public policy favors the insurer's coverage of property damage arising from construction defects in cases where construction professionals purchase general liability insurance").

- In short, the argument that the Hawaii statute does not undermine the holding in *Group Builders* has been rejected by the federal district court in *Simpson Manufacturing Co.* and three state court judges. According to Mr. Eyerly, these decisions properly considered the pertinent Hawaii supreme court decisions addressing coverage for property damage caused by faulty workmanship, followed the dictates of the statute by honoring the intention of the parties at the time of issuance of the policy, and reached a conclusion that directly contradicts *Group Builders*. However, the current federal and state cases provide contradictory analysis, and decision from the Hawaii Supreme Court will be required to provide clarity.

IDAHO

- Idaho courts have not yet addressed the issue of insurance coverage for defective construction.

ILLINOIS (2018 UPDATE)

- Update 2018: Still a mess. Two decisions issued by the Seventh Circuit during 2017 try to make sense of Illinois law but, unfortunately, only create more bad law. *Westfield Insurance Company v. National Decorating Service, Inc.*, 2017 WL 2979654 (7th Cir. July 13, 2017); *Allied Prop. & Cas. Ins. Co. v. Metro North Condominium Assoc.*, 2017 U.S. App. LEXIS 4107 (7th Cir. Mar. 8, 2017). While the *Westfield* decision finds potential coverage for a subcontractor whose defective work causes damage to other parts of a building or project, we continue to include Illinois as a RED state.

  As a reminder, Illinois decisions generally hold (incorrectly) that there can be no "occurrence" unless the defective work causes property damage to something other than the "project," "building" or "structure." Most, but not all, of the decisions address coverage for insured general contractors. Among other problems, this has caused confusion and uncertainty when the insured was a subcontractor whose defective work caused damage to other, non-defective, parts of a project or building.

  One of the recent decisions issued by the Seventh Circuit addressed this issue head on. The decision holds that there can be an "occurrence" and potential coverage (and, hence, a duty to defend) under a subcontractor's own CGL insurance policy where the claims include allegations that the subcontractor performed defective work that damaged property outside of the subcontractor's own scope of work. *Westfield Insurance Company v. National Decorating Service, Inc.*, 2017 WL 2979654 (7th Cir. July 13, 2017) ("Westfield")

  In *Westfield*, a subcontractor (National Decorating) was hired by the general contractor to coat a newly constructed, 24-story Chicago high-rise condominium building's exterior with a waterproof sealant. In the underlying lawsuit, the condominium association sued the general contractor and National Decorating alleging that National Decorating's application of exterior sealant was defective and caused property damage to the building including water damage to the interior.

  Importantly, the *Westfield* decision rejects the notion that inadvertent faulty workmanship cannot be an "accident" and, therefore is not an "occurrence." The decision holds that negligently performed and defective construction work can give rise to an "occurrence" under the standard CGL policy. Because the underlying complaint alleged National Decorating was negligent, the court found there was an "occurrence." The decision also rejects the argument that there can be no "occurrence" under a subcontractor's CGL policy unless the claim involves property damage to something other than the entire building or project. Forced to apply Illinois' incorrect legal analysis, *Westfield* reaches the only logical result by finding that there can be coverage for a subcontractor under the subcontractor's own insurance policy where its defective work damages property outside of its own scope of work. Specifically, the Seventh Circuit determined that, under Illinois law, there can be "property damage" caused by an "occurrence" if the alleged damage is outside the scope of the named insured's work, which in this case was the scope of work of National Decorating, the painting subcontractor. The court explained that "[i]t would be illogical to conclude that the scope of the project for which National Decorating contracted was the entire 200 North Building."

Because the underlying complaint alleged damage beyond National Decorating's scope of work, the court found that Westfield had a duty to defend National Decorating as the named insured. On similar grounds, the decision holds that a general contractor may have coverage under its subcontractor's insurance policy as an additional insured where the general contractor is sued for defective work performed by its subcontractor that caused damage to property outside of the subcontractor's scope of work.

Westfield is therefore good news for insured Illinois subcontractors who face claims from owners or general contractors alleging that the subcontractors performed defective work that caused property damage to something beyond their scope of work. It is also good news for general contractors who are additional insureds on their subcontractors' insurance policies who face claims from owners or others that allege that the general contractor's subcontractors performed defective work that caused property damage outside of the subcontractors' scope of work. If the Seventh Circuit's analysis of Illinois law is applied, these policyholders will be entitled to receive a defense at the insurance carrier's expense.

But unfortunately, much of the analysis in *Westfield* is required by the incorrect legal analysis that has become entrenched in Illinois law which is contrary to the actual policy intent. Illinois law continues to turn the actual policy intent on its head by looking at the named insured's scope of work and nature of the damages that are alleged to determine, in the first instance, whether there was an accidental "occurrence." Even when it is undisputed that the property damage was caused by an insured general contractor's subcontractors, these cases hold that there can be no "occurrence" unless the claims allege property damage to something outside the general contractor's scope of work. This incorrectly collapses what should be a separate analysis of the coverage grant and the "your work" exclusion into a single initial determination of coverage under the CGL policy. Under a correct coverage analysis, the first step would be to determine if there is "property damage" caused by an "occurrence" under the coverage grant, and then a separate second analysis would be used to determine if any of the applicable construction-specific policy exclusions applied to bar coverage, including the "your work" exclusion and the exception to this exclusion for property damage caused by the work of a subcontractor.

Based on their incorrect analysis, Illinois cases continue to hold that there can never be an accidental "occurrence" if the named insured is a general contractor and the alleged property damage is to any part of the entire building or project. Even where it is undisputed that the property damage was caused by a general contractor's subcontractor, these cases hold that there can be no "occurrence" or coverage for the general contractor because the property damage was to something within the general contractor's scope of work. There is no basis in the CGL policy for this kind of analysis, and it is contrary to the actual policy intent.

Under a correct legal analysis, *Westfield* would have recognized that there is an accidental "occurrence" under the CGL policy coverage grant when a claim alleges that a general contractor and/or a subcontractor caused property damage by accidentally (not intentionally) performing faulty construction work. The analysis would then have focused on whether the alleged damage to other work was covered under the applicable policy exclusions in the subcontractor's policy. (The analysis would *not* have

examined the kind of property damage to decide the threshold issues of whether the claim alleged an "occurrence.") Specifically, a correct legal analysis would have examined the alleged damage to other property to determine whether the "your work" exclusion applied to bar coverage. The correct conclusion would have been that the "your work" exclusion applied to bar coverage for the repair or replacement of the subcontractor's own faulty work, in part because the "subcontractor exception" to the exclusion would not apply where the named insured subcontractor itself performed the defective work. However, the "your work" exclusion would not apply to bar coverage for the property damage that the named insured subcontractor caused to *other* parts of the project that were outside its own scope of work. Thus, the correct analysis would have found that the subcontractor had potential coverage for at least some part of the claim, and that the insurance carrier had a duty to defend.

- Update 2018 (continued): In the other decision issued by the Seventh Circuit during 2017, the court affirmed a finding of no coverage in the *Allied Property* case (discussed below), holding that there could be no coverage even for the alleged resulting property damage to the condominiums caused by the policyholder's defective windows. *Allied Prop. & Cas. Ins. Co. v. Metro North Condominium Assoc.*, 2017 U.S. App. LEXIS 4107 (7th Cir. Mar. 8, 2017). The court reached this conclusion because (a) the only claim at issue was based on the implied warranty of habitability, and there can be no recovery for resulting property damage based on such a claim, (b) the liability for resulting property damage was not covered because it arose out of the contractual settlement agreement, and (c) the condominium association board did not have standing to assert claims on behalf of the unit owners for damage to their individual units. The decision does not address the lower court's determination that coverage does not depend on whether the policyholder is a general contractor or a subcontractor.

- Update 2018 (continued): We are also now aware of an unpublished 2015 appellate court decision that affirmed a trial court's decision to grant judgment on the pleadings in favor of an insured subcontractor and an insured window supplier where the underlying complaint against them by a condominium association included alleged "resultant damage." The decision holds that it is "well-recognized" under Illinois law that "damage to something other than the project itself *does* constitute an 'occurrence' under the CGL policy." *West Bend Mut. Ins. Co. v. Pulte Home Corp.*, 2015 IL App (1st) 140355 (emphasis in original), *citing, Milwaukee Mutual Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524, 532 (Ill. App. 2011).

  One can only hope that the Illinois Supreme Court will address and correct the "occurrence" analysis in Illinois in the near future, or that perhaps Illinois will enact appropriate legislation to correct this problem (as some other states have done). For now, it remains to be seen whether or to what extent the courts in Illinois will follow the *Westfield* decision with respect to coverage under subcontractor policies in similar circumstances.

- Update 2017: Still more bad law, and now more confusion about the scope of coverage for other property damage caused by the work of subcontractors. Without citing or discussing the *Westfield* decision (see below), an Illinois federal judge ruled that resulting water property damage to a building caused by allegedly defective windows installed by an insured subcontractor is not an accidental "occurrence" under Illinois law because it is the "natural and ordinary" consequence of the windows being

defective. The decision refused to apply *Milwaukee Mutual Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524, 532 (Ill. App. 2011) which held that an insurer had a duty to defend a subcontractor that had improperly sealed windows in a condominium building causing water damage to the common elements. Instead, the decision holds that resulting damage to something other than the building (for example, an antique rug) would constitute an "occurrence." *Allied Property & Cas. Ins. Co. v. Metro North Condominium Association*, 2016 WL 1270480 (March 31, 2016). The decision is on appeal to the Seventh Circuit.

- Update 2016: Illinois cases continue to analyze the "occurrence" issue incorrectly (as do the decisions in several other states). A federal judge in Illinois has now acknowledged that this creates a "quandary" when the incorrect analysis must be applied to cases brought in federal court. *Auto Owners Ins. Co. v. John Hagler*, 2015 WL 3862713 at *4 (S.D. Illinois, June 22, 2015) (Judge Gilbert). This situation has also led to the creation of still more bad law. Illinois decisions generally hold (incorrectly) that there can be no "occurrence" unless the defective work causes property damage to something other than the "project," "building" or "structure." Most, but not all, of these decisions address coverage for general contractors, and this created uncertainty in Illinois as to whether there can be an "occurrence" when a subcontractor's defective work causes damage to non-defective parts of the project that are outside the subcontractor's own scope of work. A recent federal trial court decision resolves this uncertainty in favor of coverage. The decision holds that there is an "occurrence" and potential coverage (and, hence, a duty to defend) when claims against a subcontractor include allegations of property damage outside the subcontractor's own scope of work. *Westfield Ins. Co. v. National Decorating Service, Inc.*, 2015 WL 7568444 (Nov. 25, 2015). While this decision is good news for subcontractors seeking coverage under Illinois law, it unfortunately extends and entrenches the incorrect coverage analysis in Illinois.

- Update 2015: In *Nautilus Ins. Co. v. Board of Directors of Regal Lofts Condominium Ass'n*, 2014 U.S. App. LEXIS 16250 (7th Cir. August 21, 2014), the court held that there was no occurrence under Illinois law unless there was damage to something other than the project itself. The court held that the underlying complaint against the project developer alleged only damage to the building itself. The court also held that any alleged damage to personal property was not covered under the "products-completed operations hazard" exclusion. This latter holding potentially creates a significant additional coverage problem for policyholders in Illinois.

- *Lagestee-Mulder Inc. v. Consol. Ins. Co.*, 682 F.3d 1054 (7th Cir. 2012). Where the underlying suit alleges damage to the construction project itself because of a construction defect, there is no coverage. However, where the complaint alleges that a construction defect damaged something other than the project, coverage exists. Here, plaintiff failed to allege damages to property other than the construction project itself, and therefore, the duty to defend was not triggered and there was no coverage under the CGL policy. *Compare with, Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524 (Ill. App. Ct. 2011) (finding an occurrence to exist based on allegations of damage to condominium owners' personal property including the unit owners' furniture, clothing and antiques).

- *Stoneridge Dev. Co. v. Essex Ins. Co.*, 888 N.E.2d 633 (Ill. App. Ct. 2008). Where the result of faulty workmanship is the rational and probable consequence of the act, it is not an accident. As a result, cracks in a house as well as its foundation were not caused by occurrence or property damage within the meaning of builder's CGL policy. *See CMK Development Corp. v. West Bend Mutual Insurance Co.*, 917 N.E.2d 1155 (1st Dist. 2009). *See also, Cincinnati Ins. Co. v. Taylor-Morley, Inc.*, 556 F. Supp. 2d 908 (S.D. Ill. 2008) (construction defects are the natural and ordinary consequences of improper construction techniques and are not sudden, unexpected, and disastrous results caused by an accident); *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684 (7th Cir. 2008) (the failure to construct home according to specifications does not constitute property damage caused by an occurrence); *State Farm Fire & Casualty Co. v. Tillerson* 777 N.E.2d 986 (5th Dist. 2002) (the natural and ordinary consequences of damages resulting from defective construction work does not cause an occurrence under a CGL policy).

- *But see: Country Mut. Ins. Co. v. Carr*, 867 N.E.2d 1157 (Ill. App. 2007). Faulty workmanship is an accident, and thus an occurrence when the contractor does not intend or expect the result. The alleged damage to basement walls caused by a subcontractor's negligent inappropriate backfill and grade work and negligent use of earth moving equipment was an accidental occurrence within the meaning of the general contractor's CGL policy. (Other IL decisions distinguish and/or criticize this case.)

INDIANA* (2018 UPDATE)

- Update 2018: *Celina Mutual Ins. Co. v. Gallas*, 2017 WL 3747214 (N.D. Ind. Jan. 30, 2017) (decision observes that faulty workmanship can constitute an accident and thus be an "occurrence" when caused unintentionally); *Gen. Cas. Ins. v. Compton Const. Co., Inc.*, 2011 WL 939245 (N.D. Ind. Mar. 16, 2011) (decision explains that the Indiana Supreme Court clarified in *Sheehan* that CGL polices generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence").

- *Sheehan Constr. Co. v. Continental Cas. Co.*, 935 N.E.2d 160 (Ind. 2010). In this landmark decision, the Indiana Supreme Court revises prior law to find faulty workmanship is an occurrence if it is unexpected and not foreseeable from the viewpoint of the insured. Here, the insured contractor's CGL policy could provide coverage for the subcontractor's faulty workmanship that caused water penetration and deterioration and decay of floors and other water damage to the interior of constructed homes. The decision specifically holds that the existence of the "your work" exclusion and the exception for damage caused by the work of subcontractors indicates that the CGL policy is intended to include construction defects as an occurrence. (The decision cites and quotes articles authored by Clifford Shapiro.)

IOWA*

- Update 2017: Big news! The Iowa Supreme Court confirmed that Iowa is an ORANGE state. *National Surety Corp. v. Westlake Investments, LLC, 880 N.W.2d 724 (Iowa 2016),* affirms the *National Surety* decision discussed in our 2016 update (see below) to change and clarify Iowa law regarding the "occurrence" issue. The 4-3 decision discusses in detail the history and evolution of the standard CGL policy, including the 1986 addition of the subcontractor exception to the "your work" exclusion. The decision holds that "defective workmanship by an insured's subcontractor may constitute an occurrence under the modern standard-form CGL policy containing a subcontractor exception to the 'your work' exclusion." While coverage now potentially exists in Iowa for damages caused by defective work performed by a policyholder's subcontractors, it remains unclear whether an insured subcontractor would itself have coverage for the cost to repair damage to property other than its own work.

- Update 2016: Our prediction that Iowa could evolve from a RED state into an ORANGE state has come true. In *National Surety Corp. v. Westlake Investments, LLC,* 2015 Iowa App. LEXIS 982 (October 28, 2015), the Iowa Court of Appeals distinguishes the Iowa Supreme Court's decision in *Pursell* to hold that property damage to something other than the insured's own defective work can constitute an "occurrence." The decision observes that *Pursell* "did not address whether a liability policy provides coverage where faulty workmanship causes property damage to something other than the insured's work product as the result of an unintended and unexpected event." The decision then finds that the 1986 revisions to the policy forms require the conclusion that "faulty workmanship of a subcontractor can be an 'occurrence' covered by a CGL policy." In part on this basis, the decision affirms a $12.7 million jury verdict against an excess insurance carrier held liable for the full amount of a consent judgment obtained by the project owner in connection with settlement of the underlying construction claims.

- Update 2016: *National Surety Corp. v. Westlake Investments, LLC* also discusses and distinguishes several other post-*Pursell* Iowa coverage decisions including: *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co.*, 246 F.3d 1132 (8th Cir. 2001); *Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161 (8th Cir. 2011); *W.C. Stewart Constr., Inc. v. Cincinnati Ins. Co.*, No. 08-0824, 2009 WL 928871 (Iowa Ct. App. 2009); *Cont'l W. Ins. Co. v. Jerry's Homes, Inc.*, No. 04-1890, 2006 WL 228917 (Iowa Ct. App. 2006).

- *Pursell Construction, Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999) holds that "defective workmanship standing alone (that is, resulting in damages only to the insured's work product itself) is not an occurrence under a CGL policy." In *Pursell*, the insured contractor was hired to build basements, footings, block works, sidewalks, and driveways for two houses. The construction sites were in a floodplain, and the city ordinance required the lowest level of the two houses to be elevated above the floodplain. However, the lowest level of each house fell below the floodplain and thus violated the ordinance. As a result, the developer could not legally occupy, rent, or sell the houses, and repairs were required to elevate the homes.

- The decision holds that there was no "occurrence" because the claims and repair work all arose out of the defective work performed by the insured contractor. The decision also implies, but does not hold, that there can be no "occurrence" unless there

is property damage outside of the insured's scope of work. If that is the case, then an insured general contractor with responsibility for the entire project would have no coverage unless there was property damage outside of the entire project. For this reason, we currently list Iowa as a RED state. *See also Cont'l W. Ins. Co. v. Oaks Dev. Co.*, 786 N.W.2d 519 (Iowa Ct. App. 2010) (defective roof claims for work performed by the insured's subcontractor did not fall within coverage afforded by the CGL policy).

- It remains possible that Iowa will develop as an ORANGE state by holding that property damage to something other than the insured's own defective work can constitute an "occurrence" even if the damage is to insured's own scope of work.

KANSAS*

- *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (Kan. 2006). Construction defects constitute an occurrence and coverage exists if the defects cause property damage not otherwise excluded from coverage under the CGL policy. Here, the claims alleged an occurrence because faulty materials and workmanship allegedly caused unforeseen and unintended damage to the home constructed by the insured.

- *See also, Fid. & Dep. Co. of Md. v. Hartford Cas. Ins. Co.*, 189 F. Supp. 2d 1212 (D. Kan. 2002). Damage allegedly caused by faulty workmanship held to constitute an occurrence because the insured did not intend for the damage to occur.

KENTUCKY* (2018 – Ketucky Sup. Ct. Confirms State Is Wacky Red)

- Update 2018: The Kentucky Supreme Court doubled down on its wrong analysis of the "occurrence" issue in *Martin/Elias Properties LLC v. Acuity*, 544 S.W.3d 639 (2018). The new decision refuses to find the existence of an "occurrence" where defective basement work performed by a subcontractor caused property damage "throughout the entire property, making it structurally unsound." The decision applies an extreme "fortuity" analysis that is not based on the actual CGL policy terms to reach this conclusion. The decision holds that "the legal analysis used to determine whether something constitutes an *accident* for issues of CGL coverage is the doctrine of fortuity, which encompasses both intent and control." The decision then holds that to determine whether an event constitutes an accident Kentucky courts must analyze (1) whether the insured intended the event to occur; and 2) whether the event was a "chance event" beyond the control of the insured. "If the insured did not intend the event or result to occur, and the event or result that occurred was a 'chance event' beyond the control of the insured, then CGL coverage covering accidents will apply to the benefit of the insured." Using this analysis, the court determined there was no "occurrence" because the subcontractor "had both intent and full control when conducting his work, which ultimately failed to support the existing structure. So it cannot be said that the resulting damage from [the subcontractor's] poor workmanship was a fortuitous event. For an event to be fortuitous, and therefore an accident, it must be 'beyond the power of any human being to bring ... to pass, [or is] ... within the control of third persons....'" The dissent points out that under the majority analysis "it is hard to see how an accident could ever occur," and argues that the majority "goes too far today in making it significantly harder for injured parties to recover." The dissent also points out that coverage would be excluded under a policy exclusion.

- Update 2017: *Am. Mining Ins. Co. v. Peters Farms, LLC*, 2016 WL 6543625 (Ky. Ct. App. Nov. 4, 2016): The Kentucky Court of Appeals held that an occurrence may either be a fortuitous loss from an unintended chance event or a prolonged unintended action. The court concluded that the fortuitous loss is dependent on good faith of the actor, not duration of the occurrence. The insured sued a mining company for mistakenly extracting coal from its property. The court held that the extraction of coal was an "occurrence" because it was an accident, "not the plan, design or intent of the insured."

- Update 2015: The Sixth Circuit applied the holding in *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010) to hold that there was no coverage under Kentucky law for property damage to a new building caused by the insured subcontractor's construction of a defective building pad. *Liberty Mutual Fire Ins. Co. v. Kay & Kay Contracting*, 2013 U.S. App. LEXIS 23587 (6th Cir). After the subcontractor, Kay and Kay, completed the building pad and a new Wal-Mart store had been constructed, Wal-Mart notified the general contractor that there were cracks in the store's walls. Wal-Mart claimed that the "fill area" installed by Kay and Kay underneath the front left corner of the building had experienced settling, and that the settling had created structural problems and damage to the new store. Even though the allegedly defective caused property damage to other property outside the subcontractor's scope of work, the court held that the claim did not allege a sufficiently "fortuitous" event under Kentucky law, and coverage was denied.

- Update 2014: *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010). Construction defects, standing alone, do not constitute an occurrence. Here, the Supreme Court of Kentucky held that the faulty home construction at issue was not an accidental occurrence because the insured general contractor had control over the construction. *See Ryan v. Acuity*, No. 2011-CA-000653, 2012 WL 3047198 (Ky. Ct. App. July 27, 2012) (negligent grading causing excessive pressure on foundation not an occurrence).

- *Liberty Mutual Ins. Co. v. Kay & Kay Constr. LLC*, 2013 WL 6084276 (6th Cir. Nov. 19, 2013) (applying Kentucky law). This federal court decision finds no "occurrence" and no coverage for a subcontractor facing claims of faulty workmanship arising out of its preparation and building pad work and damage caused to other parts of the building. The decision observes that the Supreme Court of Kentucky has not definitively decided whether faulty workmanship that causes damage to other property constitutes an "occurrence," and then predicts that the Kentucky high court would not find coverage for the claims at issue.

LOUISIANA

- *Travelers Cas. & Sur. Co. of Am. v. Univ. Facilities, Inc.*, No. 10-1682, 2012 WL 1198611 (E.D. La. Apr. 10, 2012). An occurrence includes an unforeseen and unexpected loss. Here, the failure to use workmanlike practices in construction of student housing facilities by prematurely installing wallboard and using nails instead of screws constituted an occurrence resulting in damage to the project. *See also, Oxner v. Montgomery*, 794 So. 2d 86 (La. Ct. App. 2d Cir. 2001) (property damage from improper construction of a house held to be an occurrence).

- *North Am. Treatment Sys., Inc. v. Scottsdale Ins. Co.*, 943 So. 2d 429 (La. Ct. App. 1st Cir. 2006). Negligent construction that caused a wastewater treatment plant to collapse was an occurrence. Coverage ultimately precluded due to the professional services exclusion. *See Joe Banks Drywall & Acoustics, Inc. v. Transcontinental Ins. Co.*, 753 So. 2d 980 (La. Ct. App. 2d Cir. 2000) (even though unexplained stain to vinyl flooring was an accident constituting an occurrence, coverage ultimately denied under your work exclusion).

MAINE*

- *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989). Defective construction constitutes an occurrence. Here, however, the court also concluded that there was no coverage and therefore no duty to defend based on policy exclusions. *See also, Massachusetts Bay Ins. Co. v. Ferraiolo Constr. Co.*, 584 A.2d 608 (Me. 1990) (unintended trespass and damage caused by insured during operation of gravel pit constituted an occurrence).

MARYLAND (2018 UPDATE)

- Update 2018. In *Depositors Ins. Co. v. W. Concrete*, 2017 WL 3383039 (D. Md. Aug. 4, 2017), a federal judge ruled against the existence of an "occurrence" in connection with coverage sought by an insured concrete subcontractor. The court held that, under Maryland law, "when property damage arising out of the insured's defective workmanship is confined to the insured's own work product, the damage is not caused by an 'occurrence' within the meaning of the CGL policy." The court then determined that the "thrust" of the underlying claim against the subcontractor was that its own concrete work was defective - and not that the defective concrete work caused the work of other contractors to corrode. On this basis, the court held that there was no accidental "occurrence," and therefore no coverage. The decision leaves intact potential coverage for subcontractors when their defective work causes damage to other parts of the building or project. But it remains unclear under Maryland law whether an insured general contractor has potential coverage when a subcontractor's defective work causes damage to other parts of the project or building that are within the general contractor's scope of work. The federal decisions discussed below indicate that such coverage should exist, but we are unaware of Maryland appellate court decisions that expressly agree. For now, we are leaving Maryland ORANGE.

- Update 2014: While there is still uncertainty, federal court decisions interpreting Maryland law hold that damage to non-defective work that is part of a project can constitute an "occurrence" under the CGL policy. We therefore revise our classification of Maryland from RED to ORANGE.

- *Travelers Indem. Co. of Am. v. Tower-Dawson, LLC*, 299 Fed. App'x 277 (4th Cir. 2008). An act of negligence constitutes an accident under a CGL policy when the resulting damage takes place without the insured's actual foresight or expectation. There is no accident or occurrence when there is no property damage to otherwise non-defective parts of the property. CGL policy held not to cover cost of new retaining wall and repair of damaged wetlands caused by the collapse of the original retaining wall.

- *French v. Assurance Co. of Am.*, 448 F.3d 693 (4th Cir. 2006). Holding costs to repair or replace defectively installed EIFS is not an "occurrence," but costs to repair or replace resulting property damage to non-defectively installed walls of the home is an "occurrence." The court observed: "[T]he case before us appears to be on all fours with *American Family*. Here, there is no evidence that Jeffco subjectively expected or intended that the nondefective structure and walls of the Frenches' home would suffer damage from moisture intrusion. Indeed, there does not appear even to be an allegation that Jeffco either expected or intended that its subcontractor (Coronado Stucco & Stone) would defectively install the EIFS exterior on the Frenches' home. Accordingly, as was the case of the sinking soil in *American Family*, the moisture intrusion into the nondefective structure and walls of the Frenches' home was an accident, and therefore, an "occurrence" under the initial grant of coverage of the 1986 ISO CGL Policies, which coverage is not defeated by the express exclusion for coverage of damage which is expected or intended from the standpoint of the insured." The court also stated: "Finally and significantly, our holding today that, under Maryland law, coverage exists under the 1986 ISO CGL Policies for the costs to remedy the damage to the nondefective structure and walls of the Frenches' home, unlike that of the district court and the position of the Insurance Defendants, gives effect to the subcontractor exception to the 'Your Work' exclusion in these policies. As Maryland's highest court has continually reiterated: 'It is a recognized rule of construction that a contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause or phrase so that a court does not cast out or disregard a meaningful part of the writing.' *Bausch & Lomb, Inc. v. Utica Mutual Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993). The very existence of the "Your Work" exclusion and the history of subcontractor exception to *706 that exclusion provide us solid confirmation that our holding with respect to the nondefective structure and walls of the Frenches' home is correct."

- Other cases interpreting Maryland law are not entirely consistent with this holding, and there remains uncertainly about the state of Maryland law. *See OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.*, 242 Fed. App'x 936 (4th Cir. 2007) (low-strength grout supplied to a contractor causing defective construction is not an occurrence); *Fed. Ins. Co. v. Firemen's Ins. Co. of Washington, D.C.*, 769 F. Supp. 2d 865 (D. Md. 2011) (damages to home and garage were not unforeseeable because they related to the satisfaction of the contractual agreement and thus, were not caused by an occurrence; however damage to property other than the home (including plantings, driveway, lumber, and furnishings) held caused by an occurrence); *Lerner Corp. v. Assurance Co. of Am.*, 707 A.2d 906 (Md. Ct. Spec. App. 1998) (actions for breach of contract are not covered under CGL policies as they are not a result of an accident).

MASSACHUSETTS

- Update 2014: In *Gen. Cas. Co. of Wisconsin v. Five Star Bldg. Corp.*, 2013 U.S. Dist. LEXIS 134122 (D. Mass. Sept. 19, 2013), the federal court applying Mass. law held that faulty installation of roof patches during HVAC work that resulting in water leakage and property damage to other parts of the building after a rainstorm constituted an "occurrence." The decision is consistent with Mass. being a RED state because the property damage at issue was outside the insured contractor's scope of work.

- *Mello Constr., Inc. v. Acadia Ins. Co.*, 874 N.E.2d 1142 (Mass. App. Ct. 2007). Defective construction work is not an accident and hence is not an occurrence. Here, there was no coverage for the insured general contractor under its CGL policy for claims of subcontractor's faulty foundation work.

- *See Davenport v. U.S. Fid. & Guar. Co.*, 778 N.E.2d 1038 (Mass. App. Ct. 2002) (subcontractor's faulty workmanship painting home was not a covered occurrence under general contractor's policy); *Friel Luxury Home Constr., Inc. v. ProBuilders Specialty Ins. Co. RRG*, No. 09-CV-11036-DPW, 2009 WL 5227893 (D. Mass. Dec. 22, 2009) (unpublished) (insured contractor's faulty construction and renovation of home did not constitute an occurrence); American *Home Assur. Co. v. AGM Marine Contractors, Inc.*, 379 F. Supp. 2d 134 (D. Mass. 2005) (faulty workmanship resulting in property damage to floating docks was not an occurrence because faulty workmanship is not an insurable fortuitous event; it is a business risk to be borne by the insured).

- *But see, Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Modern Cont'l Const. Co., Inc.*, No. 082015BLS1, 2009 WL 6376180 (Mass. Super. Dec. 11, 2009) (unpublished). Faulty workmanship that causes an accident can be an occurrence. An accident means an unexpected happening without intention or design. Here, it was unlikely that the construction defect was intended or expected and, thus, the court found the faulty workmanship to be an occurrence that caused property damage.

MICHIGAN

- Update 2017: We continue to classify Michigan as an ORANGE state, but the law remains uncertain. The most recent decision (unfortunately unpublished) addresses coverage for a subcontractor. *Employer's Mut. Cas. Co. v. Mid-Michigan Solar, LLC*, 2016 WL 1578999 (Mich. App. April 19, 2016). Applying Michigan law, the decision holds (a) the determination of whether there is an "occurrence" depends on the type of property damage that is at issue, and (b) there can be an "occurrence" "only if the damage in question extended beyond the insured's work product." In this case, the damages involved repairs to solar photovoltaic array systems that were defectively installed by the insured subcontractor. Because there was no allegation or evidence of damage beyond the subcontractor's own work product, the alleged property damage did not constitute an "occurrence." It remains unclear under Michigan law whether an insured general contractor has potential coverage when a subcontractor's defective work causes damage to other parts of the project or building that are within the general contractor's scope of work.

- Update 2016: Like last year, we continue to classify Michigan as an ORANGE state, but uncertainty continues to exist. In *Steel Supply & Engineering Co. v. Illinois National Ins. Co.*, 2015 U.S. App. LEXIS 14363 (6th Cir. Aug. 13, 2015), the Sixth Circuit affirmed a trial court's grant of summary judgment for an insurance company. The court held that under Michigan law, mere faulty workmanship does not constitute an occurrence, but there is an exception where faulty workmanship harms a third-party's property. The policyholder argued that the exception applied because photographs showed that its faulty workmanship damaged property that belonged to other parties. The court rejected this argument because there was no record that a third party sought

contribution, and the underlying complaint did not explicitly claim reimbursement for any specific damage to third-party property.

- Update 2015: We continue to classify Michigan as an ORANGE state, but there remains uncertainty. In *Steel Supply & Engineering Co. v. Illinois National Ins. Co.*, Case No. 1:13-CV-1034 (W.D. Michigan, August 18, 2014), the insured contracted to supply and erect steel structures that were to be part of a performing arts center. The owner (a city) sued claiming that defects in the steel structures caused damages including hiring experts, performing repairs to the steel structures and paying others for damages caused by delay. The court held that the insured's faulty work must damage "the property of others" to constitute an "occurrence" under Michigan law, citing *Hawkeye-Security Ins. Co. v. Vector Construction Co.*, 460 N.W.2d 329, 334 (Mich. Ct. App. 1990). The court held that because the underlying complaint did not allege any damage to other property, there was no duty to defend. The court made this finding even though the policyholder submitted evidence that the alleged problems with the steel structures caused damage to precast roof panels and other property. The court concluded that the allegations in the underlying case were controlling. According to the court, "just because the City *could* bring a suit that would trigger Defendant's duty to defend does not mean that it has." (emphasis in original) It appears that the court would have found the existence of a duty to defend if the underlying complaint had alleged damage to property other than the work of the contractor. It remains unclear whether Michigan is a RED state in that it requires other property damage to be outside the scope of work of the insured.

- *Radenbaugh v. Farm Bureau Gen. Ins. Co.*, 610 N.W.2d 272 (Mich. Ct. App. 2000). An insured's defective workmanship that results in damage to the property of others is an accident. Here, there was an occurrence because the faulty construction of a school roof caused damage to the interior and exterior of the building as well as personal property of the students and school district employees.

- Other recent decisions follow this holding. *See Liparoto Constr., Inc. v. General Shale Brick, Inc.*, 772 N.W.2d 801 (Mich. Ct. App. 2009) (discoloration of brick is not an occurrence because there were no allegations or presentation of evidence that the damages extended beyond the contractor's own work product); *Groom v. Home-Owners Ins. Co.*, No. 272840, 2007 WL 1166050 (Mich. Ct. App. Apr. 19, 2007) (unpublished) (defective construction of a roof by the insured builder was not itself an occurrence or property damage).

- *But see, Houseman Constr. Co. v. Cincinnati Cas. Co.*, No. 1:08-CV-719, 2009 WL 2095994 (W.D. Mich. Jul. 14, 2009) (unpublished). Prior Michigan law distinguished on the ground that the CGL policies in other decisions did not include the subcontractor exception to the "your work" exclusion. The decision states that the existence of the subcontractor exception "suggests that the Policy intended to cover at least some instances of damage to the [insured general contractor's] work caused by a subcontractor's poor workmanship." The decision therefore finds the policy to be ambiguous with respect to the existence of an occurrence, and resolves the ambiguity in favor of the insured. This is a YELLOW holding.

MINNESOTA*

- *Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450 (Minn. 1977). Defective workmanship is an accidental occurrence when it is not expected or intended by the insured. The settling of an apartment building caused by a subcontractor's negligent backfill work was an occurrence.

- *Integrity Mut. Ins. Co. v. Klampe*, No. A08-0443, 2008 WL 5335690 (Minn. Ct. App. Dec. 23, 2008) (unexpected damage to home caused burst water pipe held covered occurrence). *See also, O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996), *rev'd on other grounds, Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002) (subcontractor exception to your work exclusion held to preserve coverage for insured general contractor for defective work of subcontractor); *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818 (8th Cir. 2008) (resulting property damage from improperly installed basement floor is an "occurrence").

MISSISSIPPI

- A 2010 decision by the Mississippi Supreme Court leaves it unclear whether construction defect claims will be deemed to involve an occurrence under Mississippi law.

- In *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, (Miss. 2010) the Court held that "an interpretation of the policy which views the term 'occurrence' categorically to preclude coverage for the simple negligence of a subcontractor subverts the plain language and purpose of the CGL part of these policies." The decision therefore reverses a lower court ruling that found the intentional hiring of subcontractors to be a sufficiently deliberate act to preclude the existence of any accidental occurrence for defective work performed by the subcontractors. The decision also holds that "[only] when property damage is proximately caused by an accident (an inadvertent act) does an occurrence, as defined by the policy, trigger coverage." However, the decision leaves open the extent to which performing defective construction work will ever been deemed sufficiently accidental or inadvertent to be an occurrence that potentially triggers coverage.

MISSOURI*

- 2016 Update: *Village at Deer Creek Homeowners Association, Inc. v. Mid-Continent Cas. Co.*, 432 S.W.3d 231 (Mo. Ct. App. 2014) confirms that Missouri is a YELLOW state. The decision states: "It is well-settled Missouri law that when a 'liability policy defines occurrence as meaning accident, Missouri courts consider this to mean injury caused by the negligence of the insured." *Id.* at 246 (*quoting, Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 393 (Mo. App. E.D. 2007) *and Wood v. Safeco Ins. Co. of Am.*, 980 S.W.2d 43, 49 (Mo. App. E.D. 1998)). The decision holds that the trial court did not err "in concluding that the exteriors of each townhome suffered property damage as a result of an 'occurrence.'" *Id.* (*citing Assurance Co. of America v. Secura Ins. Co.*, 384 S.W.3d 224, 232 (Mo. App. E.D. 2012). Importantly, the decision also holds the cost to repair defective work itself can be a covered loss if "it too has been damaged or must be removed to access other damaged areas." *Id.* at 243.

- *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899 (Mo. 2010). There is an accidental occurrence where the damages caused by faulty workmanship are unexpected or unforeseeable. Here, defective home construction by the insured contractor that caused foundation damage constituted an occurrence. *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. Ct. App. 2007). An accident constituting an occurrence is an event that takes place without one's foresight or expectation. An accident need not be sudden and can be a part of a process. Here, defective concrete installed in house foundation was an accidental occurrence covered under the insured's CGL policy because neither the defect in the concrete nor the resulting damage in the home was foreseeable.

MONTANA

- We did not locate cases discussing construction defect claims directly, but two Montana Supreme Court decisions address the occurrence issue with reference to the subjective intent of the policyholder to cause the expected result. We anticipate that this analysis will apply favorably for policyholders that face the occurrence issue in connection with construction claims in this state, but it remains possible a court will find property damage caused by construction defects is natural and probable, and therefore intentional and not an occurrence.

- *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746 (Mont. 1993). "[T]he intent of the policy is to insure the acts or omissions of the insured, including his intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured's standpoint." Here, there was no occurrence because the insured intentionally injected additive into a pipeline causing injury to the refinery. *See also, Lindsay Drilling & Contracting v. U.S. Fid. & Guar. Co.*, 676 P.2d 203 (Mont. 1984). Occurrence found to exist where mining core samples were potentially negligently altered by persons other than the insured, and the damages were neither expected nor intended from the standpoint of the insured.

NEBRASKA*

- Update 2017: *Drake-Williams Steel, Inc. v. Continental Cas. Co.*, 294 Neb. 386 (2016). The Supreme Court of Nebraska has confirmed that its 2004 decision in *Auto-Owners Ins. Co.* (see below) is good law. Faulty workmanship, standing alone, is not "property damage," but faulty workmanship that causes damage to other property can constitute "property damage" covered by the CGL insurance policy. The decision affirms denial of coverage to a subcontractor for costs it incurred to remediate pile caps after it was discovered that the subcontractor had misfabricated re-bar. Because there was no physical injury to the misfabricated re-bar itself or the pile caps into which it was installed, and because there was no damage to other parts of the system, the decision holds that the costs incurred by the subcontractor were not caused by any "property damage." The decision observes that damage arising out of an insured contractor's completed work can, in some situations, constitute "property damage" caused by an accidental "occurrence." For example, the coverage determination in this case could have been different if the remediation work had demolished and replaced the pile caps. The decision confirms that Nebraska is an ORANGE state. Unfortunately, the decision cites and quotes extremely out of date articles, including a 1971 article by Dean Henderson.

- *Original Entry: Auto-Owners Ins. Co. v. Home Pride Cos.*, 684 N.W.2d 571 (Neb. 2004). Faulty workmanship, standing alone, is not an occurrence and, therefore, is not covered under a CGL policy because it is not a fortuitous event. Here, a subcontractor's faulty installation of shingles that caused property damage to other roof structures and buildings constituted an occurrence under the insured subcontractor's CGL policy. *See also, Blair v. Mid-Continent Cas. Co.*, 167 P.3d 888 (Mont. 2007) (insured's deliberate removal of gravel was not an occurrence).

NEVADA

- *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039 (D. Nev. 2006). Faulty construction is an accidental occurrence where the property damage is unexpected or unintended from the standpoint of the insured. Water intrusion caused by defective construction constitutes an occurrence because the property damage was not expected, foreseen, or intended by the insured. *See also, CGU/Hawkeye Sec. Ins. Co. v. Oasis Las Vegas Motor Coach Park*, 65 Fed. App'x 182 (9th Cir. 2003) (general contractor has coverage for faulty workmanship of subcontractor including all damage to general contractor's project).

NEW HAMPSHIRE*

- Update 2016: We continue to include New Hampshire as a YELLOW state based on language in the state's Supreme Court in *High Country*, but more recent decisions indicate New Hampshire may be an ORANGE state.

- *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474 (N.H. 1994). Faulty construction is an accidental occurrence where the property damage is unexpected or unintended from the standpoint of the insured. Negligent construction is an occurrence when it results in substantial moisture seepage, mildew, and rotting walls in a condominium project. The court expressly rejected the business risk doctrine holding that the doctrine does not trump the policy language. *See also, Ins. Co. v. Peerless Ins. Co.*, 679 F. Supp. 2d 229 (D. Mass. 2010) (applying New Hampshire law, physical injury to original woodwork and plumbing pipe caused by faulty construction and renovation of a home constituted property damage caused by an occurrence).

- *But see, Webster v. Acadia Ins. Co.*, 934 A.2d 567 (N.H. 2007). Damage to property other than the work of the insured is an occurrence. Defective roof construction by the insured held to be was an occurrence because the allegations included damage to the purlins of the constructed building.

NEW JERSEY* (2018 UPDATE – *WEEDO* IS REALLY DEAD)

- Update 2018: More good news! In *Travelers Prop. Cas. Co. of Am. v. USA Container Co.*, (3d Cir. 2017), the Third Circuit applied the holding in *Cypress Point* to conclude that faulty workmanship causing damage to otherwise non-defective work constitutes an occurrence under New Jersey law. This should help dispel any uncertainty that *Weedo* is dead. In this case, the insured was hired by a corn syrup distributor to arrange for the transfer of corn syrup from rail cars to drums prior to shipment. The insured subcontracted out the heating of the syrup and the subcontractor damaged the product by overheating it. The court

found that the damage was an unintended and unexpected harm caused by the subcontractor's negligent conduct, and that this constituted an accidental "occurrence" under *Cypress Point.*

- Update 2017: Big news! The New Jersey Supreme Court affirmed the Appellate Court decision in *Cypress Point Condominium Association Inc. v. Adria Towers Inc.*, 2016 WL 4131662 (August 4, 2016). The Supreme Court's decision distinguishes its prior and very influential *Weedo* decision, and effectively removes *Weedo* from modern jurisprudence on the "occurrence" issue. The new decision holds that the term "accident" encompasses unintended and unexpected harm caused by negligent conduct, and that consequential harm caused by negligent work is an accidental "occurrence." Therefore, the result of the subcontractor's faulty workmanship here -- consequential water damage to other completed and nondefective portions of the project -- was an "accident" and an "occurrence." (Still no action on the legislation referenced in the 2015 update below.)

- Update 2016: Big news! The New Jersey Supreme Court has agreed to reconsider its seminal decision in *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 796 (1979), regarding the "occurrence" issue. *Cypress Point Condominium Association Inc. v. Adria Towers Inc.*, No. 76348 (N.J. Oct. 29, 2015) (granting certification). The court will review a July, 2015 New Jersey Appellate Division opinion that distinguished *Weedo* and held that "the unintended and unexpected consequential damages caused by [a] subcontractor['s] defective work constitute 'property damage' and an 'occurrence' under the [CGL] policy." *Cypress Point Condominium Association v. Adria Towers LLC*, 441 N.J.Super 369 (App. Div. 2015). The appellate court decision distinguishes *Weedo* (and *Firemen's Insurance Co. of Newark v. National Union Fire Insurance Co., 387 N.J.Super. 434, 904 A.2d 754 (App. Div.2006))*, on the ground that those opinions construed ISO's earlier 1973 standard CGL forms, and not the post-1986 insurance policy forms that include the subcontractor exception to the "your work" exclusion. The decision also explicitly rejects the argument that finding in favor of coverage for construction defect claims somehow transforms the CGL insurance policy into a "performance bond," and states that the current "majority rule" is that construction defects causing consequential damages constitute an "occurrence." Based on the appellate court decision, we are changing New Jersey from a RED state to an ORANGE state, but the law will remain uncertain until the New Jersey Supreme Court issues its decision. In addition, the proposed legislation referenced below could still be enacted.

- Update 2015: *National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Construction Co.*, 986 N.Y.S.2d 74 (N.Y. App. Div. 2014) (no coverage for curtain wall contractor under New Jersey law (with additional citation to New York law). While this decision was issued by a New York court applying New Jersey law, in our judgment it demonstrates that both New York and New Jersey are trending as "red" states. The decision cites *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 796 (1979) (a decision that addressed only policy exclusions), and states that the holding in *Weedo* was extended by *Fireman's Fund* (see below) to the threshold "occurrence" issue. The decision then holds that faulty workmanship by subcontractors hired by the insured general contractor do not constitute covered property damage caused by an "occurrence" because the entire project was the general contractor's work. Importantly, the decision refuses to find in favor of an "occurrence" even though the OCIP policy at issue included an expanded definition of "occurrence." Unlike the standard policy form that defines an "occurrence" as an "accident," the OCIP policy at issue provided coverage for "an accident, event or happening." The court found that this

modification did not change the "fortuity" requirement to trigger coverage, or the conclusion that such fortuity could only be found upon the occurrence of property damage to something outside of the insured's scope of work. The decision concludes by refusing to adopt the more modern reasoning applied in several other jurisdictions. Instead, the decision states that doing so would essentially transform the policy into a surety or performance bond, even though this kind of argument has been severely criticized and rejected in decisions issued by several other states.

- Update 2015: A bill (A4510) has been introduced in New Jersey that would expand the CGL definition of "occurrence." The bill, if enacted, would require that a CGL policy: "shall not be delivered, issued, executed, or renewed in this State, on or after the bill's effective date, unless the policy contains a definition of occurrence that includes: (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) property damage or bodily injury resulting from faulty workmanship." However, the bill, like those enacted in other states, would not restrict exclusions from coverage that an insurer includes in a CGL policy. Thus, the law would not require or provide coverage for defect claims, and it would not preclude an insurer from denying coverage for a construction defect claim based on any applicable policy exclusion (including, for example, the "your work" exclusion). As proposed, A4510 would take effect 90 days following its enactment.

- *Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co.*, 904 A.2d 754 (N.J. Super. Ct. App. Div. 2006). Defective workmanship "standing alone" is not an occurrence, but faulty workmanship that causes damage to property other than the insured's own work or the project itself can be an occurrence. Here, there was no occurrence because the installation of sub-standard firewalls did not cause damage to the rest of the building or to any other person or property. *See also*, *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Parkshore Dev. Corp.*, No. CIV. 07-1331 RBK/JS, 2009 WL 1737032 (D.N.J. Jun. 17, 2009)(unpublished) (allegations that general contractor's faulty construction of condominium resulted in water intrusion and damage to the building's structure and common elements did not trigger coverage under the contractor's CGL policy because faulty construction causing damage only to the insured's work is not an occurrence).

NEW MEXICO

- New Mexico has no published decisions on this issue. *But see*, *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1197 (D.N.M. 2012). Where the harm is the natural result of voluntary and intentional acts of the insured, it is not caused by an accident, even though the result may have been unexpected or unforeseen. Under New Mexico law, damage to the landowner's property resulting from construction of a water diversion system by contractors was not an occurrence covered under the contractor's CGL policy. Although contractor may not have intended or expected to flood property, it intended to divert the water.

NEW YORK (2018 UPDATE – BIG NEWS – FEDERAL COURT PREDICTS NEW YORK IS ORANGE)

- Update 2018: Big news! Our prediction that New York law will change to recognize the existence of an "occurrence" when the claim alleges damage to property caused by an insured's subcontractor may come true. In *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd*, 882 F.3d 952 (10th Cir. 2018), the Tenth Circuit (which hears appeals from Kansas, Oklahoma, New Mexico, Wyoming, and Utah), predicted in a 2-1 decision that the highest New York court would hold that resulting damage from faulty subcontractor work constitutes an "occurrence." The case involved an insured EPC contractor that agreed to design and build several jet bubbling reactors. The EPC contractor had to settle claims with the owner after its subcontractor's defective work caused damage to internal components of the reactors. The Tenth Circuit held that the claim involved an "occurrence" under the CGL policy based on its prediction that the New York Court of Appeals would "join the clear trend among state supreme courts holding that damage from faulty subcontractor work constitutes an 'occurrence' under the Policy." If the New York Court of Appeals adopts this position, then New York will become an ORANGE state. But, for now, we will leave New York listed as a RED state, because no New York court has concluded otherwise.

- Update 2017: We continue to predict that the New Jersey Supreme Court's decision in *Cypress Point Condominium Association v. Adria Towers LLC* (see above) will affect/change New York law. We are now hopeful that New York will eventually become at least an ORANGE state. But that has not happened yet.

- Update 2016: See the discussion above regarding the New Jersey Supreme Court's decision to reconsider the "occurrence" issue in *Cypress Point Condominium Association v. Adria Towers LLC*, 441 N.J.Super 369 (App. Div. 2015). When the New Jersey Supreme Court issues its decision, it likely will affect New York law as the courts in New York and New Jersey evaluate the "occurrence" issue similarly and often cite decisions from both states.

  In the meantime, consider the holding in *National Union Fire Ins. Co. v. Turner Construction Co.*, No. 11927 (N.Y. App. Div. May 15, 2014). In that case, the New York Supreme Court, Appellate Division, refused to find an "occurrence" even when the wrap-up policy at issue defined "occurrence" more broadly than the standard CGL policy to include "an accident, event, or happening." The court nonetheless refused to find any coverage for damages caused when the exterior wall of an office building fell from the eighth story. According to the court: "Under both New York and New Jersey law, construction defects such as those asserted in the underlying action -- faulty design, fabrication or installation -- do not constitute 'occurrences' under a commercial general liability insurance policy. The general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, breach of fiduciary duty, or breach of warranty, but rather for bodily injury and property damage." The court therefore concluded: "There is no 'occurrence' under a commercial general liability policy where faulty construction only damages the insured's own work, and faulty workmanship by subcontractors hired by the insured does not constitute covered property damage caused by an 'occurrence' for purposes of coverage under commercial liability insurance policies issued to the general contractor, since the entire project is the general contractor's work."

- Update 2015: *Rosewood Homebuilders, LLC v. Nat'l Union Fire Marine Ins. Co., 2013*WL 1336594 (N.D.N.Y. March 29, 2013) (no "occurrence"/no coverage for insured homebuilder because entire home was its product and no damage to other property). *See also National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Construction Co.*, __ N.Y.S.2d __, 2014 WL 1923586 (App. Div. May 15, 2014) (no coverage for curtain wall contractor under New Jersey law (with additional citation to New York law); CGL policy does not provide coverage for breach of contract or breach of warranty claims where faulty construction only damages the insured's own work).

- *Aquatectonics, Inc. v. Hartford Cas. Ins. Co.*, No. 10-CV-2935, 2012 WL 1020313 (E.D.N.Y. Mar. 26, 2012) (unpublished). There is no occurrence where faulty workmanship is claimed to cause only damage to the construction project itself. Here, allegations that the insured's subcontractor negligently installed tile in the construction of a swimming pool did not constitute an occurrence when the damage was only to the entire pool project itself. *Accord Amin Realty LLC v. Travelers Prop. Cas. Co., 2006 WL 1720401 (E.D.N.Y. June 20, 2006) (*finding alleged injury in underlying action did not arise out of an occurrence when the "only damage alleged to have occurred was property damage to the [insured's] work product (the building itself) or damage resulting from the loss of use of that building.)"

- *See also George A. Fuller Co. v. U.S. Fid. & Guar. Co.*, 613 N.Y.S.2d 152 (N.Y. App. Div. 1994) (no occurrence when alleged negligence by a subcontractor retained by an insured general contractor only affected economic interest in the completed work product); *J.Z.G. Res., Inc. v. King*, 987 F.2d 98 (2d Cir. 1993) (property damage arising out of the insured excavation company's failure to properly perform its contract was not the result of an occurrence).

NORTH CAROLINA

- *Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 52 F. Supp. 2d 569 (E.D.N.C. 1999), *aff'd*, 213 F.3d 634 (4th Cir. 2000). Defective workmanship standing alone is not an occurrence, but defective workmanship can be an occurrence when it causes damage to property other than the insured's own work. Insured general contractor's alleged faulty workmanship in constructing an addition to a building did not constitute an accidental occurrence that would trigger coverage under the CGL policy when claims were based solely on the costs of repairing insured's allegedly faulty workmanship. *See also, Breezewood of Wilmington Condos. Homeowners' Ass'n, Inc. v. Amerisure Mut. Ins. Co.*, 335 Fed. App'x 268 (4th Cir. 2009) (no coverage for water damage to condominium development caused by insured general contractor's faulty workmanship).

- *But see, Builders Mutual Ins. Co. v. Mitchell*, 709 S.E.2d 528 (N.C. Ct. App. 2011). Alleged damage to previously undamaged portions of home that may have been caused by insured contractor's negligence could constitute an accidental occurrence.

NORTH DAKOTA*

- Update 2014: *K & L Homes, Inc. v. American Family Mutual Insurance Company*, 213 N.D. 57 (N.D. 2013). Like several other high courts, the North Dakota Supreme Court concluded in 2013 that its earlier decision finding against coverage was incorrect and must be reversed. The decision makes North Dakota a YELLOW state.

- "The first question we address in the present case must be whether the faulty workmanship may constitute an occurrence. Our Court in Burd & Smith [*ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33 (N.D. 2006)] incorrectly decided the question of whether faulty workmanship may constitute an "occurrence" by drawing a distinction between faulty workmanship that damages the insured's work or product and faulty workmanship that damages a third party's work or property." "There is nothing in the definition of 'occurrence' that supports that faulty workmanship that damages the property of a third party is a covered 'occurrence,' but faulty workmanship that damages the work or property of the insured contractor is not an 'occurrence.'" "We conclude faulty workmanship may constitute an 'occurrence' if the faulty work was 'unexpected' and not intended by the insured, and the property damage was not anticipated or intentional, so that neither the cause nor the harm was anticipated, intended, or expected. This is consistent with our definition of 'accident' for purposes of a CGL policy. To this extent we overrule Burd & Smith."

OHIO* (2018 UPDATE – BIG NEWS – OHIO IS ORANGE – AT LEAST FOR NOW)

- Update 2018: We have concluded that Ohio is now an ORANGE state based on the 2017 decision issued by the Third District of the Court of Appeals of Ohio in *Ohio Northern University v. Charles Construction Services, Inc.*, 2017 WL 334151, --- N.E. 3d --- (Ohio App. Ct. 2017). That decision holds that coverage exists for an insured general contractor when the claim arises after the project is completed and involves property damage caused by the policyholder's subcontractors. Importantly, the decision distinguishes the Ohio Supreme Court's holding in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 1979 N.E.2d 269 (Ohio 2012), and expressly rejects the carrier's argument that *Westfield* bars coverage for all defective work claims (regardless of who performs the work) because defective work can never constitute an "occurrence." In the case, an Ohio University hired a general contractor to build a new luxury hotel on the University's campus. The contractor, in turn, hired subcontracted that performed most of the construction work. After the project was completed, the University discovered water intrusion, moisture damage and structural defects. The Third District determined that the Supreme Court's decision in *Westfield* was not controlling because that case involved coverage for an insured subcontractor and the Supreme Court's analysis was limited to whether the subcontractor's own defective workmanship could constitute an accidental "occurrence." Based on a careful review of the coverage grant and the relevant exclusions in the CGL policy, as well as the current law in other jurisdictions, the court concluded that the insurer had an obligation to defend and indemnify the contractor under the "Products-Completed Operations Hazard" provisions in the policy because: (1) the property damage occurred after the project was completed, and (2) the claims involved property damage caused by work performed by the insured contractor's subcontractors. The court also held that the carrier's interpretation of the CGL

policy (that defective work could never constitute an occurrence) would render entire portions of the policy meaningless or unnecessary, which would violate fundamental rules of contract law. In addition, the court determined that "at a minimum" the policy provisions created an ambiguity that was required to be construed against the insurer. While the Ohio Supreme Court has yet to affirm the decision in *Charles Construction*, the case presents a compelling argument for coverage when the alleged damages arise out of a subcontractor's work. Policyholders in Ohio can now cite this decision in support of a claim for coverage and, at least for now, Ohio is an ORANGE state.

- Update 2017: It remains unclear if Ohio is an ORANGE state, and we continue to classify it as RED. In *Mesa Underwriters Specialty Ins. Co. v. Myers*, 2016 WL 4367079 (August 16, 2016), an Ohio federal court applied the Ohio Supreme Court's decision in *Westfield* (see below) to find that some of the alleged damages potentially were covered and some were not. The decision holds that the "occurrence" determination depends on the kind of damages alleged. Here, the cost to repair a roofing system damaged by the insured's use of an improper sealant was not an "occurrence" because the costs related only to repair of the insured's own defective roofing work. However, remediation costs incurred to clean up resulting environmental damage caused by sealant run-off into Lake Erie were held to be an "occurrence." (However, the clean-up costs were determined not to be covered due to the policy's pollution exclusion.) The decision leaves unanswered whether the cost to repair *other* parts of a building damaged by an insured's defective work can be an "occurrence." The decision observes in a footnote that the complaint in the underlying case did not allege any damage to other parts of the building outside the scope of the insured roofer's work.

- *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 979 N.E.2d 269 (Ohio 2012). Claims for defective construction work by a property owner are not claims for property damage caused by an occurrence within the meaning of the CGL policy. Here, all of the alleged defective work and resulting property damage were within the scope of work of the insured, and even though the steel grain bin was constructed by the insured's subcontractors, there could be no occurrence. (The decision does not expressly address whether damage to other non-defective work can be an occurrence, but it appears implied.) A strong dissent argues that the court improperly answered the question by examining the kind of damages at issue to determine whether there has been an occurrence. The dissent argues that the majority's approach fails to recognize that the CGL policy anticipates the occurrence of construction defects by defining the scope of coverage for such claims in the policy exclusions.

- *But see, Erie Ins. Exch. v. Colony Dev. Corp.*, 736 N.E.2d 941, 947 (Ohio Ct. App. 1999). An occurrence is defined as an accident, including continuous or repeated exposure to the same general, harmful conditions. Here, the court found negligent construction by insured condominium developer, which resulted in damages to condominium units, common areas, as well as surrounding landscape to be an occurrence under the developer's CGL policy.

OKLAHOMA*

- While there is some uncertainty, we judge Oklahoma to be an ORANGE state. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372 (Okla. 1991). The decision assumes (without deciding) that defective workmanship by a subcontractor is an occurrence, but denies coverage based on the business risk exclusions.

- *Employers Mut. Cas. Co. v. Grayson*, No. CIV-07-917-C, 2008 WL 2278593 (W.D. Okla. May 30, 2008) (unpublished). Defective installation of concrete in bridge held to be an occurrence because there was unintended damage to the bridge deck and structural components during the required concrete removal and repair.

OREGON*

- Update 2017: Oregon law remains unclear about the "occurrence" issue despite a new decision from the Oregon Supreme Court that addresses insurance coverage issues arising out of a construction defect case. In *FountainCourt Homeowners' Ass'n v. Fountain Dev., LLC*, 360 Or. 341 (2016), the jury in an underlying construction defect case found an insured siding subcontractor liable for part of the property damage to a housing complex that was caused by water penetration. The *FountainCourt* decision does not directly discuss what constitutes an "occurrence" under Oregon law. Instead, it addresses issues that arose at subsequent garnishment proceedings directed against the subcontractor's insurance policy. The decision holds that an insurer cannot, in a subsequent proceeding, retry the policyholder's liability, or alter the nature of the damages awarded in the underlying proceeding. The decision also found that the policyholder met its burden of proof for coverage under the CGL policy by demonstrating at the garnishment proceeding that it had become legally obligated to pay damages because of property damage to the housing complex, which meant there had been an "occurrence" under the insurance policy. In addition, the decision holds, as a matter of law, that a policyholder is not required to prove the precise amount of damages that occurred during a policy period to demonstrate that there was an "occurrence" that triggered coverage under the policy. The opinion's discussion about the existence of damage to property other than the insured's own defective workmanship strongly indicates that Oregon likely is an ORANGE state. But in the absence of a case that expressly explains Oregon law on this issue, it is still too close to call.

- Oregon decisions are unclear regarding the occurrence issue. In *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254 (Or. 2000), claims for defective construction were held to be commercial risks arising out of the parties' contractual undertakings, and damage to a custom home caused by faulty painting performed by the insured's subcontractors was held not to be covered by the CGL insurance policy. *But see MW Builders, Inc. v. Safeco Ins. Co. of Am.*, 267 Fed. App'x 552 (9th Cir. 2008) (an accidental occurrence is an act that happens by chance without design and contrary to intention or expectation and, under Oregon law, damage to a hotel caused by a subcontractor's faulty installation of an exterior insulation and finishing system constituted property damage caused by an "occurrence").

PENNSYLVANIA* (2018 UPDATE)

- Update 2018: More of the same. In *Northridge Village, LP v. Travelers Indemnity Co. of Conn.*, 2017 WL 3776621 (E.D. Pa. Aug. 31, 2017), the court, citing *Kvaerner*, found that "the term occurrence [] does not include faulty workmanship" and "[t]he same conclusion has been reached in this circuit in cases where the faulty workmanship results in foreseeable damage to property other than the insured's work product." The court rejected the contention that *Kvaerner* was not controlling because the underlying allegations included claims related to damage to other property and negligent construction and hiring or supervising. Moreover, the court explained that *Kvaerner* cannot be avoided by casting allegations of faulty workmanship as negligence claims. In addition, in *Sapa Extrusions Inc. v. Liberty Mutual Insurance Co. et al.*, M.D. Pa. 2018), a Pennsylvania federal court held that an insured aluminum products manufacturer had no coverage for an underlying lawsuit and subsequent settlement over its sale of tens of millions of faulty windows. The court held that *Indalex* (discussed below) did not apply because the underlying claim only sought to recover costs incurred to remove and replace the defective windows. The court acknowledged that if the underlying claim had alleged damage to additional property "the outcome may have differed."

- Update 2015: More of the same. *See State Farm Fire & Casualty Co. v. McDermott*, 2014 U.S. LEXIS 147702 (E.D. Pa. October 14, 2014). In this case, PulteGroup Inc., sued contractor McDermott, claiming that McDermott performed defective plaster, stucco, and window installation work on almost 300 homes in a housing community. PulteGroup also alleged negligence and breach of contract, which McDermott claimed triggered coverage under the CGL policy. The court held that the underlying suit failed to allege an occurrence needed to trigger coverage, despite negligence allegations included in the PulteGroup complaint. The court held that the underlying complaint alleged faulty workmanship which was not an accident that constitutes an "occurrence" under the CGL policy. The court observed that the construction contract required McDermott to complete the project in a "workmanship like manner," and therefore held that any liability McDermott faced stemmed from the alleged failure to meet these contractual obligations. Relying on the "substance" of the negligence allegations, the court held that there was no duty to indemnity or to defend the claims.

- Update 2014: *Zurich Am. Ins. Co. v. R.M. Shoemaker Co.*, 2013 U.S. App. LEXIS 6093 (3d Cir. 2013) (applying Pa. law). This decision denies coverage for faulty construction of an addition to a correctional facility where the alleged faulty work of subcontractors caused damage to structural elements. Relying on *Kvaerner* and *Gambone*, the decision does not address or discuss the purpose of the subcontractor exception to the "your work" exclusion.

- Update 2014: In *Indalex Inc. v. National Union Fire Insurance Company of Pittsburgh*, No. 612 WDA 2012 (Pa. Super. Ct. December 3, 2013), the court rejected an insurer's attempt to expand "faulty workmanship" into the products liability arena. The court held that *Kvaerner* and its progeny do not apply to claims alleging that an off-the-shelf product failed in service causing damage to other property and/or personal injury. While it does not appear that *Indalex* changes the legal landscape for construction defect cases involving faulty workmanship of contractors, it potentially halts the expansion of Pennsylvania's faulty workmanship analysis to cases involving defective products that are incorporated into construction projects.

- *Kvaerner Metals Div. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006). The definition of accident required to establish an occurrence under CGL policies cannot be satisfied by claims based upon faulty workmanship because such claims simply do not present the degree of fortuity contemplated by the ordinary definition of accident or its common judicial construction in the context of CGL policies. Here, an insured builder's alleged faulty workmanship was not an accident and, therefore, not an occurrence within the meaning of the insured's CGL policy.

- *See also, Millers Capital Ins. Co. v. Gambone Bros. Dev. Co., Inc.*, 941 A.2d 706 (Pa. Super. Ct. 2007) (there is no occurrence triggering coverage where faulty window installation caused water damage to interior of houses from rainfall).

RHODE ISLAND

- The Rhode Island Supreme Court has not directly addressed the occurrence issue. The most recent Rhode Island case to address the issue is *Furey Roofing & Constr. Co., Inc. v. Employers Mut. Cas. Ins. Co.*, No. KC-2009-0685, 2010 WL 422253 (R.I. Super. Ct. Feb. 1, 2010). In that case, the pleading were held to allege an "occurrence of property damage" sufficient to trigger the duty to defend because correcting the insured's allegedly defective roofing work could make it necessary to repair sections of the roof installed by others and/or other parts of the project.

- The Rhode Island Supreme Court has addressed defective construction claims, and in each case denied coverage based on the "your work" exclusion. *See Shelby Ins. Co. v. Northeast Structures, Inc.*, 767 A.2d 75 (R.I. 2001) (no coverage for defective construction claim where defective temporary bracing for building could not be distinguished from the remainder of the structure); *Employers Mut. Cas. Co. v. Pires*, 723 A.2d 295 (R.I. 1999) (your work exclusion bars coverage for damage to windowpanes caused by painting contractor working on window frames); *General Acc. Ins. Co. of Am. v. American Nat'l Fireproofing, Inc.*, (R.I. 1998) (no coverage for the costs of restoration, repair or replacement of property necessitated by insured's faulty workmanship).

SOUTH CAROLINA+*

- Update 2017: On January 11, 2017, the South Carolina Supreme Court issued a decision that reviews and summarizes the court's prior decisions regarding coverage for construction defect claims. *Harleysville Group Insurance v. Heritage Communities, Inc., et al.*, 2017 S.C. LEXIS 8 (Jan. 11, 2017). The decision confirms that in South Carolina "the cost of repairing faulty workmanship is not covered under CGL policies but resulting property damage beyond he defective work product itself is covered." The decision further confirms that defective work is not covered because it is not "property damage," and not because it is not an "occurrence." The decision discusses other important coverage issues including insurer's reservation of rights letters and pro rata allocation of progressive damages under a time-on-risk analysis. The decision does not discuss the "occurrence" statute adopted in 2011 (see below).

- Update 2014: The South Carolina Supreme Court continues to issue decisions with shockingly incorrect legal analysis regarding insurance coverage for construction defect claims. Its new decision does not address the "occurrence" issue, but removes much of the intended coverage for construction defect claims based on an overbroad reading of two exclusions in the CGL policy. *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 2013 S.C. LEXIS 170 (S.C. 2013).

- In *Auto Owners*, a general contractor hired a subcontractor to clean brick, and the subcontractor used a pressure washer and acid solution that discolored some of the bricks and removed their decorative sandy finish. After attempts to repair the appearance of the brick face proved unsuccessful, the project owner directed the general contractor to remove and replace all of the brick. The project owner replaced the brick at its own expense, sued, and obtained a default judgment against the general contractor, and then brought suit against the general contractor's insurance company seeking coverage for the damage.

  The South Carolina Supreme Court first denied coverage based on Exclusion j.(5) (the Performing Operations Exclusion) which excludes coverage for coverage "property damage" to "[t]hat 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...." It held that that the exclusion applied to bar coverage, because the operations to attempt to remedy the brick were being performed at the time of the property damage. However, this analysis ignores that the original brick construction work at issue was completed at that time, and therefore was more properly analyzed under Exclusion l (the "your work" exclusion), which applies to claims that involve completed operations and includes the exception for property damage caused by the work of a subcontractor.

  Second, the court applied Exclusion n (the Sistership Exclusion) to deny coverage. This provision excludes coverage for "[d]amages claimed for any loss, cost or expense ... incurred ... for the ... repair, replacement, adjustment, removal or disposal of ... "Your work" ... If such ... work ... is withdrawn ... from use ... because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it." It held that this exclusion also applied to bar coverage, because the brick face was replaced because of a known defect or inadequacy in it. However, the insurance industry's own publications explain that Exclusion n. is intended to apply only to the costs of a classic products recall, and virtually all other courts have limited the application of this exclusion to the costs of such a withdrawal and refused to apply the exclusion to construction defect claims. By applying this exclusion to deny coverage, the court greatly expanded circumstances under which coverage will be denied regardless of the "occurrence" determination.

- *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011). Decision analyzes a CGL policy issued before the effective date of the occurrence statute (see below). Finds negligent construction of a condominium project causing water intrusion and property damage to non-defective work to be an occurrence under the insured developer's CGL policy.

- S.C. CODE ANN. § 38-61-70 (2011), Enacted on May 17, 2011, South Carolina Code Section 38-61-70 provides 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. The legislation applies to all existing and future insurance policies and all pending and future disputes.

SOUTH DAKOTA * (2018 UPDATE – SUPREME COURT CONFIRMS YELLOW)

- Update 2018: *Owners Ins. Co. v. Tibke Construction, Inc.*, 901 N.W.2d 80 (S.D. 2017). Citing its prior decision in *Corner Construction*, the South Dakota Supreme Court confirmed that, "if inadvertent faulty workmanship causes unexpected injuries to people or property, it may constitute an accident and thus an occurrence." The court also observed that "the majority of the state supreme courts that have considered the issue of whether inadvertent faulty workmanship is an accidental 'occurrence' potentially covered under the CGL policy have decided that it can be an 'occurrence.'" The court then held that the insured's failure to conduct soil testing was an unplanned omission, not an intentional or deliberative action, that caused an unexpected result and was therefore an accidental "occurrence" within the meaning of the CGL policy. The court also confirmed that, under South Dakota law, a "deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly." Additionally, the court found that the "faulty workmanship" exclusion did not apply to bar coverage because the exclusion only applied to bar coverage for the "particular part" of the property on which the insured's work was incorrectly performed. Here, the damage to the house caused by the failure to conduct soil testing was not caused by any defective work on particular part of the property, and was therefore outside the scope of the policy exclusion.

- *Corner Constr. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887 (S.D. 2002). Faulty construction is an occurrence when the property damage is neither expected nor intended by the general contractor. Here, the subcontractor's defective wall construction is an occurrence under the general contractors CGL policy because it was an unintended accidental event.

TENNESSEE*

- *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn. 2007). An accidental occurrence refers to an event that is unforeseeable, unexpected, and fortuitous. The alleged water penetration from the faulty window installation by the insured contractor's subcontractor was an accidental occurrence, even though the property damage could be the natural consequence of the faulty workmanship.

- Update 2014: *Forrest Construction v. The Cincinnati Ins. Co.*, 703 F. 3d 359 (6th Cir. 2013) (applying Tennessee law). This decision holds that the insurance was carrier required to provide a defense despite lack of clarity in the underlying complaint regarding work performed by a subcontractor and/or damage to anything other than the defective work itself. The court held that allegations about a faulty foundation implied damages to the house and that allegations that the house was rendered unsafe to enter were to be construed in favor of potential coverage and the duty to defend.

TEXAS*

- *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007). An occurrence depends on whether the property damage is unexpected or unintended from the standpoint of the insured. Here, the general contractor's faulty workmanship in building a house foundation constituted and an occurrence because there were no allegations that the insured general contractor intended or expected its or its subcontractor's work to damage the home. The court ruled that property damage to the contractor's own work is an occurrence under the CGL policy.

- The Texas Supreme Court has confirmed this holding. *See Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co.*, 248 S.W.3d 171 (Tex. 2008) (remanding case to lower court for decision consistent with its ruling in *Lamar Homes)*; *see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650 (Tex. 2009) (homeowners' faulty workmanship claims against insured homebuilder held to be claims for property damage caused by an occurrence).

UTAH

- Update 2016: It is now clearer that Utah is trending as an ORANGE state. In *Cincinnati Ins. Co. v. Spectrum Dev. Corp.*, 2015 WL 730020 (D. Utah Feb. 19, 2015), the court held that there was an "occurrence" under the general contractor's CGL policy where the negligent work of its subcontractors resulted in water damage to a home. The decision discusses *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275 (D. Utah 2006) (see below), which held that the negligent acts of an insured's subcontractor in building homes could constitute an occurrence, and emphasized the distinction between the insured's work and a subcontractor's negligent work. The decision also discusses *N.M. on behalf of Caleb v. Daniel E.*, 175 P.3d 566, 570-1 (Utah 2008). In that case, the Utah Supreme Court held that "when determining whether there is an accident, the court is not to examine whether the underlying act is intentional, deliberate, or foreseeable, but rather whether the result of the act was intended or expected from the perspective of the insured." Utah's case law therefore now analyzes whether the result of conduct was expected or intended by the policyholder, rather than the conduct itself, to determine whether there was an accidental "occurrence." While this could indicate a "yellow" analysis, these courts appear to still determine whether there is an "occurrence" by looking to whether the property damage was to something other than the defective work itself, and the analysis is therefore being classified as "orange."

- Update 2015: Based on a new federal court decision applying Utah law, we are changing our analysis to "ORANGE" from "GREY," but it remains unclear whether Utah is actually an "ORANGE" or a "RED state. While it now appears clear that damage to something other than the insured's own defective work must be at issue to constitute an "occurrence," it is still very unclear whether damage to non-faulty work that is part of the insured's scope of work would qualify.

- Update 2015: In *Cincinnati Ins. Co. v. AMSCO Windows*, 593 Fed. App'x 802 (10th Cir. 2014), the Tenth Circuit, applying Utah law, held that Cincinnati Insurance was required to defend AMSCO against claims that its windows caused property damage to

the interior and exterior of the homes in which they were installed. The court expressly rejected the carrier's argument that the resulting property damage could not be an "occurrence" as a matter of law because it was the "natural and probable" result of faulty workmanship. The court held that the correct test to determine is not whether the result was "foreseeable," but rather whether it was expected or intended from the standpoint of the insured. The decision holds that the carrier was required to provide a defense because the underlying case alleged damage to property other than the defective windows themselves, and because there was no evidence that AMSCO intended to cause that property damage.

The decision also discusses the court's prior decision in *Employers Mutual Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153 (10th Cir. 2010). That decision stated that the "natural results" of unworkmanlike construction are not an "occurrence." This holding was distinguished on the ground that the damages there "arose out of construction defects caused by the insured's negligent roofing work itself -- not, as here, out of damage to property other than the allegedly defective work." However, it remains unclear under Utah law whether resulting property damage to an insured contractor's own scope of work is an "occurrence."

- *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275 (D. Utah 2006). An accidental occurrence within the meaning of a CGL policy is determined from the viewpoint of the insured and not the actor causing the injury. Under Utah law, a subcontractor's faulty work is an accidental occurrence from the standpoint of an insured general contractor and, thus, an occurrence under the general contractors CGL policy. *But see, H.E. Davis & Sons, Inc. v. North Pac. Ins. Co.*, 248 F. Supp. 2d 1079 (D. Utah 2002) (insured subcontractor's defective work is not an occurrence where the consequences of the faulty work are natural and foreseeable).

VERMONT*

- *Peerless Ins. Co. v. Wells*, 580 A.2d 485 (Vt. 1990). No occurrence where property damage arises out of the faulty workmanship of the insured. Here, the Supreme Court of Vermont held there was no occurrence and, therefore, no coverage, for property damage arising out of the insured contractor's own faulty soil compaction beneath a home. *See also, Transcontinental Ins. Co. v. Engelberth Constr., Inc.*, No. 1:06-CV-213, 2007 WL 3333465 (D. Vt. Nov. 8, 2007) (insured general contractor's CGL policy covered property damage caused by a subcontractor's negligent construction of dormers and heating systems of a hotel).

VIRGINIA

- *Dragas Mgmt. Corp. v. Hanover Ins. Co.*, 798 F.Supp.2d 758 (E.D. Va. 2011). An occurrence is an accident including continuous or repeated exposure to substantially the same general harmful conditions which result in a property defect. Here, an insured property developer's repair or replacement of non-defective components of homes damaged by defective drywall installed by its subcontractor was an occurrence within the meaning of its CGL policy. *See also, Stanley Martin Cos. v. Ohio Cas. Group*, 313 Fed. App'x 609 (4th Cir. 2009) (under Virginia law, an occurrence exists where a subcontractor's defective workmanship causes property damage to the general contractor's non-defective work). *But see, Hotel Roanoke Conf. Ctr. Comm'n v. Cincinnati Ins.*

Co., 303 F. Supp. 2d 784 (W.D. Va. 2004) (insured subcontractor's defective work is not an occurrence).

- We previously listed Virginia as a GREY/uncertain state based on *Travelers Indem. Co. v. Miller Bldg. Corp.*, 142 Fed. App'x 147 (4th Cir. 2005) (all defective work, even that performed by the insured's subcontractors are deemed expected and intended by the insured general contractor). However, we are now aware that this federal court decision applied North Carolina and not Virginia law. We therefore now list Virginia as an ORANGE state.

WASHINGTON*

- Update 2015: Washington still does not have recent case law directly addressing the "occurrence" issue, but its prior case law cited below continues to indicate that Washington is a "yellow" state in the appropriate case. However, a recent decision applying the J(5) - "damage to property" - exclusion to deny coverage injects a note of caution. In *Western National Assurance Co. v. Shelcon Construction Group LLC*, 182 Wn. App. 256, 332 P.3d 986 (2014), the court held that there was no duty to defend a subcontractor against claims it negligently performed site soil preparation work. The court held that the exclusion for "property damage to that particular part of real property on which you … are performing operations" applied to exclude any and all coverage for the alleged loss, including the alleged loss of value for the property when a prospective purchaser rescinded its agreement after the negligent soil work was performed.

- *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 608 P.2d 254 (Wash. 1980). An accident within coverage of the CGL policy is an unexpected or unforeseen happening or consequence from either a known or an unknown cause. Here, the insured manufacturer's unintentional and unexpected defective manufacture of concrete panels was an accident contemplated by the CGL policy.

- Although the *Yakima* decision involves defective products, the holding has been relied upon in defective construction cases. *See Mid-Continent Cas. Co. v. Titan Constr. Corp.*, 281 Fed. App'x 766 (9th Cir. 2008), *aff'd*, 440 Fed. App'x 547 (9th Cir. 2011) (unpublished). In that case, the court held that, absent intentional conduct, the negligent construction of a condominium project that resulted in breach of contract and breach of warranty claims against insured construction company constituted an occurrence under the construction company's CGL policy.

- *But see, Big Const., Inc. v. Gemini Ins. Co.*, No. C12-5015 RJB, 2012 WL 1858723 (W.D. Wash. May 22, 2012) (citing to *Yakima,* finds no occurrence where a complaint fails to allege any property damage).

WEST VIRGINIA*

- Update 2016: We are changing West Virginia to ORANGE from YELLOW because it is now clear that property damage resulting from faulty workmanship is required for there to be an "occurrence."

- Update 2016: The West Virginia Supreme Court of Appeals ruled that *Cherrington* applies retroactively, creating coverage for policies sold while the overruled precedents governed. *BPI Inc. v. Nationwide Mut. Ins. Co.*, 235 W. Va. 303 (2015).

- Update 2016: The West Virginia Supreme Court of Appeals issued its decision in *SER Nationwide v. Wilson*, No. 15-0424 (W.Va. October 7, 2015). The case examines coverage under a CGL policy issued to a contractor who allegedly negligently constructed a home, failed to complete construction, and failed to pay suppliers and subcontractors. Based on *Cherrington* (discussed below), the trial court held that the faulty workmanship claim was insured under the policy and that the carrier therefore had a duty to indemnify the contractor for *any damages* that were recovered against the contractor on all claims. On appeal, however, the Supreme Court held that virtually all of the causes of action asserted against the contractor were *not* covered by a CGL policy (including claims for breach of contract, breach of the covenant of good faith and fair dealing, defamation, unfair and deceptive practices, fraud and intentional misrepresentation, conversion, unconscionability and injunctive relief). Only the claim for defective workmanship was potentially covered by the policy because, under *Cherrington*, "defective workmanship causing bodily injury or property damage is an 'occurrence' …."

  Unfortunately for the policyholder, the Supreme Court further held that exclusions in the policy applied to bar coverage. The court based this conclusion on the allegations in the homeowners' amended complaint that only sought damages based on the insured contractor's own work (not that of its subcontractors), and the homeowner's refusal to provide information in discovery that could have shed light on the involvement of any subcontractors. The decision holds that the "your work" and "impaired property" exclusions precluded coverage for the construction defect claim.

- Update 2014: In *Cherrington et al. v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d (W. Va. 2013), the West Virginia Supreme Court of Appeals abandoned nearly five decades of precedent holding that faulty workmanship is not an "occurrence" under commercial general liability ("CGL") policies. The June 18, 2013 decision holds that "defective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of general liability insurance." The decision expressly overrules *Corder v. William W. Smith Excavating Co.*, 556 S.E.2d 77 (W. Va. 2001), *Webster County Solid Waste Auth. v. Brackenrich & Assocs.*, 617 S.E.2d 851 (W.Va. 2005) and certain other prior decisions issued by the West Virginia Supreme Court of Appeals.

- *Cherrington* involved a suit by a homeowner against a developer. The claim included alleged defects in a concrete floor and water infiltration through the roof. The court stressed that the alleged defects were not "deliberate, intentional expected, desired or foreseen" by the insured developer, and therefore constituted an "accident" within the meaning of the term "occurrence." The court further found that a contrary conclusion would create an "absurd result" in light of the subcontractor exception to the "your work" exclusion, because the policy "expressly provides coverage for damages occasioned by subcontractors acting on behalf of the insured." The decision also holds that the homeowner alleged "property damage" (including the costs to repair damage caused by the leaking roof), and that various policy exclusions did not apply to bar coverage for the claim.

WISCONSIN*

- *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004), holds that property damage caused by unintentional faulty workmanship is an "occurrence." The Wisconsin Supreme Court explained its decision as follows: "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."

- In *Pamperin Rentals II, LLC v. R.G. Hendricks & Sons Construction, Inc., 822 N.W.2d 736* (Wis. Ct. App. Sept 5, 2012), an owner of gas stations sued the supplier of concrete used to construct the gas stations on the ground that the concrete was defective and damaged nearby asphalt. The supplier tendered the claim to its general liability insurers, which denied coverage on the ground that the claims did not allege "property damage" or an "occurrence." The supplier sued and the trial court granted the insurers' motions for summary judgment, but the appellate court reversed. The decision concludes that the damage to the asphalt qualified as "property damage" within the meaning of the insurance policies at issue. The decision also holds that, while the damage to the concrete itself was not a covered loss, the resulting damage to the asphalt was a covered loss because it was neither expected nor intended by the policyholder and, therefore constituted an "occurrence." *See also Stuart v. Weisflog's Showroom Gallery, Inc.*, 753 N.W.2d 448 (Wis. 2008) (insured general contractor's misrepresentations were not covered by its CGL policy because misrepresentations are not accidental and, thus, not occurrences). *But see, Mantz Automation, Inc. v. Navigators Ins. Co.*, 787 N.W.2d 60 (Wis. Ct. App. 2010) (no "occurrence" where the only property damage was to the defective floor itself).

WYOMING

- Update 2016: There are still no decisions issued by a Wyoming state court that directly address the "occurrence" issue. However, federal decisions interpreting Wyoming law continue to find that property damage to a project caused by the faulty workmanship of a general contractor or subcontractor does not constitute an "occurrence." We therefore continue to classify Wyoming as a RED state. *See also* Utah.

- In other contexts, Wyoming decisions hold that breach of contract claims are not covered by the CGL insurance policy. *See First Wyoming Bank v. Continental Ins. Co.*, 860 P.2d 1094 (Wyo. 1993); *Action Ads, Inc. v. Great American Ins. Co.*, 685 P.2d 42 (Wyo. 1984). *See also Reisig v. Union Ins. Co.*, 870 P.2d 1066 (Wyo. 1994) (accident is "an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens;" "an unusual, fortuitous, unexpected, unforeseen or unlooked for event).

- Decisions from the 10th Circuit hold that that there can be no "occurrence" under Wyoming law for property damage to the project caused by faulty workmanship of the insured or its subcontractors. For example, in *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1175 (10th Cir. 2010) (*Bartile I*), the Tenth circuit held that under both Wyoming and Utah law the insurer had no duty to indemnify Bartile because "the natural results of an insured's negligent and unworkmanlike construction do not constitute an occurrence triggering coverage under a CGL policy." In a second appeal in this same case, the court further explained its holding as follows: "Coverage here does not depend on whether the claims against Bartile sound in tort or contract. As we explained in *Bartile I*, regardless of the label applied to a claim, '[u]nder [both] Wyoming and Utah law, the natural results of an insured's negligent and unworkmanlike construction do not constitute an occurrence triggering coverage under a CGL policy.' . . . The issue therefore is not whether the [amended complaint] contains a tort claim, but whether the [amended complaint] seeks to hold Bartile liable for something other than the natural results of its own negligent and unworkmanlike construction. Bartile has failed to show this is the case. *Employers' Mut. Cas. Co. v. Bartile Roofs, Inc.*, 478 F. App'x 493, 499 (10th Cir. 2012).

- The 10th Circuit reached a different conclusion applying Utah law in a case that involved resulting water damage claims against a window manufacturer. *Cincinnati Ins. Co. v. AMSCO Windows*, 593 F. App'x 802 (10th Cir. 2014). Unlike the decisions in Bartile I and Bartile II (in which the court applied both Wyoming and Utah law), *AMSCO* holds that resulting damage to property other than the insured's windows themselves can be an "occurrence" under the CGL policy. The court attempts to explain its different conclusion as follows: "[I]n *Bartile I*, we stated that 'the natural results of an insured's negligent and unworkmanlike construction do not constitute an occurrence triggering coverage under a CGL policy.' However, the claims at issue in *Bartile* arose out of construction defects caused by the insured's negligent roofing work itself -- not, as here, out of damage to property other than the allegedly defective work. Whether damaged property underlying a claim is the direct product of negligent conduct or, instead, is one or more steps removed from the alleged product of negligent conduct may determine whether an insured expected that damage to result. Thus, we do not believe that *Bartile* requires us to hold -- as a broad principle -- that no occurrence can arise from negligence." The decision also states (in a footnote): "FN 3. Our order in a subsequent appeal in the same case, *Bartile II*, does not alter our analysis. Although the property at issue on the second appeal was non-defective property damaged by water intrusion, the insured did not present any argument for the court to consider that the resultant damage was not an expected result of the insured's negligent construction."

- *Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming*, No. 06-CV-020-WCB, 2006 WL 3933078 (D. Wyo. Oct. 20, 2006) (unpublished). Holds that property damage caused by defective work, including damage to non-defective work outside the scope of work performed by the insured subcontractor, does not constitute an "occurrence." The decision states: "The allegations contained in the Underlying Action sound in contract, and fail to allege losses resulting from an 'occurrence' as defined by the Policy. Nothing in the allegations suggests that any resulting damage was caused by an unintended, unforeseen, or unexpected accident." The decision further states: "Although, defendant argues that while not specifically stated, the Underlying Action

alleges that defendant improperly installed and waterproofed the siding, resulting in water damage to the … resort, the facts fail to demonstrate an alleged loss resulting from an "occurrence" as defined by the Policy. Instead, the allegations demonstrate losses resulting from breach of contract, as water damage is the natural and foreseeable result of improper installation and waterproofing of exterior siding, and therefore cannot constitute an 'accident' for purposes of determining coverage. Further, many jurisdictions hold that the natural results of negligent and unworkmanlike construction do not constitute an occurrence … ."

Clifford J. Shapiro
Partner and Chair of the Construction Law Practice Group
Barnes & Thornburg LLP
Chicago, Illinois 60606
cshapiro@btlaw.com
June 14, 2018

Acknowledgment: The author wishes to thank Andrea Warren, a partner in the Indianapolis office of Barnes & Thornburg, for her invaluable help in preparing this 2018 update. This 50-state survey was first prepared for and published by the American College of Construction Lawyers in connection with the ACCL's annual meetings held during 2013 and 2014. The author wishes to acknowledge and give thanks and appreciation to James Duffy O'Connor, a partner in Maslon LLP's Construction & Real Estate Litigation Group, for his initiation, vision and initial contributions to this project.

©2018 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.