Colorado House Bill 10-1394

Presented to the

Construction Defect Claim Manager Association

By:

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Comment [MSOffice1]: See Exhibit 1, HBA Legislative Publication: Myth vs. Fact

CONCERNING COMMERCIAL LIABILITY INSURANCE POLICIES ISSUED TO CONSTRUCTION PROFESSIONALS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Part 8 of article 20 of title 13, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

13-20-808. Insurance policies issued to construction professionals. (1) (a) THE GENERAL ASSEMBLY FINDS AND DETERMINES THAT:

(I) THE INTERPRETATION OF INSURANCE POLICIES ISSUED TO CONSTRUCTION PROFESSIONALS IS OF VITAL IMPORTANCE TO THE ECONOMIC AND SOCIAL WELFARE OF THE CITIZENS OF COLORADO AND IN FURTHERING THE PURPOSES OF THIS PART 8.

(II) INSURANCE POLICIES ISSUED TO CONSTRUCTION PROFESSIONALS HAVE BECOME INCREASINGLY COMPLEX, OFTEN CONTAINING MULTIPLE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

LENGTHY ENDORSEMENTS AND EXCLUSIONS CONFLICTING WITH THE REASONABLE EXPECTATIONS OF THE INSURED.

(III) THE CORRECT INTERPRETATION OF COVERAGE FOR DAMAGES ARISING OUT OF CONSTRUCTION DEFECTS IS IN THE BEST INTEREST OF INSURERS, CONSTRUCTION PROFESSIONALS, AND PROPERTY OWNERS.

(b) THE GENERAL ASSEMBLY DECLARES THAT:

(I) THE POLICY OF COLORADO FAVORS THE INTERPRETATION OF INSURANCE COVERAGE BROADLY FOR THE INSURED.

(II) THE LONG-STANDING AND CONTINUING POLICY OF COLORADO FAVORS A BROAD INTERPRETATION OF AN INSURER'S DUTY TO DEFEND THE INSURED UNDER LIABILITY INSURANCE POLICIES AND THAT THIS DUTY IS A FIRST-PARTY BENEFIT TO AND CLAIM ON BEHALF OF THE INSURED.

Comment [MSOffice2]: *See* **Exhibit 2.** Hecla Mining Co. v. New Hampshire Insurance Co., 811 P.2d 1083 (Colo. 1991); *See also* Cotter Corp. v. American Empire Surplus Lines Insurance Co., 90 P.3d 814 (Colo. 2004) (insurer's broad duty to defend)

(III) THE DECISION OF THE COLORADO COURT OF APPEALS IN *GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA V. MOUNTAIN STATES MUTUAL CASUALTY COMPANY,* 205 P.3d 529 (COLO. APP. 2009) DOES NOT PROPERLY CONSIDER A CONSTRUCTION PROFESSIONAL'S REASONABLE EXPECTATION THAT AN INSURER WOULD DEFEND THE CONSTRUCTION PROFESSIONAL AGAINST AN ACTION OR NOTICE OF CLAIM CONTEMPLATED BY THIS PART 8.

Comment [MSOffice3]: *See* **Exhibit 3.** General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company, 205 P.3d 529 and HHMR Blog post on this case

(IV) FOR THE PURPOSES OF GUIDING PENDING AND FUTURE ACTIONS INTERPRETING LIABILITY INSURANCE POLICIES ISSUED TO CONSTRUCTION PROFESSIONALS, WHAT HAS BEEN AND CONTINUES TO BE THE POLICY OF COLORADO IS HEREBY CLARIFIED AND CONFIRMED IN THE INTERPRETATION OF INSURANCE POLICIES THAT HAVE BEEN AND MAY BE ISSUED TO CONSTRUCTION PROFESSIONALS.

(2) FOR THE PURPOSES OF THIS SECTION:

(a) "INSURANCE" HAS THE SAME MEANING AS SET FORTH IN SECTION 10-1-102, C.R.S.

(b) "INSURER" HAS THE SAME MEANING AS SET FORTH IN SECTION 10-1-102, C.R.S.

(c) "INSURANCE POLICY" MEANS A CONTRACT OF INSURANCE.

(d) "LIABILITY INSURANCE POLICY" MEANS A CONTRACT OF INSURANCE THAT COVERS OCCURRENCES OF DAMAGE OR INJURY DURING THE POLICY PERIOD AND INSURES A CONSTRUCTION PROFESSIONAL FOR LIABILITY ARISING FROM CONSTRUCTION-RELATED WORK.

(3) IN INTERPRETING A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL, A COURT SHALL PRESUME THAT THE WORK OF A CONSTRUCTION PROFESSIONAL THAT RESULTS IN PROPERTY DAMAGE, INCLUDING DAMAGE TO THE WORK ITSELF OR OTHER WORK, IS AN ACCIDENT UNLESS THE PROPERTY DAMAGE IS INTENDED AND EXPECTED BY THE INSURED. NOTHING IN THIS SUBSECTION (3):

(a) REQUIRES COVERAGE FOR DAMAGE TO AN INSURED'S OWN WORK UNLESS OTHERWISE PROVIDED IN THE INSURANCE POLICY; OR

(b) CREATES INSURANCE COVERAGE THAT IS NOT INCLUDED IN THE INSURANCE POLICY.

(4) (a) UPON A FINDING OF AMBIGUITY IN AN INSURANCE POLICY, A COURT MAY CONSIDER A CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS IN THE INTERPRETATION OF AN INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL.

(b) IN CONSTRUING AN INSURANCE POLICY TO MEET A CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS, THE COURT MAY CONSIDER THE FOLLOWING:

(I) THE OBJECT SOUGHT TO BE OBTAINED BY THE CONSTRUCTION PROFESSIONAL IN THE PURCHASE OF THE INSURANCE POLICY; AND

(II) WHETHER A CONSTRUCTION DEFECT HAS RESULTED, DIRECTLY OR INDIRECTLY, IN BODILY INJURY, PROPERTY DAMAGE, OR LOSS OF THE USE OF PROPERTY.

(c) IN CONSTRUING AN INSURANCE POLICY TO MEET A CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS, A COURT MAY CONSIDER AND GIVE WEIGHT TO ANY WRITING CONCERNING THE INSURANCE POLICY PROVISION IN DISPUTE THAT IS NOT PROTECTED FROM DISCLOSURE BY

Comment [MSOffice4]: *See* **Exhibit 4**. Greystone Const., Inc. v. National Fire & Marine Ins. Co., 649 F.Supp. 2d 1213 (D. Colo. 2009), the HHMR Blog post on this case, and the June 2, 2010 Tenth Circuit Court of Appeals' Certification of Question of State Law to the Colorado Supreme Court

Comment [MSOffice5]: *See* **Exhibit 5**. Sample ISO Endorsements for amendment to the "damage to your work" exclusion

Comment [MSOffice6]: *See* **Exhibit 6**. 1979 ISO Circular regarding Broad Form Property Damage Explained

THE ATTORNEY-CLIENT PRIVILEGE, WORK-PRODUCT PRIVILEGE, OR ARTICLE 72 OF TITLE 24, C.R.S., AND THAT IS GENERATED, APPROVED, ADOPTED, OR RELIED ON BY THE INSURER OR ITS PARENT OR SUBSIDIARY COMPANY; OR AN INSURANCE RATING OR POLICY DRAFTING ORGANIZATION, SUCH AS THE INSURANCE SERVICES OFFICE, INC., OR ITS PREDECESSOR OR SUCCESSOR ORGANIZATION; EXCEPT THAT SUCH WRITING SHALL NOT BE USED TO RESTRICT, LIMIT, EXCLUDE, OR CONDITION COVERAGE OR THE INSURER'S OBLIGATION BEYOND THAT WHICH IS REASONABLY INFERRED FROM THE WORDS USED IN THE INSURANCE POLICY.

(5) IF AN INSURANCE POLICY PROVISION THAT APPEARS TO GRANT OR RESTORE COVERAGE CONFLICTS WITH AN INSURANCE POLICY PROVISION THAT APPEARS TO EXCLUDE OR LIMIT COVERAGE, THE COURT SHALL CONSTRUE THE INSURANCE POLICY TO FAVOR COVERAGE IF REASONABLY AND OBJECTIVELY POSSIBLE.

Comment [MSOffice7]: *See* Exhibit 7, Union Ins. Co. v. Kjeldgaard, 820 P.2d 1183, 1187 (Colo. App. 1991)

(6) IF AN INSURER DISCLAIMS OR LIMITS COVERAGE UNDER A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL, THE INSURER SHALL BEAR THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT:

(a) ANY POLICY'S LIMITATION, EXCLUSION, OR CONDITION IN THE INSURANCE POLICY BARS OR LIMITS COVERAGE FOR THE INSURED'S LEGAL LIABILITY IN AN ACTION OR NOTICE OF CLAIM MADE PURSUANT TO SECTION 13-20-803.5 CONCERNING A CONSTRUCTION DEFECT; AND

(b) ANY EXCEPTION TO THE LIMITATION, EXCLUSION, OR CONDITION IN THE INSURANCE POLICY DOES NOT RESTORE COVERAGE UNDER THE POLICY.

(7) (a) AN INSURER'S DUTY TO DEFEND A CONSTRUCTION PROFESSIONAL OR OTHER INSURED UNDER A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL SHALL BE TRIGGERED BY A POTENTIALLY COVERED LIABILITY DESCRIBED IN:

(I) A NOTICE OF CLAIM MADE PURSUANT TO SECTION 13-20-803.5;
OR

(II) A COMPLAINT, CROSS-CLAIM, COUNTERCLAIM, OR THIRD-PARTY CLAIM FILED IN AN ACTION AGAINST THE CONSTRUCTION PROFESSIONAL CONCERNING A CONSTRUCTION DEFECT.

(b) (I) AN INSURER SHALL DEFEND A CONSTRUCTION PROFESSIONAL WHO HAS RECEIVED A NOTICE OF CLAIM MADE PURSUANT TO SECTION 13-20-803.5 REGARDLESS OF WHETHER ANOTHER INSURER MAY ALSO OWE THE INSURED A DUTY TO DEFEND THE NOTICE OF CLAIM UNLESS AUTHORIZED BY LAW. IN DEFENDING THE CLAIM, THE INSURER SHALL:

Comment [MSOffice8]: *See* **Exhibit 8.** Sample endorsement

(A) REASONABLY INVESTIGATE THE CLAIM; AND

(B) REASONABLY COOPERATE WITH THE INSURED IN THE NOTICE OF CLAIMS PROCESS.

(II) THIS PARAGRAPH (b) DOES NOT REQUIRE THE INSURER TO RETAIN LEGAL COUNSEL FOR THE INSURED OR TO PAY ANY SUMS TOWARD SETTLEMENT OF THE NOTICE OF CLAIM THAT ARE NOT COVERED BY THE INSURANCE POLICY.

(III) AN INSURER SHALL NOT WITHDRAW ITS DEFENSE OF AN INSURED CONSTRUCTION PROFESSIONAL OR COMMENCE AN ACTION SEEKING REIMBURSEMENT FROM AN INSURED FOR EXPENDED DEFENSE COST UNLESS AUTHORIZED BY LAW AND UNLESS THE INSURER HAS RESERVED SUCH RIGHT IN WRITING WHEN ACCEPTING OR ASSUMING THE DEFENSE OBLIGATION.

Comment [MSOffice9]: Reservation of rights letter consideration

SECTION 2. Part 1 of article 4 of title 10, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

Comment [MSOffice10]: *See* **Exhibit 9.** Sample endorsement probably made void and unenforceable as against public policy

10-4-110.4. Exclusion - claims involving loss in progress not known to insured. (1) A PROVISION IN A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL EXCLUDING OR LIMITING COVERAGE FOR ONE OR MORE CLAIMS ARISING FROM BODILY INJURY, PROPERTY DAMAGE, ADVERTISING INJURY, OR PERSONAL INJURY THAT OCCURS BEFORE THE POLICY'S INCEPTION DATE AND THAT CONTINUES, WORSENS, OR PROGRESSES WHEN THE POLICY IS IN EFFECT IS VOID AND UNENFORCEABLE IF THE EXCLUSION OR LIMITATION APPLIES TO AN INJURY OR DAMAGE THAT WAS UNKNOWN TO THE INSURED AT THE POLICY'S INCEPTION DATE.

(2) ANY PROVISION IN AN INSURANCE POLICY ISSUED IN VIOLATION OF THIS SECTION IS VOID AND UNENFORCEABLE AS AGAINST PUBLIC POLICY.

A COURT SHALL CONSTRUE AN INSURANCE POLICY CONTAINING A PROVISION THAT IS UNENFORCEABLE UNDER THIS SECTION AS IF THE PROVISION WAS NOT A PART OF THE POLICY WHEN THE POLICY WAS ISSUED.

(3) THIS SECTION APPLIES ONLY TO AN INSURANCE POLICY THAT COVERS OCCURRENCES OF DAMAGE OR INJURY DURING THE POLICY PERIOD AND THAT INSURES A CONSTRUCTION PROFESSIONAL FOR LIABILITY ARISING FROM CONSTRUCTION-RELATED WORK.

SECTION 3. Applicability. This act applies to all insurance policies currently in existence or issued on or after the effective date of this act.

SECTION 4. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Terrance D. Carroll
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Brandon C. Shaffer
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Karen Goldman
SECRETARY OF
THE SENATE

APPROVED_____

Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO

Exhibit 1

HB-1394 – Myth vs. Reality

Myth – The bill allows the "stacking" of insurance policies.

Reality – Under HB-1394, insurance companies will not be able to exclude coverage for damages that the builder did not know about but became apparent during the policy's term. HB-1394 DOES NOT change the current ability of insurance companies to exclude damages that a builder knew existed in subsequent insurance policies to cover construction defects. The Bill also does not affect existing Colorado law requiring equitably pro-rating on a percentage basis an insured loss among various insurers on the risk when property damage occurs over several policy periods. In other words, the "years on the risk" percentage formula that insurers have relied on when dividing up a covered loss among themselves remains unaffected.

- Builders obtain and pay for policies on a yearly basis.
- Each policy is responsible only for damage that occurs within that policy period.
- Unlike a car accident where all of the damage occurs at once, damage to a building can progress – for example from a roof leak, to the roof leak rotting the support beams, to a roof leak causing rot to roof beams that then collapse.
- Under such circumstances, the builder's policies cover the damage that occurs within the policy period, not the entire damage. So the insurer who insured during the year when the roof leak began only pays for that damage, the insurer provided coverage for the year in which the rot occurred pays only for that damage, and the insurer that provided the coverage for the year of the collapse pays only for that damage.
- That is NOT stacking, that is giving the builder what it paid for when it bought the policies.

Myth – The bill will turn commercial general liability insurance policies into performance bonds.

Reality – Wrong. The Bill is limited simply to reaffirming the insurance industry's admitted intent, as expressed in their own interpretive and marketing materials going back to 1986, that their liability policies cover property damage resulting from the insured's negligence. In no way does the Bill require a liability insurer: (a) to pay to remedy defective work that does not cause property damage; (b) to pay for the completion of unfinished or non-conforming work; (c) to pay delay damages or (d) to pay for punchlist or warranty repairs. This is what the insurance industry has said in the past about the coverage afforded by the liability policies that are the subject of the measure:

- Insurance Services Organization (ISO) is the insurance industry trade group that creates the industry's standardized policies and underwriting guidelines pursuant to a federal anti-trust exemption. *ISO Circular, Commercial General Liability Program Instructions Pamphlet (1986)*: ". . . covers damages caused by faulty

workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed."

- Fire, Casualty and Surety Bulletins (FC&S) are published by the National Underwriter, an insurance industry trade and publication group. *FC&S Bulletin: Public Liability, Aa 16-17 (1993)*: "Example: An insured general contractor builds an apartment house with many subcontractors' services. After construction is complete a defect in the building's wiring, which wiring was installed by a subcontractor, causes the building, including the work of the general contractor and other subcontractors, to sustain substantial fire damage. The insured is sued by the building owner. Result: Although the insured's policy excludes damage to "your work" arising out of it or any part of it, the second part of the exclusion makes it clear that the exclusion does not apply to the claim."
- *FC&S Bulletin: Public Liability, M.10-3 (February, 2002)*: "Example: Stucco work peels and chips, but which work was performed by the insured's subcontractor. Result: "The insured may have hired the subcontractor and may be ultimately held legally responsible for the subcontractor's work, but when it comes to the your work exclusion, the CGL form considers the insured and the subcontractor as two separate entities. The insured will not be penalized for the faulty work."

Myth – The bill voids existing contracts.

Reality – As with any other law, the bill's procedural aspects regarding what type of evidence that may be considered by a court in resolving a dispute as to what a complicated insurance contract means are effective immediately; however, any other aspect of the bill that some are arguing would unconstitutionally rewrite an existing contract would be ineffective to do so.

Myth – The bill voids "Montrose exclusions."

Reality – Wrong. HB-1394 expressly allows "Montrose exclusions" as the insurance industry originally adopted them following the Montrose decision in California, which exclusion bars coverage for lawsuits and claims that the insured is aware of before his insurance policy issues. However, the bill limits recent and unfair changes to this exclusion which disregard whether the insured has any knowledge of such lawsuits or claims before purchasing his policy and, instead, exclude coverage for losses of which the insured was completely unaware. These more recent, unfair provisions, when combined with Colorado's pro rata rule which limits each insurer's liability only to that percentage of the property damage which occurs during its particular policy, was allowing insurers to keep the insured's multiple premiums while simultaneously "squeezing" all of the insurance liability under a single policy, leaving the construction professional completely uninsured for its liability for property damage occurring afterwards.

- Example: By coupling its Montrose provisions with Colorado's insurance apportionment rule, insurers, whose policies defined a covered "occurrence" as

including property damage resulting from "continuous or repeated exposure to substantially the same general harmful conditions," were arguing that, in the event of the insured's liability for $100,000 in damages for long-term, progressive property damage spanning three policy years, the Montrose provision barred coverage during the last two years while Colorado's apportionment rule only allowed allocation of one-third of the damages ($33,333) to the first policy year. Thus, the insured is left on the hook for $66,667 of the $100,000 loss even though the insured had no idea of the loss and potential liability until long after it paid its premiums for all three insurance policies.

Exhibit 2

811 P.2d 1083, 33 ERC 1340
(Cite as: 811 P.2d 1083)

Supreme Court of Colorado,
En Banc.

HECLA MINING COMPANY, a Delaware corporation, Petitioner,
v.
NEW HAMPSHIRE INSURANCE COMPANY and Industrial Indemnity Company, Respondents.
No. 89SC646.

May 13, 1991.
Rehearing Denied June 10, 1991.

Two cases were consolidated sua sponte by the court considering the duty of insurers to defend against and provide indemnification for claims of environmental damage against insured that conducted mining operations. The District Court of the County of Denver, Warren O. Martin, J., granted summary judgment for insured, and insurers appealed. The Court of Appeals, 791 P.2d 1154, affirmed in part, reversed in part, and remanded in part. After grant of certiorari, the Supreme Court, Erickson, J., held that: (1) comprehensive general liability policies' definition of occurrence as accident that was neither expected nor intended from standpoint of insured would be read to exclude only damages that insured knew would flow directly and immediately from its intentional act; (2) environmental damage allegedly resulting from insured's mining operations would be deemed "occurrence" under terms of comprehensive general liability policies for purposes of determining insurers' duty to defend; (3) term "sudden," in context of pollution exclusion in comprehensive general liability policies excluding coverage of pollutant discharges unless discharge is "sudden" and accidental would be construed to mean unexpected and unintended; and (4) insurers had duty to defend insured.

Reversed and remanded with directions.

Mullarkey, J., filed dissenting opinion in which Rovira, C.J., and Kirshbaum, J., joined.

West Headnotes

[1] Insurance 217 ⚿2911

217 Insurance
217XXIII Duty to Defend
217k2911 k. In General; Nature and Source of Duty. Most Cited Cases
(Formerly 217k514.9(1))
Duty to defend and duty to indemnify are separate and distinct.

[2] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
(Formerly 217k434(1))
Colorado Mined Land Reclamation Act did not provide notice to mine operators that mining could cause environmental damage, so as to preclude finding that pollution damage caused from mining operations was not unexpected so was not an occurrence covered by insured's comprehensive general liability policies; the Act proclaimed that mining was necessary and proper activity that should be promoted by state of Colorado and stated that both extraction of minerals and reclamation of land were compatible. West's C.R.S.A. §§ 34-32-101 et seq., 34-32-102.

[3] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
(Formerly 217k434(1))
Comprehensive general liability policies' definition of occurrence as accident that was neither expected nor intended by standpoint of insured would be read to exclude only damages that insured knew would flow directly and immediately from its intentional act.

[4] Insurance 217 2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
(Formerly 217k434(1))
Environmental damage allegedly resulting from insured's mining operations would be deemed "occurrence" under terms of comprehensive general liability policies for purposes of determining insurers' duty to defend, where complaint under CERCLA contained claims asserting strict liability, third-party complaint against insured did not allege that insured expected or intended environmental damage to result from its mining operations, and no proof was presented that damage caused by insured was expected or intended. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101, 107, 42 U.S.C.A. §§ 9601, 9607.

[5] Insurance 217 2939

217 Insurance
217XXIII Duty to Defend
217k2936 Evidence
217k2939 k. Burden of Proof. Most Cited Cases
(Formerly 217k514.21(1))
Insurer seeking to avoid its duty to defend insured bears heavy burden.

[6] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
(Formerly 217k514.10(1))
Insurer's duty to defend arises when underlying complaint against insurer alleges any facts that might fall within coverage of policy.

[7] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
(Formerly 217k514.10(1))
Obligation of insurer to defend arises from allegations in complaint which if sustained would impose liability covered by policy.

[8] Insurance 217 2120

217 Insurance
217XV Coverage--in General
217k2120 k. Questions of Law or Fact. Most Cited Cases
(Formerly 217k437.2(1))
Whether coverage is ultimately available under insurance contract is question of fact to be decided by trier of fact.

[9] Insurance 217 2927

217 Insurance
217XXIII Duty to Defend
217k2925 Fulfillment of Duty and Conduct of Defense
217k2927 k. Insurer's Options in General. Most Cited Cases
(Formerly 217k514.9(1), 217k514.8)
Appropriate course of action for insurer that believes it is under no obligation to defend is to provide defense to insured under reservation of its rights to seek reimbursement should facts at trial prove that incident resulting in liability was not covered by policy or to file declaratory judgment action after underlying case has been adjudicated.

[10] Insurance 217 1823

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1823 k. Exceptions, Exclusions or Limitations. Most Cited Cases
(Formerly 217k146.5(4))
To avoid policy coverage, policy must establish that exemption claim applies in particular case, and that exclusions are not subject to any other reasonable interpretations.

[11] Insurance 217 2913

217 Insurance

217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
(Formerly 217k514.9(1))
Insurer has duty to defend unless insurer can establish that allegations in complaint are solely and entirely within exclusions in policy.

[12] Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
(Formerly 217k514.9(1))
Insurer is not excused from duty to defend insured unless there is no factual or legal basis on which insurer might eventually be held liable to indemnify insured.

[13] Insurance 217 1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases
(Formerly 217k146.7(1))
Ambiguous language in insurance policy must be construed in favor of insured and against insurer who drafted policy.

[14] Insurance 217 1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases
(Formerly 217k146.1(2))
Terms used in insurance contract are ambiguous when they are susceptible to more than one reasonable interpretation.

[15] Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases
When determining plain and ordinary meaning of words, definitions in recognized dictionary may be considered.

[16] Insurance 217 2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
(Formerly 217k434(1))
Term "sudden," in context of pollution exclusion in comprehensive general liability policies excluding coverage of pollutant discharges unless discharge is "sudden" and accidental, would be construed to mean unexpected and unintended.

[17] Insurance 217 2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
(Formerly 217k514.10(2))
Insurers which had issued comprehensive general liability policies to insured that conducted mining operations had duty to defend insured in CERCLA suit in which third-party action was brought against insured where neither CERCLA complaint nor third-party complaint alleged that insured expected or intended discharge of pollutants as result of its mining operations, and the policies extended coverage to sudden and accidental occurrence involving discharge of pollutants. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101, 107, 42 U.S.C.A. §§ 9601, 9607.
***1084** Kelly, Haglund, Garnsey & Kahn, Edwin S. Kahn, Denver, Williams, Trine, Greenstein & Griffin,

P.C., Jean E. Dubofsky, Boulder, for petitioner.

Crane & Leake, P.C., Robert E. Crane, James E. Casey, Durango, Buchalter, Nemer, Fields & Younger, Victor C. Rabinowitz, Los Angeles, Cal., for respondent N.H. Ins. Co.

Rothgerber, Appel, Powers & Johnson, Charles Goldberg, Frederick J. Baumann, Mark Spitalnick, JoAnn L. Vogt, Gregory A. Vallin, Denver, for respondent Indus. Indem. Co.

Denis H. Mark, and Berkowitz, Brady & Backus, William J. Brady, Denver, for amicus curiae Colo. Trial Lawyer's Ass'n.

Popham, Haik, Schnobrich & Kaufman, Ltd., Gary E. Parish, Wiley Y. Daniel, Denver,***1085** Popham, Haik, Schnobrich & Kaufman, Ltd., John E. Heintz, Lisa I. Latorre, Washington, D.C., for amici curiae American Min. Congress, Colo. Min. Assoc., Newmont Min. Corp., Idarado Min. Co., Homestake Min. Co. and Cyprus Minerals Co.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Jacqueline H. Berardini, Deputy Atty. Gen., James D. Ellman, First Asst. Atty. Gen., Mary Capdeville, Asst. Atty. Gen., Denver, for amicus curiae State of Colo.

Bradley, Campbell, Carney & Madsen, John R. Jacus, Golden, for amicus curiae The Lowry Coalition.

Geoffrey T. Wilson, Denver, Anderson Kill Olick & Oshinsky, P.C., Eugene R. Anderson, Geri L. Weiseman, New York City, for amicus curiae Colo. Mun. League.

White & Steele, P.C., Frederick W. Klann, Denver, for amicus curiae Ins. Environmental Litigation Ass'n.

Justice ERICKSON delivered the Opinion of the Court.

We granted certiorari to review *New Hampshire Insurance Co. v. Hecla Mining Co.*, 791 P.2d 1154 (Colo.App.1989), which held that a comprehensive general liability insurance policy did not require an insurer to defend an action for damages for pollution resulting from the insured's mining activities. We reverse and remand with directions.

In 1983, the state of Colorado (state) filed suit in federal district court under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601, 9607 (1983 & 1990 Supp.), against Asarco, Inc., Resurrection Mining Company, and the Res-Asarco Joint Venture. [FN1] The state alleged that the defendants were jointly and severally liable under the strict liability provisions of CERCLA, and under common-law negligence theories, for the cleanup costs and other damages resulting from the discharge of heavy metals and other contaminants into California Gulch from the Yak Tunnel.[FN2] The state filed an amended complaint in April 1985, seeking compensation for the cleanup costs for the entire California Gulch drainage basin system.

> FN1. CERCLA creates statutory liability for present and former owners of hazardous waste disposal sites, transporters of hazardous wastes, and those who arrange for the transport and disposal of hazardous waste. 42 U.S.C. § 9607. Under CERCLA, any party with an ownership interest in the site responsible for the release of contaminants can be held strictly liable regardless of fault or intent. *Id.* The liability under CERCLA is joint and several, regardless of each party's degree of fault or responsibility for the creation of the hazardous condition. *Id.*

> FN2. The Yak Tunnel is not far from Leadville, and was developed between 1895 and 1923. The tunnel extends four and one-half miles under Iron Hill and Breece Hill in upper California Gulch, and was designed as a portal for the transportation of ore out of adjacent mines and to allow for drainage of the mine shafts into the California Gulch.

The state's CERCLA complaint was initiated after employees of Asarco caused a surge of yellow sedimentary sludge to emit from the Yak Tunnel when shoring timbers and accumulated debris were removed that had impounded the contaminated water.[FN3] The yellow sedimentary sludge emitted from

the Yak Tunnel was a limonitic precipitate, formed by ferric hydroxide and a variety of ferric sulfates, that accumulated on the bottom of the drainage tunnel. The surge of contaminated water turned a twenty-mile stretch of the Arkansas River orange.

> FN3. A "surge" is a sudden release of water that has been impounded in a mine tunnel. A surge is of short duration and generally produces a high flow of water. When a tunnel is properly maintained as part of the ongoing mining operations, surges do not occur, although once maintenance stops, roof rock and timbers collapse, creating debris barriers, impounding water that has seeped into the tunnel. When the hydraulic pressure becomes high enough, the impounded water bursts the debris barrier and a surge results. Flow rates and volumes of a surge are unpredictable.

In January 1985, Resurrection, Asarco, and Res-Asarco Joint Venture filed a third-party complaint against Hecla Mining Company.[FN4] The complaint against Hecla seeks ***1086** contribution for alleged discharges into the Yak Tunnel that occurred from 1938 to 1953 when Hecla was a shareholder and had a one-third ownership interest in the Resurrection Mining Company. The Resurrection Mining Company mined gold, silver, and lead ore at the Resurrection mine. Two of Resurrection's mine shafts connect with and drain into the Yak Tunnel. From 1981 to 1985, Hecla also held a lease interest in a mill and several tailings impoundments located in the lower California Gulch.

> FN4. Third-party complaints were also filed against over 200 other companies and individuals.

Industrial Indemnity Company provided a series of comprehensive general liability (CGL) insurance policies covering Hecla from January 1, 1974, through January 1, 1982. New Hampshire Insurance Company provided a series of one year CGL insurance policies for Hecla from January 1, 1980, through January 1, 1985. Hecla requested that both Industrial and New Hampshire provide a defense against the joint venture's third-party complaint. Industrial denied coverage and filed a declaratory judgment action in Denver District Court to obtain a judicial determination of whether it had a duty to defend the third-party claim, and whether it had a duty to indemnify Hecla for any liability resulting from the lawsuit. C.R.C.P. 57; § 13-51-101, 6A C.R.S. (1987). New Hampshire originally agreed to defend Hecla, subject to a reservation of its right to deny coverage. New Hampshire later denied coverage and intervened in the declaratory judgment action brought by Industrial.

[1] The district court entered summary judgment in favor of Hecla, finding that Industrial and New Hampshire had a duty to defend Hecla in the CERCLA action, and that the issue of the duty to indemnify was not ripe for resolution. The court of appeals reversed the district court, holding that Hecla knew or should have known of a substantial probability that its mining activities would result in environmental damage, and therefore the resulting damage was not an unexpected and unintended occurrence and was thus outside the scope of Hecla's coverage. The court of appeals concluded that neither Industrial, nor New Hampshire, had a duty to defend or to indemnify Hecla for liability resulting from pollution generated by its mining activities. We hold that under the terms of Hecla's CGL policies, both Industrial and New Hampshire have a duty to defend Hecla against the state's CERCLA action. The issue of Industrial's or New Hampshire's duty to indemnify Hecla can only be determined after liability of Hecla has been determined, and is therefore not ripe for resolution at this stage of the proceedings.[FN5]

> FN5. The duty to defend and the duty to indemnify are separate and distinct. *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1148 (2d Cir.1989). Any determination of whether Industrial or New Hampshire have a duty to indemnify Hecla is premature, and should not be made until the underlying claims are resolved. *Id.* at 1153.

I

The CGL insurance policies issued to Hecla by Industrial and New Hampshire limit defense and liability coverage to property damage caused by an occurrence. The word "occurrence" is defined in Hecla's policies as:

> an accident, including continuous or repeated exposure to conditions, which result in bodily injury or property damage, neither expected nor intended from the standpoint of the insured.

See Fire Casualty & Surety Bulletin, Aat-1 (1986) (commenting on CGL coverage forms and interpretations of occurrence and claims-made trigger provisions). Hecla's policies also contain exclusions that limit the scope of coverage as defined in the insuring agreement. The pertinent exclusion at issue here is:

> *This insurance does not apply ...* to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge,* ***1087** dispersal, release or escape *is sudden and accidental ....*

(Emphasis added.) This CGL policy provides defense and liability coverage for damage that results from an unexpected and unintended occurrence, not including damage caused by the discharge of pollution, unless that discharge is sudden and accidental.[FN6]

> FN6. Following the widespread prosecution of CERCLA actions, the standard CGL policy was amended and now provides:
>
> 2. **Exclusions.**
>
> This insurance does not apply to:
>
> ....
>
> f.(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
>
> (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
>
> (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
>
> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or
>
> (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.
>
> Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.
>
> As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.
>
> (2) Any loss, cost or expense arising out of any:
>
> (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or any way respond to, or assess the effects of pollutants; or
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way re-

> sponding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> Fire Casualty & Surety Bulletin, F-1, -2 (November 1990).

Hecla contends that the discharge of heavy metals into California Gulch was neither an expected, nor intended, consequence of its mining activity, and that although the discharge of heavy metals constitutes pollution, the discharge was sudden and accidental. Hecla therefore contends that both Industrial and New Hampshire are liable for defense and indemnification costs associated with the state's CERCLA action.

Industrial and New Hampshire both contend that the contamination of California Gulch was reasonably foreseeable and thus was expected and not an occurrence under the terms of Hecla's policies. Industrial and New Hampshire argue that even if this court determines that the damage was unexpected and unintended, the discharge of pollution was not sudden and accidental and is therefore not covered under the CGL insurance policies.

A

[2] The court of appeals concluded that the damage caused by Hecla's mining operations was not unexpected, and therefore was not an occurrence covered by Hecla's insurance policies. The court of appeals reasons were that:

> The results of one's intentional acts cannot be unexpected if they are the ordinary consequences of those acts.
>
> Here, Hecla knew or should have known of a substantial probability that its mining activities would result in environmental damage. The Colorado Mined Land Reclamation Act, § 34-32-101, 14 C.R.S. (1984), expresses the General Assembly's intent to "aid in the protection of wildlife and aquatic resources ... and promote the health, safety, and general ***1088** welfare of the people of this state." Section 34-32-102, 14 C.R.S. (1984).... Thus, absent a contrary showing, the Act provides constructive notice to all mine operators that their activities could cause environmental damage.
>
> ... Accordingly, the damage that occurred was an ordinary consequence of Hecla's actions. As a matter of law, it was not unexpected.

New Hampshire Ins. Co. v. Hecla Mining Co., 791 P.2d at 1157 (citations omitted).

The court of appeals reasoning is in error. The Colorado Mined Land Reclamation Act does not provide notice to all mine operators that mining could cause environmental damage. The court of appeals, in interpreting the Mined Land Act, failed to consider the entire section on which it relied for its holding. Section 34-32-102, 14 C.R.S. (1984), begins:

> It is declared to be the policy of this state that the extraction of minerals and the reclamation of land affected by such extraction are both *necessary and proper activities.* It is further declared to be the policy of this state that *both such activities should be and are compatible.* It is the intent of the general assembly by the enactment of this article to allow for the continued development of the mining industry of this state, while requiring those persons involved in mining operations to reclaim land affected by such operations ....

(Emphasis added.) Contrary to the court of appeals analysis, the Mined Land Act proclaims that mining is a necessary and proper activity, and should be promoted by the state of Colorado.

[3] Hecla's CGL insurance policies provide that an occurrence is an accident that is neither expected nor intended from the standpoint of the insured. In *City of Johnstown v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2nd Cir.1989), the Second Circuit held that damages are only intended if the insured knew that they would flow directly and immediately from the insured's intentional act. The Second Circuit said:

> In general, what make injuries or damages ex-

> pected or intended rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act ....

Id. at 1150 (citations omitted). *See also* Brooklyn Law School v. Aetna Casualty & Sur. Co., 849 F.2d 788, 789 (2d Cir.1988). We are persuaded by the Second Circuit and hold that the phrase "neither expected nor intended" should be read only to exclude those damages that the insured knew would flow directly and immediately from its intentional act.

[4] The state's CERCLA complaint contains claims asserting strict liability. The third-party complaint against Helca does not allege that Hecla expected or intended environmental damage to result from its mining operations. There is no allegation and no proof that the damage caused by Hecla was expected or intended. The incident therefore must be deemed an occurrence under the terms of the CGL policies for the purposes of determining the insurers' duty to defend.

B

Indemnity and New Hampshire contend that even if the discharge is an occurrence covered by the policies, the discharge is subject to the exclusionary clause because it was not a sudden and accidental discharge, but rather occurred continuously for a period of many years. Hecla contends that because the phrase sudden and accidental is ambiguous, it must be construed against the insurance carriers to mean unexpected and unintended.[FN7]

> FN7. The definition of occurrence focuses on whether the damage caused by the discharge of pollution was unexpected and unintended, the pollution exclusion clause focuses on whether the discharge of pollution was unexpected and unintended. *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989).

[5][6][7][8] ***1089** An insurer seeking to avoid its duty to defend an insured bears a heavy burden. *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d at 1149. An insurer's duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy. *Douglass v. Hartford Ins. Co.*, 602 F.2d 934, 937 (10th Cir.1979). "The actual liability of the insured to the claimant is not the criterion which places upon the insurance company the obligation to defend." Rather, the obligation to defend arises from allegations in the complaint, which if sustained, would impose a liability covered by the policy. [FN8] *Id.* "[W]here the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." [FN9] *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555, 558 (1984). Since the duty to defend is broader than the duty to indemnify, the insurer must defend the insured if the pollution could have occurred suddenly and accidentally. Whether coverage is ultimately available under the contract is a question of fact to be decided by the trier of fact. *Reliance Insurance Co. of Ill., v. Martin*, 126 Ill.App.3d 94, 97, 81 Ill.Dec. 587, 590, 467 N.E.2d 287, 290 (1984). *See* Fire Casualty & Surety Bulletin, Aa-1 (1990) (not necessary that all allegations come within scope of coverage).

> FN8. *See also Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276-77, 54 Cal.Rptr.104, 113, 419 P.2d 168, 177 (1966) (insurer obligated to defend insured even assuming application of clause excluding coverage of intentionally caused damage, since the facts alleged in the complaint might have supported a judgment based merely on the negligent conduct of the insured, which is within the coverage of the policy); *Hawaiian Ins. & Guar. Co. v. Blanco*, 72 Haw. 9, ----, 804 P.2d 876, 879-80 (1990) (duty to defend arises whenever pleadings allege facts which potentially might lead to indemnification liability); *Zurich Ins. Co. v. Raymark Indus.*, 118 Ill.2d 23, 51, 112 Ill.Dec. 684, 697, 514 N.E.2d 150, 163 (1987) (although insurer

may not ultimately be obligated to indemnify insured, insurer must defend insured if complaint alleges facts which bring the claim within potential indemnity coverage of the policy); *Republic Vanguard Ins. Co. v. Buehl,* 295 Minn. 327, 331, 204 N.W.2d 426, 429-30 (1973) (where the allegations of a complaint state a cause of action within the terms of policy coverage, the insurer must undertake to defend the insured); *Graber v. State Farm Fire & Cas. Co.,* 797 P.2d 214, 217 (Mont.1990) (same); *MacDonald v. Home Ins. Co.,* 97 N.J.Super. 501, ----, 235 A.2d 480, 482 (1967); (same); *Technicon Elecs. Corp. v. American Home Assur. Co.,* 74 N.Y.2d 66, 73, 544 N.Y.S.2d 531, 533, 542 N.E.2d 1048, 1050 (1989) ("when an exclusion clause is relied upon to deny coverage, the insurer has the burden of demonstrating that the 'allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto,* are subject to no other interpretation' ") (emphasis in original) (citation omitted); *Waste Management of Carolinas v. Peerless Ins. Co.,* 315 N.C. 688, 690-93, 340 S.E.2d 374, 377-78 (1986) (insurer's duty to defend is measured by facts alleged in pleadings, and any doubt as to coverage is to be resolved in favor of insured).

FN9. Similarly, where the complaint alleges facts which would "establish a reasonable likelihood that the alleged tortious conduct of [the insured] is excluded from coverage ...," the insurer may seek a declaratory judgment to determine the insured's duty to defend. *Troelstrup v. District Court,* 712 P.2d 1010, 1012-13 (Colo.1986); *see also First Nat'l Bank in Bristol v. South Carolina Ins. Co.,* 207 Tenn. 520, 522, 341 S.W.2d 569, 570 (1960) (insurer has no duty to defend where alleged facts fall within policy exclusion to coverage).

[9] The appropriate course of action for an insurer who believes that it is under no obligation to defend, is to provide a defense to the insured under a reservation of its rights to seek reimbursement should the facts at trial prove that the incident resulting in liability was not covered by the policy, or to file a declaratory judgment action after the underlying case has been adjudicated.[FN10] *See* ***1090***Reliance v. Martin,* 126 Ill.App.3d at 97, 81 Ill.Dec. at 590, 467 N.E.2d at 290; *City of Willoughby Hills v. Cincinnati Ins. Co.,* 459 N.E.2d at 558. Determining the duty to defend based on the allegations contained within the complaint comports with the insured's legitimate expectation of a defense, and prevents the insurer from evading coverage by filing a declaratory judgment action when the complaint against the insured is framed in terms of liability coverage contemplated by the insurance policy.[FN11] *Hartford Ins. Group v. District Court,* 625 P.2d 1013, 1018 (Colo.1981).

FN10. If the trial court were permitted to go beyond the complaint to determine Industrial's and New Hampshire's duty to defend, this would likely place Hecla in the dilemma of establishing in the declaratory judgment action that although it was responsible for the discharge of pollution into the California Gulch, that discharge was both sudden and accidental. This defense, the most reasonable and effective in the declaratory judgment action, would unduly compromise Hecla's defense in the CERCLA action where the complaint is based on a strict liability claim.

If the declaratory judgment action were to result in a determination that Hecla's discharge of pollution was neither sudden nor accidental, but was expected and intended, then the state, in the underlying action, need only amend its CERCLA complaint to include intentional discharge and invoke the doctrine of collateral estoppel against Hecla. *Hartford Ins. Group v. District Court,* 625 P.2d 1013, 1016 (Colo.1981). However, if Industrial and New Hampshire provide Hecla with a defense to the state's CERCLA action, and it is there determined that Hecla was not liable, the insurer avoids any judgment liability under its insurance contract. If Hecla had been defended under a reservation of rights and no declaratory judgment had been sought and Hecla was found to be liable to the state under CERCLA, that determination would have had no effect on a

subsequent declaratory proceeding brought by Indemnity and New Hampshire seeking reimbursement for defense expenses, since a determination as to strict liability and negligence does not resolve whether the discharge was sudden and accidental for the purposes of the pollution exclusion. *See* Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 801 (4th Cir.1949); Lane v. Hartford Fire Ins. Co., 343 F.Supp. 79, 85-86 (E.D.Mo.1972); Gray v. Zurich Ins. Co., 65 Cal.2d 263, 278, 54 Cal.Rptr. 104, 114, 419 P.2d 168, 178.

The burden imposed on Industrial and New Hampshire by requiring that the duty to defend be determined by the allegations in the complaint are negligible compared with the burden imposed on Hecla in defending a declaratory judgment action which looks to facts beyond the allegations in the complaint. *See* Hartford Ins. Group v. District Court, 625 P.2d at 1017.

FN11. Requiring the average auto accident victim, or the average home owner to bear the onerous financial burden of proving that they are entitled to a defense from liability claims asserted against them would deny the insured the protection afforded by a liability policy.

[10][11][12] In order to avoid policy coverage, an insurer must establish that the exemption claimed applies in the particular case, and that the exclusions are not subject to any other reasonable interpretations. City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d at 1149. *See also* Koncilja v. Trinity Universal Ins. Co., 35 Colo.App. 27, 528 P.2d 939, 941 (1974) (having affirmatively expressed coverage through broad promises, the insurer assumes a duty to define any limitations upon that coverage in clear and explicit terms). The insurer has a duty to defend unless the insurer can establish that the allegations in the complaint are solely and entirely within the exclusions in the insurance policy. *Id.* An insurer is not excused from its duty to defend unless there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured. *See* Hartford Ins. Group v. District Court, 625 P.2d 1013, 1018 (Colo.1981); *see also* City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d at 1149.

[13][14] The determination of a duty to defend in this case depends on the terms in the insurance policy, and the interpretation of those terms based upon the principles of contract interpretation. Marez v. Dairyland Ins. Co., 638 P.2d 286, 288-89 (Colo.1981); Benham v. Manufacturers & Wholesalers Indem. Exchange, 685 P.2d 249, 253 (Colo.App.1984). Hecla's CGL insurance policies do not define the meaning of the phrase "sudden and accidental." The interpretation of the phrase "sudden and accidental" is therefore dependent on whether the phrase is used ambiguously in the context of the policy's exclusionary clause.[FN12] Ambiguous language must be construed in favor of the insured and against the insurer who drafted the policy. ***1091** Northern Ins. Co. of N.Y. v. Ekstrom, 784 P.2d 320, 323 (Colo.1989); Kane v. Royal Ins. Co. of America, 768 P.2d 678, 680 (Colo.1989); Republic Ins. Co. v. Jernigan, 753 P.2d 229, 232 (Colo.1988). Terms used in a contract are ambiguous when they are susceptible to more than one reasonable interpretation. Northern Ins. Co. v. Ekstrom, 784 P.2d at 323.

FN12. Some courts have determined that the terms "sudden and accidental" are ambiguous by the mere fact that they are not defined in the insurance policy. *See* Buckeye Union Ins. v. Liberty Solvents & Chem., 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984).

A majority of the courts addressing the meaning of the phrase "sudden and accidental" as used in CGL insurance policies have determined that the phrase is ambiguous and therefore must be construed against the insurer to mean unexpected and unintended. *See* Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989); United States Fidelity & Guar. v. Specialty Coatings Co., 180 Ill.App.3d 378, 386, 129 Ill.Dec. 306, 311, 535 N.E.2d 1071, 1077 (1989); Upjohn Co. v. New Hampshire Ins. Co., 178 Mich.App. 706, 714, 444 N.W.2d 813, 817 (1989); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co. of N.Y., 218 N.J.Super. 516, 531-35, 528 A.2d 76, 84-85 (App.Div.1987); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 488, 426 N.Y.S.2d 603, 605 (1980); Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App.3d 228, 231, 535 N.E.2d 334, 338 (1987); United Pac. Ins. Co. v. Van's Westlake Un-

ion, Inc., 34 Wash.App. 708, 664 P.2d 1262 (1983); *Just v. Land Reclamation, Ltd.*, 155 Wis.2d 737, 157 Wis.2d 507, 456 N.W.2d 570, 575-76 (1990). Other courts have determined that "sudden and accidental" has a temporal quality and means immediate, unexpected, and unintended. *See United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir.1988); *American Motorist Ins. Co. v. General Host Corp.*, 667 F.Supp. 1423 (D.Kan.1987); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 702 F.Supp. 1317, 1326 (E.D.Mich.1988); *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 212 Ill.App.3d 231, 156 Ill.Dec. 432, 570 N.E.2d 1154 (1991); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 379 (1986); *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 383 Pa.Super. 558, 566, 557 A.2d 393, 397-99 (1989). *See also Great Lakes Container Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 727 F.2d 30 (1st Cir.1984) (complaint alleged that pollution was deliberate and continuous); *American States Ins. Co. v. Maryland Casualty Co.*, 587 F.Supp. 1549 (E.D.Mich.1984) (same); *Barmet of Indiana, Inc. v. Security Ins. Group*, 425 N.E.2d 201 (Ind.App.1981) (same); *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa.Super. 1, 487 A.2d 820 (1984) (same).

[15] When determining the plain and ordinary meaning of words, definitions in a recognized dictionary may be considered. *People v. Forgey*, 770 P.2d 781, 783 (Colo.1989). In doing so, we find that a number of recognized dictionaries differ on the meaning of the term "sudden." Webster's Third New International Dictionary 2284 (1986) attaches a number of definitions to "sudden." Webster's first defines "sudden" as "happening without previous notice ... occurring unexpectedly ... not foreseen." Webster's then lists synonyms for "sudden" that include "prompt" and "immediate." Random House Dictionary of the English Language 1900 (2 ed. 1987) defines the word "sudden" in a temporal sense as "happening, coming, made, or done quickly." Black's Law Dictionary 1284 (5th ed.1979) defines "sudden" as "[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for."

[16] In *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 335, 380 S.E.2d 686, 688 (1989), the Georgia Supreme Court stated:

> Perhaps, the secondary meaning is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to ***1092** describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's spring. *See also* Oxford English Dictionary, at 96 (1933) (giving usage examples dating back to 1340, e.g., "She heard a sudden step behind her"; and, "A sudden little river crossed my path As unexpected as a serpent comes.").

Although "sudden" can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended. Since the term "sudden" is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase "sudden and accidental" against the insurer to mean unexpected and unintended.[FN13]

> FN13. The determination that "sudden and accidental" is an ambiguous phrase is supported by a large amount of conflicting authority. Although the mere existence of conflicting authority does not establish the ambiguity of a contract term, *see Allstate Insurance Co. v.Troelstrup*, 789 P.2d 415 (Colo.1990), "this type of comprehensive debate dispels the insurer's contention that the exclusionary language is clear." *Just v. Land Reclamation, Ltd.*, 456 N.W.2d at 578.

If we were to construe "sudden and accidental" to have a solely temporal connotation, the result would be inconsistent definitions within the CGL policies. In the portion of the policies defining occurrence, accident is defined to include "continuous or repeated exposure to conditions, which result in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." If "sudden" were to be given a temporal connotation of abrupt or immediate, then the phrase "sudden and accidental discharge" would mean: an abrupt or immediate, and continuous or repeated discharge. The phrase "sudden and accidental" thus becomes inherently contra-

dictory and meaningless. *City of Northglenn v. Chevron, U.S.A., Inc.*, 634 F.Supp. 217, 222 (D.Colo.1986); *United States v. Conservation Chem. Co.*, 653 F.Supp. 152, 203-04 (W.D.Mo.1986); *Van's Westlake Union, Inc.*, 34 Wash.App. at 711-15, 664 P.2d at 1265-66.

[17] Neither the state's CERCLA complaint, nor the third-party complaint contains claims asserting that Hecla expected or intended the discharge of pollutants into the California Gulch as a result of its mining operations.

Hecla's CGL policies extend coverage to a sudden and accidental occurrence. The trial court resolved the duty to defend issue by entering a summary judgment. No allegations were made in either the CERCLA complaint or in the third-party complaint that the damage caused by Hecla's discharge of the contents of the Yak tunnel was either expected or intended. No proof was offered by either Indemnity or New Hampshire, discovery proceedings had not been completed, and the factual issues had not been determined. Accordingly, the trial court did not err in concluding that Indemnity and New Hampshire had the duty to defend Hecla.

We reverse and remand to the court of appeals with directions to reinstate the judgment entered by the trial court against Indemnity and New Hampshire.

MULLARKEY, J., dissents, and ROVIRA, C.J., and KIRSHBAUM, J., join in the dissent.

Justice MULLARKEY dissenting:

I respectfully dissent from the majority's opinion. I do not believe that this is an appropriate case in which to determine the insurers' duties to defend based solely on the allegations of the underlying complaints. Although the insurers filed this declaratory judgment action, this case is before us as a result of Hecla's motion for summary judgment. I would reverse the trial court order granting Hecla's motion for summary judgment because dispositive issues of fact remain to be resolved before a court can decide whether the insurers have duties to defend in this case.

On remand, the trial court would have discretion either to proceed with discovery in the declaratory judgment action and to resolve the issue of the insurers' duties to defend or to hold the declaratory action in abeyance until the underlying claim against ***1093** Hecla is resolved. Under the first approach, the trial court could permit the parties to proceed with discovery to develop a more complete factual record which will enable the trial court to determine whether the damages from Hecla's alleged releases constitute an occurrence within the insurance policies and, if so, whether the releases fall within the pollution exclusion clauses of the policies. If, in the alternative, the trial court held the declaratory action in abeyance, I would require that Hecla be provided with a defense to the underlying claim until the underlying claim is resolved. Then the insurers could seek reimbursement for defense costs along with a determination of their duties to defend and to indemnify Hecla.

I.

I acknowledge that the general rule for determining an insurer's duty to defend requires examining the allegations of the underlying complaint in comparison with the terms of the insurance policy. *See, e.g., Lee v. Aetna Casualty & Surety Co.*, 178 F.2d 750, 751 (2d Cir.1949) ("[I]t is the claim which determines the insurer's duty to defend; and it is irrelevant that the insurer may get information from the insured, or from anyone else, which indicates, or even demonstrates, that the injury is not in fact 'covered.' "); *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 227 (Me.1980) (insurer had duty to defend because the complaint "disclose[d] a *potential* for liability within the coverage and contain[ed] no allegation of facts which would necessarily exclude coverage.") (emphasis in original); *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.2d 66, 73, 544 N.Y.S.2d 531, 533, 542 N.E.2d 1048, 1050 (1989) ("The duty to defend insureds ... is derived from the allegations of the complaint and the terms of the policy.").

Many cases, however, have held that an insurer's duty to defend is determined based on evidence gained by looking beyond the allegations of the complaint. *See, e.g., American Motorists Ins. Co. v. General Host Corp.*, No. 88-1503, --- F.2d ---- (10th Cir. March 21, 1991) (Westlaw 35967) (concluding, based on "extensive findings of fact in [an underlying case] indicating that the pollution at issue ... was intended by defendants," that the pollution was not "accidental" and granting insurer's motion for summary judgment that it did not have a duty to defend or indemnify); *Great Lakes Container Corp. v. National Union Fire*

Ins. Co. of Pittsburgh, Pennsylvania, 727 F.2d 30 (1st Cir.1984) ("Under New Hampshire law, the complaint and the policy alone may be sufficient for a determination of no coverage. Independent evidence, of course, may be needed if the complaint in the underlying action does not on its face establish lack of coverage.") (citations omitted); *Atlantic Mut. Fire Ins. Co. of Savannah v. Cook,* 619 F.2d 553, 555 (5th Cir.1980) ("[I]n a declaratory action to determine an insurer's duty to defend, the court may take evidence for the purpose of deciding the insurer's duty to defend in this regard, where the facts alleged in the [underlying] petition are sufficient to establish ... liability on the part of the insured but are silent as to the facts or characterization thereof relied upon for a policy exclusion.") (construing Alabama law); *Boyce Thompson Institute for Plant Research, Inc. v. Insurance Co. of N. Am.,* 751 F.Supp. 1137 (S.D.N.Y.1990) (denying summary judgment on the issue of an insurer's duty to defend, despite controlling authority that the duty to defend is determined by allegations of the underlying complaint, because further factual development was warranted to determine whether damage, as alleged in the complaint, occurred while the premises were being used as contemplated by the policy); *American States Ins. Co. v. Maryland Casualty Co.,* 587 F.Supp. 1549, 1553 (E.D.Mich.1984) (declaratory judgment action by insurer where, despite state authority that the duty to defend is determined based on allegations of the complaint, court looked to "subsequent discovery and testimony at trial" to discern the "continuous nature of the insured's dumping" and held that the insurer had no duty to defend or indemnify); ***1094***Kepner v. Western Fire Ins. Co.,* 109 Ariz. 329, 509 P.2d 222 (1973) (holding, despite authority for the general proposition that the duty to defend is determined based on the allegations of the complaint, that an insurer had no duty to defend where the underlying claim was covered by the policy based on the facts pleaded in complaint but other facts not appearing in the complaint excluded coverage); *Barmet of Indiana v. Security Ins. Group,* 425 N.E.2d 201 (Ind.Ct.App.1981) (holding, based on factual determinations made by trial court in declaratory judgment proceeding, that insurer had no duty to defend because discharges were not sudden and accidental); *Bituminous Casualty Corp v. Bartlett,* 307 Minn. 72, 240 N.W.2d 310 (1976) (holding, based on deposition which revealed that defective materials were used and construction was contrary to workmanship standards, that insurer had no duty to defend because damages should have been expected by the insured); *Transamerica Ins. Co. v. Sunnes,* 77 Or.App. 136, 711 P.2d 212 (1985) (insurer did not have duty to defend or indemnify in case submitted to the court on parties' stipulation of facts). *See also City of Johnstown v. Bankers Standard Ins.,* 877 F.2d 1146 (2d Cir.1989) ("[W]e hold that the insurers did not meet their burden of showing that they had no duty to defend the City in the CERCLA action. This is so whether that duty is measured against the underlying CERCLA complaint alone *or against the record as a whole.*") (citations omitted) (emphasis added).

Several rationales have been offered for looking beyond the allegations of the underlying complaints to determine whether an insurer has a duty to defend. Two of these rationales are summarized well in *Kepner,* 109 Ariz. at 331, 509 P.2d at 224: (1) under modern pleading rules, the complaint serves a notice function and is framed prior to discovery which crystallizes the facts of the case; and (2) in many cases, proof of alleged facts will not determine the obligation of the insurer under the policy.

Both of these rationales are present in this case. Both the underlying CERCLA complaint and the third-party complaint in this case merely served notice functions. The third-party complaint also was framed prior to discovery, before the third party complainants could know facts that would permit more specific allegations.[FN1]

> FN1. I do not believe that a complaint that merely alleged "intentional" or "knowing" discharges, for example, would remove an insurer's duty to defend based on those allegations. Despite such allegations, an insured might be able to prove that its conduct fell within the terms of the policy, thus creating the insurer's duty to defend.

Moreover, because the complaint against Hecla merely notified Hecla of a strict liability claim under CERCLA, the complaint's allegations did not need to specify either that Hecla intended or expected to pollute or that alleged releases were not sudden and accidental. As the majority notes, any party with an ownership interest in the site responsible for the release of contaminants can be held strictly liable under CERCLA regardless of fault or intent. *Maj. op.* at 1085, n. 1. *See also* 42 U.S.C. § 9607. Thus, there is

no need for the third party to allege facts in its complaint concerning the insured's intent which, if proven, would result in a denial of coverage. It is immaterial for purposes of liability under CERCLA whether pollution damage was unexpected or unintended or whether alleged releases were sudden and accidental.

In addition, third-party complaints were filed against more than 200 other defendants in this case. It is entirely implausible to expect the third-party complainants to have sufficient knowledge to allege the intent of more than 200 defendants and the nature of those defendants' alleged releases. The naming of so many defendants in the third-party complaint in this case, however, is a necessary result of CERCLA. CERCLA is designed to require defendants to seek contribution from the potential myriad of other defendants who also may be held strictly liable for the pollution or contamination at issue. *See* R. Findley & D. Farber, *Environmental Law* 183 (1988) ("[Under CERCLA], joint and several liability is the general rule. The government thus is relieved of the obligation to join all ***1095** potentially responsible parties (PRPs) and to prove their individual contributions to the hazardous waste sites. The burden of proving divisibility of harm is on the defendant seeking to limit his liability. In this situation, the subject of contribution among PRPs is of great importance, especially to those against whom the government initially chooses to proceed for recovery of response costs."). This makes the determination of an insurer's duty to defend based on allegations in a third-party complaint seeking contribution under CERCLA particularly inappropriate.

The second rationale from *Kepner* also applies to this case. Because CERCLA is a strict liability statute, proof of the alleged facts required to establish the liability of Hecla will not determine the obligation of the insurers under the policies at issue. It is not necessary for the third-party complainants to establish whether any pollution damage was unexpected or unintended, or whether any alleged releases were sudden and accidental, to establish Hecla's liability. Mere ownership during relevant time periods would suffice to establish liability.[FN2]

> FN2. The chance that facts determining the insurers' duty to defend would be proved in the underlying CERCLA action is further reduced by various provisions of CERCLA which are designed specifically to encourage settlements. *See, e.g.,* R. Findley & D. Farbes, *Environmental Law* 186 ("[S]ection 122(a) directs that '[w]hen-ever practicable and in the public interest,' settlement agreements should be sought in order to expedite effective remedial actions at superfund sites and to minimize litigation. Section 122(e) includes a new procedural element designed to facilitate agreements among PRPs. It calls for the President to prepare a 'non-binding preliminary allocation of responsibility' (NBAR), allocating percentages of the total response costs at a site among the PRPs, after completion of a 'remedial investigation and feasibility study.' "). The fact that the statute is designed to foster settlements reduces further the chance that a determination of the intent, expectedness, suddenness or accidental nature of alleged damages or discharges would be determined in the underlying CERCLA case.

II.

The facts of this case illustrate the peril of always determining an insurer's duty to defend based solely on the allegations of the complaint. Defense of CERCLA actions can be extremely costly. Thus, Industrial Indemnity took the step of filing a declaratory judgment action to determine its duty to defend and indemnify and New Hampshire intervened in the action. Rather than proceeding with discovery to determine the two insurers' duties to defend or indemnify, however, Hecla refused to answer interrogatories and produce documents as requested by Industrial Indemnity and New Hampshire, citing the rule that an insurer's duty to defend is determined based on the allegations of the complaint. Hecla's Motion for a Protective Order; Hecla's Opposition to Plaintiff's Motions to Compel and For An Extension of Time.[FN3] Hecla moved for summary judgment, relying on the same rule. The majority then resolves all questions of coverage in favor of Hecla even though Hecla moved for summary judgment and even though Hecla refused to cooperate with discovery to develop facts revealing whether Hecla's conduct brings the claim within the insurance policies and exclusions in this case. No case has gone so far in precluding an insurer from proving that it had no duty to defend.

> FN3. *Cf.* Boyce Thompson Inst. for Plant Research, Inc., 751 F.Supp. at 1144 ("Coloring our analysis [regarding the denial of insured's motion for summary judgment with respect to the insurer's duty to defend] is the fact that discovery [has not concluded]. Thus, evidence which could resolve these questions [with respect to the insurer's duty to defend] could very well emerge in the near future now that the issues have been focused."). *See also* Kepner, 109 Ariz. 329, 331, 509 P.2d 222, 224 (one rationale for looking beyond the allegations of the complaint to determine an insurer's duty to defend is that "the complaint serves a notice function and is *framed before discovery proceedings crystalize the facts of the case.*") (emphasis added).

III.

Colorado has approved of the use of declaratory judgment actions brought by the insurer to determine the insurer's duty to defend prior to the trial of the underlying action. Troelstrup v. Dist. Court, 712 P.2d 1010 (Colo.1986). In *Troelstrup,* we said:

> ***1096** It is beyond dispute that an insurance company has the right to seek a declaration of its rights and duties under a policy of insurance.... Resolution of the issue as framed in the declaratory action will result in a determination of [the insurer's] duty to defend [the insured] in the underlying ... action. The existence or nonexistence of this duty "is a proper and sufficient ground for invoking the jurisdiction of the courts under the declaratory judgment act, and presents a justiciable controversy."

Troelstrup, 712 P.2d at 1012 (citations omitted). We also have held that it was not an abuse of the trial court's discretion to delay a declaratory judgment action on an insurer's duties to indemnify and defend until after the trial of the underlying action. Hartford Ins. Group v. Dist. Court, 625 P.2d 1013, 1018 (Colo.1981).

In both *Troelstrup* and *Hartford Ins. Group,* we emphasized the discretion of the trial court with respect to declaratory judgment actions. Troelstrup, 712 P.2d at 1012; Hartford Ins. Group, 625 P.2d at 1016. In addition, the trial court in *Hartford Ins. Group,* where we approved of the delay of the declaratory proceeding until after trial of the underlying action, found that the pleadings in the underlying action "clearly indicate[d] a duty to defend." Hartford Ins. Group, 625 P.2d at 1016. Conversely, we pointed out in *Troelstrup* that "the nature and character of the alleged facts giving rise to [the complainant's] ... case establish[ed] a reasonable likelihood that the alleged tortious conduct of [the insured] [was] excluded from coverage." Troelstrup, 712 P.2d at 1012. Finally, in both cases we compared the prejudice to the respective parties, including the burden on the insured in defending the declaratory action on the issue of coverage and the burden on the insurer in defending the underlying claim. Troelstrup, 712 P.2d at 1012-13; Hartford Ins. Group, 625 P.2d at 1016-17.

Colorado also has approved of factual determinations in such declaratory judgment actions. Section 13-51-113 of the Declaratory Judgment Act provides as follows:

> When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of facts are tried and determined in other civil actions in the court in which the proceeding is pending.

See also Baumgartner v. Schey, 143 Colo. 373, 378, 353 P.2d 375, 377 (1960) (authorizing trial by jury of disputed questions of fact in declaratory judgment proceedings where "the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without the intervention of declaratory procedure.").[FN4] Colorado's Declaratory Judgment Act thus contemplates that contracts will be interpreted in light of facts determinable at the time. *Cf.* McDonald's Corp. v. Rocky Mountain McDonald's, Inc., 42 Colo.App. 143, 145, 590 P.2d 519, 521 (1979) ("Although the Uniform Declaratory Judgments Law and C.R.C.P. 57(c) provide that a contract may be interpreted prior to breach, these provisions are inapplicable where the dispute requires an interpretation in light of extrinsic facts which are *not yet determinable.*") (citation omitted) (emphasis added). Finally, it is settled in Colorado that where a party moves for summary judgment in a declaratory judgment proceeding determining the scope of coverage under an insurance policy, "the party moving for

summary judgment has the burden of demonstrating 'clearly the absence of any genuine issue of fact' in order to prevail." *O'Herron v. State Farm Mut. Auto. Ins. Co.*, 156 Colo. 164, 172, 397 P.2d 227, 231 (1964). *See also Boyce Thompson Institute for Plant Research, Inc.*, 751 F.Supp. at 1144 ("[Insured's] motion for summary judgment [with respect to insurer's duty to defend] must be denied as ***1097** premature because a factual question exists which further discovery may resolve.").

> FN4. We also looked beyond the allegations of the complaint to support our approval of the use of the declaratory judgment proceeding prior to the trial of the underlying action in *Troelstrup*. *Troelstrup*, 712 P.2d at 1012 ("Moreover, the pleadings produced subsequent to the complaint arguably supported [the underlying complainant's] actions.").

IV.

The cost and duration of declaratory proceedings to determine an insurer's duty to defend can vary greatly. In some cases, the complaint and underlying facts dictate clear results. In other cases, resolution is less clear. The burden and the potential prejudice to the parties in determining the duty to defend before or after resolution of the underlying claim also will vary between cases. Thus, in view of the trial court's substantial discretion with respect to declaratory judgment actions, I would permit the trial court to decide in this case whether currently to proceed with further discovery to find facts necessary to resolve the insurers' duties to defend or to postpone resolution of the declaratory judgment action until after the underlying claim is resolved.

In making such a determination, the trial court can weigh the relative prejudices and burdens on the insured and the insurers. If the trial court finds that resolution of a declaratory judgment action prior to the underlying action would not unduly prejudice the insured, the trial court may order immediate resolution of the declaratory judgment action. On the other hand, if the trial court concludes that litigating the declaratory judgment proceeding prior to the underlying action would overly prejudice the insured, either because of the cost and duration of the litigation, or out of concerns of estoppel in the underlying action, the trial court may postpone resolution of the declaratory judgment action until after the underlying proceeding is resolved.

I also would hold that, in the event the trial court decided to postpone resolution of the declaratory proceeding, the insurers would be required to provide Hecla with a defense of the underlying action but that the insurers may seek reimbursement for their defense costs after the underlying action is resolved.[FN5] By requiring an insurer to provide the defense (although subject to reimbursement), we ensure that the insured does not bear the burden of providing its own defense. The insured also will not be forced to reimburse the insurer for costs of the defense unless the insurer can prove that the insured's conduct was outside the scope of the policy. This comports with reasonable expectations of both the insured and the insurer. In this case, for example, Hecla could not reasonably expect to be provided with a defense to intentional conduct that clearly falls outside the policy's coverage.

> FN5. Because the majority holds in this action that the insurers have a duty to defend, the insurers apparently cannot seek reimbursement for the costs they incur in defending Hecla in the underlying CERCLA action.

In addition, the burden placed on the insured in defending against a potential claim by the insurer seeking reimbursement for defense costs after the underlying action is much less than the burden on the insured where the insured is required to establish the insurer's duty to defend prior to resolution of the underlying action. The parties will have the benefit of further pleadings, discovery, and, in some cases, trial records and findings, on which they can rely to help determine factual issues relating to the duty to defend. The resources necessary to litigate the issue of the duty to defend after the resolution of the underlying claim may therefore be reduced greatly. It also is likely that, after resolution of the underlying claim, the insured and insurers will be involved in a declaratory judgment action regarding the insurer's duty to indemnify.[FN6] The issue of the insurer's duty to defend can be resolved in the same declaratory proceeding. Thus, it is much less of a burden on an insured to litigate the issue of an insurer's duty to defend after resolution of the underlying action while simultaneously litigating the issue of the duty to indemnify

than it is to litigate the duty to defend ***1098** issue in a separate action prior to resolution of the underlying action.

> FN6. This most likely will be the situation in the present case. The majority correctly holds that "[a]ny determination of whether Industrial [Indemnity] or New Hampshire have a duty to indemnify Hecla is premature, and should not be made until the underlying claims are resolved." *Maj. op.* at 1086 n. 5.

V.

The result reached by the majority can be expected where a court too rigidly adheres to the rule of determining an insurer's duty to defend based on the allegations of the underlying complaint regardless of the type of claim asserted in the underlying complaint, the insured's conduct in the declaratory judgment proceeding, or who moved for summary judgment. In my opinion, however, this result unfairly prejudices the insurers and rewards evasive tactics by the insured. The trial court order granting Hecla's motion for summary judgment should be reversed.

On remand, the trial court can decide, within its discretion, whether to proceed with discovery so the trial court can make the factual findings necessary to decide whether New Hampshire and Industrial Indemnity have a duty to defend, or, in the alternative, to hold the declaratory judgment proceeding with respect to the insurers' duties to defend in abeyance until the underlying claim is resolved. In the latter situation, I would require the insurers to provide Hecla with a defense in the underlying action subject to reimbursement pending resolution of the insurers' duties to defend in a declaratory proceeding following resolution of the underlying claim.[FN7]

> FN7. The issue of whether the insurers would be involved in a conflict of interest requiring them to provide independent counsel, possibly of Hecla's choosing, or to obtain Hecla's consent to allow the insurers to conduct the defense is not before us. I would therefore leave this issue to the trial court to resolve.

Accordingly, I respectfully dissent.

ROVIRA, C.J., and KIRSHBAUM, J., join in this dissent.
Colo.,1991.
Hecla Min. Co. v. New Hampshire Ins. Co.
811 P.2d 1083, 33 ERC 1340

END OF DOCUMENT

Exhibit 3

Friday, January 22, 2010

Is there coverage for construction defect claims in Colorado? Part 1: It's not looking good.

In General Security Indemnity Co. of Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529 (Colo. App. 2009), a framing subcontractor's insurer brought a contribution and indemnification action against a sub-subcontractor's commercial general liability insurers. The framer's carrier sought relief for the sub-sub's insurer's failure to fund the framing subcontractor's defense costs related to the third-party complaint filed by the general contractor.

The Court of Appeals held that complaints in construction defect actions that allege only poor workmanship do not allege an "occurrence" sufficient to trigger a duty to defend in the typical CGL policies. The Court of Appeals, in reaching its decision, adopted the reasoning of the Cyprus Amax Minerals, Hecla Mining Co. v. New Hampshire Ins. Co., and Union Ins. Co. v. Hottenstein courts. The court cited these cases in support of the following principles:

- In determining whether a duty to defend exists, a trial court must limit its examination to the four corners of the underlying complaint. Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003);
- An insurer's duty to defend arises when the underlying complaint against the insured alleges any facts that might fall within the coverage of the policy. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1089 (Colo.1991);
- Poor workmanship constituting a breach of contract is generally not an accident that constitutes a covered occurrence. Union Ins. Co. v. Hottenstein, 83 P.3d 1196, 1199 (Colo. App. 2003).

Litigants seeking recovery of damages for construction defects under an insurance policy must be especially diligent and thorough when drafting their complaints. In practical terms, this means inclusion of any known damage resulting from defective workmanship. Unfortunately, in many cases, resulting damage may not be apparent until long after a complaint is drafted and experts have had a chance to inspect the work of a given construction professional.

 If you have any questions regarding the General Security case, or anything else pertaining to construction law or insurance coverage issues in Colorado, please contact Shawn Eady at (303) 987-9816 or by e-mail at eady@hhmrlaw.com. For a more full explanation of construction law in Colorado please visit our website or request a copy of our Overview of Construction Defect Litigation in Colorado.

Posted by Shawn Eady at 3:12 PM 0 comments Links to this post

Labels: Colorado construction attorneys, Colorado construction litigation, construction defect, Denver construction attorneys

C

Colorado Court of Appeals,
Div. I.
GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, f/k/a Fulcrum Insurance Company, an Arizona corporation, Plaintiff-Appellant,
v.
MOUNTAIN STATES MUTUAL CASUALTY COMPANY, a New Mexico corporation; American Family Mutual Insurance Company, a Wisconsin corporation; Colony National Insurance Company, a Virginia corporation; Farmers Alliance Mutual Insurance Company, a Kansas corporation; Hartford Insurance Company; and Western Heritage Insurance Company, Defendants-Appellees.
Nos. 07CA2291, 07CA2292.

Feb. 19, 2009.

Background: Framing subcontractor's insurer brought contribution and indemnification action against sub-subcontractors' commercial general liability (CGL) insurers, seeking relief for such insurers failure or refusal to share the costs in the defense of framing subcontractor against third-party complaint filed by general contractor in construction defect action. The Boulder County District Court, Morris W. Sandstead, J., granted sub-subcontractors' insurers summary judgment, and subcontractor's insurer appealed.

Holding: The Court of Appeals, Taubman, J., held that as a matter of first impression, complaints in construction defect action that only alleged poor workmanship did not allege an occurrence that triggered a duty to defend in the CGL policies issued to the sub-subcontractors.

Affirmed.

West Headnotes

[1] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
In construction defect action, complaint filed against general contractor by homeowners' association and third-party complaint filed by general contractor against framing subcontractor did not allege an "occurrence" that triggered a duty to defend, in commercial general liability (CGL) insurance policies issued to framing subcontractor's sub-subcontractors; CGL policies defined "occurrence" as an "accident," the necessary element of fortuity was inherent in the meaning of the term "accident," complaints in construction defect action only alleged poor workmanship and did not allege any damage beyond the work product of the framing subcontractor or that the poor workmanship caused consequential damages, poor workmanship was not a fortuitous event, and CGL policies were not intended to hold insurers as guarantors of an insured's work.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
A trial court's interpretation of an insurance policy is reviewed de novo, applying ordinary principles of contract interpretation.

[3] Insurance 217 ⚿1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases
Courts give words in an insurance policy their plain and ordinary meaning, unless the policy evinces a contrary intent.

[4] Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases
Courts read insurance policy provisions as a whole, rather than in isolation.

[5] Insurance 217 ⚿1807

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1807 k. Function Of, and Limitations On, Courts, in General. Most Cited Cases
Courts cannot rewrite, add, or delete provisions in their interpretations of insurance policies.

[6] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
In determining whether a duty to defend exists under an insurance policy, a trial court must limit its examination to the four corners of the underlying complaint.

[7] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
An insurer's duty to defend arises when the underlying complaint against the insured alleges any facts that might fall within the coverage of the policy.

[8] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
An insurance company has a duty to defend if the allegations in the complaint could impose liability under the policy.

[9] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
An insurance company has a duty to defend if the allegations in the complaint state a claim which is potentially or arguably within the policy coverage or if there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded.

[10] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases
A claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered "occurrence" under a commercial general liability (CGL) insurance policy, regardless of the underlying legal theory pled.

[11] Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases
Courts must avoid reading an insurance policy so as to render some provisions superfluous.

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Company.

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Fowler, Schimberg & Flanagan, P.C., Katherine Taylor Eubank, Denver, Colorado, for Defendant-Appellee Hartford Insurance Company.

Senter, Goldfarb & Rice, L.L.C., John D. Hayes, Maria T. Lighthall, Denver, Colorado, for Defendant-Appellee Western Heritage Insurance Company.

Opinion by Judge TAUBMAN.

Plaintiff, **General Security** Indemnity Company of Arizona (GSINDA), appeals the trial court's orders granting summary judgment in favor of six insurance company defendants, American Family Mutual Insurance Company (American), Colony National Insurance Company (Colony), Farmers Alliance Mutual Insurance Company (Farmers), Hartford Insurance Company (Hartford), Mountain States Mutual Casualty Company (Mountain), and Western Heritage Insurance Company (Western). We affirm.

In granting defendants' summary judgment motions, the trial court rejected GSINDA's claims that defendants were obligated to contribute to the defense of GSINDA's insured, Foster Frames, against a third-party construction defect complaint.

The sole issue for review is whether the trial court erred in determining that defendants, who insured Foster Frames' subcontractors (the sub-subcontractors), had no duty to defend Foster Frames as a matter of law because there was no "occurrence" alleged in the underlying complaints of the construction defect litigation. We perceive no error because we conclude that claims of defective workmanship, standing alone, do not constitute an "occurrence." Further, we conclude the broad allegations of "other" or "consequential" damages here are insufficient to give rise to a duty to defend.

I. Background

In 2003, Summit at Rock Creek Homeowners Association, Inc. (HOA) filed suit against D.R. Horton, Inc.-Denver (DRH) for alleged construction defects in the Summit at Rock Creek housing project. Specifically, the HOA asserted, inter alia, that DRH's negligence resulted in property damage and that DRH breached contractual and implied warranties, which also resulted in property damage. Eventually, the HOA settled its claims against DRH.

After the HOA complaint was filed, DRH filed a third-party indemnification complaint against its subcontractors, including Foster Frames. DRH asserted claims of breach of contract, breach of express warranty, and negligence, among others.

Because GSINDA had insured Foster Frames, it defended it against DRH's third-party complaint. The DRH third-party complaint was later dismissed by the trial court, and the dismissal was affirmed by a division of this court. *See D.R. Horton, Inc.-Denver v. AAA Waterproofing, Inc.*, 2008 WL 4516292 (Colo.App. No. 06CA 1874, Oct. 9, 2008) (not published pursuant to C.A.R. 35(f)).

In the trial court, Foster Frames filed a fourth-party complaint against the sub-subcontractors, seeking indemnity if it were found liable to DRH.

The trial court stayed proceedings on Foster Frames' fourth-party claims, pending appeal of the dismissal of the DRH complaint.

In this action, GSINDA filed a complaint against the sub-subcontractors' insurance companies, seeking relief for their failure or refusal to share in the costs of the defense of Foster Frames against the DRH third-party complaint. GSINDA sought a declaratory judgment as to the duties owed by defendants with respect to Foster Frames. It also sought equitable contribution, equitable subrogation, equitable indemnity, and damages, in the nature of reimbursement, from defendants for the costs of defending or indemnifying Foster Frames.

GSINDA filed motions for partial summary judgment against defendants, asserting that as a matter of law

the insurance policies ***532** issued to the sub-subcontractors obligated defendants to defend Foster Frames against DRH's third-party complaint because the underlying complaints alleged damage arguably covered under the insurance policies. Defendants filed cross-motions for summary judgment.

The trial court granted defendants' cross-motions for summary judgment in six separate orders and determined that defendants were not obligated to defend Foster Frames as a matter of law because the property damage alleged by the HOA was not caused by an "occurrence," as defined in defendants' insurance policies.

The trial court certified its summary judgment orders pursuant to C.R.C.P. 54(b) as final and appealable. GSINDA now appeals.

The trial court stayed all other issues in the insurance coverage action, pending resolution of DRH's appeal of the trial court's dismissal of its third-party complaint.

II. Coverage of Defective Workmanship Under Insurance Policies

GSINDA contends that the trial court erred in not following *Hoang v. Monterra Homes (Powderhorn) LLC*, 129 P.3d 1028 (Colo.App.2005) *(Monterra Homes), rev'd on other grounds sub nom. Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo.2007), in its determination that the underlying HOA complaint and the DRH third-party complaint did not allege an "occurrence."

More specifically, GSINDA argues that the trial court should have applied *Monterra Homes* to determine that because the sub-subcontractors did not know, intend, or expect property damage to result from their work, the HOA complaint and DRH third-party complaint sufficiently alleged that defective workmanship by DRH resulted from an accident. Thus, in GSINDA's view, the underlying complaints alleged an occurrence that triggered coverage under the policies. We perceive no error in the trial court's orders because we conclude a claim of defective workmanship, standing alone, does not allege an occurrence.

We review a trial court's summary judgment order de novo. *West Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo.2002). Summary judgment is appropriate when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *Id.* The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Id.*

[1] The sole issue here is whether the underlying complaints-the HOA complaint and the DRH third-party complaint-alleged an occurrence that would trigger a duty to defend under the insurance policies defendants issued to the sub-subcontractors. We conclude that they did not.

[2][3][4][5] We review a trial court's interpretation of an insurance policy de novo, applying ordinary principles of contract interpretation. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294 (Colo.2003). We give words in an insurance policy their plain and ordinary meaning, unless the policy evinces a contrary intent. *McGowan v. State Farm Fire & Casualty Co.*, 100 P.3d 521, 522 (Colo.App.2004). We read policy provisions as a whole, rather than in isolation. *Id.* We cannot rewrite, add, or delete provisions in our interpretation. *Id.*

[6] In determining whether a duty to defend exists, a trial court must limit its examination to the four corners of the underlying complaint. *Cyprus Amax Minerals*, 74 P.3d at 299.

[7] An insurer's duty to defend arises when the underlying complaint against the insured alleges any facts that might fall within the coverage of the policy. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089 (Colo.1991) (citing *Douglass v. Hartford Ins. Co.*, 602 F.2d 934, 937 (10th Cir.1979)).

[8][9] An insurance company has a duty to defend if the allegations in the complaint could impose liability under the policy. *Id.* (citing *Douglass*, 602 F.2d at 937). Alternatively, an insurance company has a duty to ***533** defend if the allegations in the complaint state a claim which is potentially or arguably within the policy coverage or if there is some doubt as to whether a theory of recovery within the policy cover-

age has been pleaded. *Id.* (citing *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555, 558 (1984)).

With these principles in mind, we review the allegations of the complaint against the sub-subcontractors, which is based on the allegations in the HOA and DRH complaints. Then we review the terms of the insurance policies.

As relevant here, the HOA complaint alleged:

2. The Community's existing 226 units were completed in approximately February 2001.

....

31. On information and belief, these errors [enumerated in ¶ 30 of the complaint], deficiencies and defects, for which defendants are legally liable, have caused, and continue to cause, actual property damage, loss of use and/or other losses to the Association, and consequential damage to, and the loss of use of, various elements of the Project, over time, from the date those areas were first put to their intended use.

The DRH complaint incorporated the same property damage allegations, asserting, "To the extent that the allegations made in the HOA's Complaint are true, which [DRH] denies, any and all damages incurred by the HOA were proximately caused in whole or in part by the breach of contract by the Third-Party Defendants [including Foster Frames] and/or their subcontractors." DRH made this same allegation with regard to the HOA's other claims as well.

The trial court determined that "[t]he HOA complaint, on which the [DRH] Third-Party complaint was based, sought damages for numerous construction defects, but does not claim damages from any event that would qualify as an 'occurrence' under" the policies. Further, the trial court determined that "the [DRH] third-party complaint contains no allegation of the timing of the property damages," and it "contains nothing substantive about the extent or nature of the property damages either."

Our review of the HOA and DRH complaints shows that the claims asserted lay in tort, contract, and breach of warranty. They alleged the contractors, subcontractors, and sub-subcontractors were negligent, breached contractual obligations, and breached various express or implied warranties in constructing the housing project. The claims also alleged general defects, poor workmanship, improper design, and misrepresentation or failure to disclose material facts about the project. Because Foster Frames and the sub-subcontractors at issue in this appeal worked only on the construction aspect of the project, the claims against them are limited to allegations that their poor workmanship caused property damage.

The commercial general liability (CGL) insurance policies defendants issued to the sub-subcontractors limit defense and liability coverage to property damage caused by an "occurrence." The policies issued by American, Western, Mountain, and Colony state:

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

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

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory": and

(2) The "bodily injury" or "property damage" occurs during the policy period.

The language in the Hartford and Farmers policies is substantially the same.

The word "occurrence" is defined in the American, Western, Mountain, Colony, and Hartford policies as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Farmers policies similarly define "occurrence" as: "an accident and includes repeated exposure to similar conditions."

Thus, all the insurance policies at issue require an accident to trigger an occurrence. Because "accident" is not defined by the ***534** policies, we apply the ordinary definition of "accident" to determine if the underlying complaints alleged an occurrence.

The trial court used *Black's Law Dictionary* to define an accident as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not reasonably be anticipated." *Black's Law Dictionary* 6 (2d pocket ed.2001). Applying that definition, it concluded that the allegations in the underlying complaints did not concern unanticipated events, and thus were not accidents.

A. "Occurrence"

Divisions of this court have previously defined "accident" in CGL policies as: "an unanticipated or unusual result flowing from a commonplace cause." *Monterra Homes*, 129 P.3d at 1034; *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1201 (Colo.App.2003); *Fire Ins. Exchange v. Bentley*, 953 P.2d 1297, 1300 (Colo.App.1998). In addition, courts in Colorado and other jurisdictions have considered an accident to be a "fortuitous event." *See American Home Assurance Co. v. AGM Marine Contractors, Inc.*, 379 F.Supp.2d 134, 136 (D.Mass.2005), *aff'd*, 467 F.3d 810 (1st Cir.2006); *McGowan*, 100 P.3d at 525; *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571, 577 (2004); 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 129:4 (3d ed.2005) (fortuity is required to constitute an accident) (collecting cases).

A division of this court previously determined that poor workmanship constituting a breach of contract is generally not an accident that constitutes a covered occurrence. *Hottenstein*, 83 P.3d at 1202. There, the homeowner's underlying complaint against a construction company included breach of contract claims based on defective workmanship. *Id.* at 1198. Although the homeowner was awarded damages for breach of contract, the trial court did not require the defendant's insurance company to indemnify the defendant. On appeal, a division of this court held that the insurance policy precluded coverage of the breach of contract liability for defective workmanship because the breach of contract was not an accident that constituted an occurrence. *Id.* at 1202.

Here, the HOA complaint and the DRH third-party complaint alleged not only breach of contract, but tort and breach of warranty claims as well.

Whether defective workmanship can constitute an occurrence for purposes of both tort and breach of warranty claims is an issue of first impression in Colorado. We are persuaded by the reasoning of courts in other jurisdictions that have extended the *Hottenstein* rule to all claims of poor workmanship, regardless of whether the claims are based on contract, tort, or breach of warranty theories. *See, e.g., Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999) (making no distinction when analyzing an underlying complaint with both breach of contract and negligence theories where the claim was based on the same allegation of defective workmanship).

[10] We conclude the better rule is that a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of the underlying legal theory pled. *See* Ronald M. Sandgrund & Leslie A. Tuft, *Liability Insurance Coverage for Breach of Contract Damages*, 36 Colo. Law. 39, 39 (Feb.2007) (difficulties arise "in jurisdictions that attempt to clearly demarcate coverage between tort and contract liabilities, because some liabilities may sound both in tort and contract"); *cf. Gerrity Co. v. CIGNA Prop. & Cas. Ins. Co.*, 860 P.2d 606, 607 (Colo.App.1993) (duty to defend is determined by factual allegations, not by legal claims).

Next, we address whether general allegations of faulty workmanship constitute an occurrence under the policies at issue here. There is a split among other jurisdictions whether a defective workmanship claim, standing alone, is an "occurrence" under CGL policies. *See*9A *Couch on Insurance* § 129:4 (collecting cases). *Compare* Clifford J. Shapiro, *Point/Counterpoint: Inadvertent Construction Defects are an "Occurrence" Under CGL Policies*, 22 Constr. Law. 13 (Spring 2002), *with* Linda B. Foster, *Point/Counterpoint: No Coverage Under the* ***535** *CGL Policy for Standard Construction Defect Claims*, 22 Constr. Law. 18 (Spring 2002).

A majority of those jurisdictions has held that claims of poor workmanship, standing alone, are not occurrences that trigger coverage under CGL policies similar to those at issue here. *See J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir.1993); *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill.App.3d 404, 268 Ill.Dec. 63, 777 N.E.2d 986 (2002); *Pursell Constr.*,

596 N.W.2d 67; *Auto-Owners*, 684 N.W.2d at 576; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (2006); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005); Christopher Burke, *Construction Defects and the Insuring Agreement in the CGL Policy-There is No Coverage for a Contractor's Failure to Do What It Promised,* Prac. L. Inst.: Litig. No. 8412, Insurance Coverage 2006: Claim Trends and Litigation 73, 82 (May 2006) (Burke) (collecting cases) ("Courts from no less than 25 states have adopted the position that there is no coverage [under CGL policies] for construction defect claims.").

Further, a corollary to the majority rule is that an "accident" and "occurrence" are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity. *J.Z.G.*, 987 F.2d at 102; *see, e.g., Auto-Owners*, 684 N.W.2d at 578-79 (faulty installation of roof shingles that caused consequential damage to roof structures and other buildings was sufficient to constitute an occurrence). As discussed below, we conclude there is no basis to apply this corollary here.

In contrast, a minority of jurisdictions has held that the damage resulting from faulty workmanship is an accident, and thus, a covered occurrence, so long as the insured did not intend the resulting damage. *See Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F.Supp.2d 1275 (D.Utah 2006); *United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla.2007); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486 (2006); *Travelers Indem. Co. v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn.2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex.2007); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65, 83 (2004).

We are persuaded by the majority rule because it is consistent with *Hottenstein* and *McGowan* and relies on the necessary element of fortuity inherent in the ordinary meaning of the term "accident." Additionally, the Tenth Circuit and Colorado courts have found an "occurrence" only when additional, consequential property damages were alleged as a result of the faulty workmanship. *Adair Group, Inc. v. St. Paul Fire & Marine Ins. Co.*, 477 F.3d 1186, 1187-88 (10th Cir.2007); *see, e.g., Am. Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955 (Colo.App.1990) (coverage when the poor workmanship in using the wrong material for a roof installation led to the roof collapsing, which caused additional property damage); *Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11, 13 (Colo.App.1985) (coverage when the poor workmanship created an exposure to continuous condition, which resulted in additional property damage).

In *McGowan*, a division of this court determined that a CGL policy excluded coverage for faulty workmanship. 100 P.3d at 525. There, the division relied on an explicit exclusion in the insurance policy for faulty workmanship. However, the division explained that CGL policies "normally exclude coverage for faulty workmanship based on the rationale that poor workmanship is considered a business risk to be borne by the policyholder" and such policies are "not intended to be the equivalent of performance bonds." 100 P.3d at 525.

This same rationale has been used in jurisdictions that have adopted the majority rule. For example, in *Pursell Construction*, the Iowa Supreme Court refused to adopt the minority rule because the "fundamental nature of a comprehensive general liability policy" would then hold the insurer as "a guarantor of the insured's performance of the contract," and the insurance policy would thus take on the attributes of a performance bond. 596 N.W.2d at 71; *see also Kvaerner*, 908 A.2d at 899 (the minority rule improperly ***536** converts an insurance policy into a performance bond).

Additionally, the *McGowan* division concluded that poor workmanship is not a "fortuitous event." Other jurisdictions adopting the majority rule have similarly focused on the fortuity required to constitute an accident.

For example, the Nebraska Supreme Court examined a CGL policy similar to the ones at issue here. *Auto-Owners Ins. Co.*, 684 N.W.2d 571. It adopted the majority rule because it concluded that "[t]he fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Id.* at 577 (quoting *McAllister v. Peerless Ins. Co.*, 124 N.H. 676, 474 A.2d 1033, 1036 (1984)).

The Pennsylvania Supreme Court rejected the minor-

ity rule because it relied on "an overly broad interpretation of accident." *Kvaerner*, 908 A.2d at 899 n. 9. The court held that faulty workmanship claims "simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in this context." *Id.* at 899.

In contrast, the jurisdictions adopting the minority rule have unconvincingly concluded that defective work is unforeseeable, and thus the property damage caused by defective work is an accident that constitutes an occurrence. *See J.S.U.B.*, 979 So.2d at 883; *Moore & Assocs.*, 216 S.W.3d at 309. However, courts adopting the minority rule and applying a broad definition of "accident" do not address the reasoning of courts following the majority rule that an accident must be fortuitous. *See, e.g., J.S.U.B.*, 979 So.2d at 885-86.

Furthermore, the minority rule has been criticized as improperly shifting the burdens of a subcontractor's poor workmanship from the contractor to the insurance company. For example, in *Lamar Homes*, the dissent reasoned that the minority rule would dissuade contractors from avoiding unqualified subcontractors because the insurance companies, not the contractors, would pay for the consequences of a subcontractor's defective workmanship. 242 S.W.3d at 20 (Brister, J., dissenting).

B. *Monterra Homes*

Despite the large number of jurisdictions following the majority rule, GSINDA argues that we must reverse because the trial court disregarded *Monterra Homes* in determining that the underlying HOA complaint and DRH third-party complaint here did not allege an occurrence. GSINDA asserts that the insureds, Foster Frames and the sub-subcontractors, did not intend defective workmanship, and thus there was an accident that constituted an "occurrence." We disagree. *Monterra Homes* is unpersuasive because (1) it does not address the out-of-state case law discussed above, (2) its standard would render other provisions in defendants' insurance policies superfluous, and (3) it relies on *Hecla's* interpretation of "occurrence," which involved a definition materially different from that in the policies at issue.

1. Out-of-State Authority

The *Monterra Homes* division cited only Colorado case law in its discussion. It did not consider the out-of-state authority discussed above, particularly the majority rule, which we have found persuasive.

Thus, the *Monterra Homes* division did not consider whether defective workmanship was accidental based on the concept of fortuity. As discussed above, we are persuaded that defective workmanship is not a fortuitous event that constitutes an accident. Therefore, as a matter of law, faulty work is not included under the definition of "occurrence" in this case.

In *Monterra Homes*, the homeowners had prevailed on their underlying complaint against a builder for property damage. The homeowners brought a garnishment action against the builder's insurer to recover the award of damages. The trial court entered judgment in favor of the homeowners and against the insurance company, and a division of this court affirmed.

That division held that the trial court applied the proper legal standard in determining that there was an occurrence under the ***537** insurance policy because it had focused on the knowledge, actions, and intentions of the insured builder. That division relied on *Hecla* for the proposition that "it is the 'knowledge and intent of the insured' that make injuries or damages expected or intended rather than accidental." 129 P.3d at 1034 (quoting *Hecla*, 811 P.2d at 1088). Then, it affirmed the trial court's finding of an occurrence based on evidence showing that the builder did not intend or expect the property damages resulting from its negligence.

2. Superfluous Provisions

[11] A reading of the insurance policies at issue that focuses only on the knowledge and intent of the insureds would render other provisions in those policies superfluous. Under Colorado law, we must avoid reading an insurance policy so as to render some provisions superfluous. *See Holland v. Bd. of County Comm'rs*, 883 P.2d 500, 505 (Colo.App.1994) (in construing contracts, courts must give effect to every provision, if possible).

The American, Western, Mountain, Colony, and Hartford policies contain an explicit exclusion for expected or intended damage:

> This insurance does not apply to ... "[b]odily injury" or "property damage" expected or intended from the standpoint of the insured....

Similarly, the Farmers policies state:

> "We" do not pay for "bodily injury," or "property damage": a. which is expected by, directed by, or intended by the "insured"; or b. that is the result of intentional and malicious acts of the "insured."

Applying the *Monterra Homes* "occurrence" definition would render these provisions superfluous, because they already exclude coverage for property damage resulting from expected or intended conduct. *See* Burke, at 94 (defining "occurrence" based on "whether the insured 'expected or intended' to cause the damage ... renders the expected or intended injury exclusion in the policy meaningless"). Significantly, the *Monterra Homes* division did not address whether a similar provision existed in the policy at issue there.

3. "Occurrence" in *Hecla*

Additionally, the reliance on *Hecla* was misplaced in *Monterra Homes* because the *Hecla* insurance policy defined "occurrence" differently from its definition in the policies at issue here. *Hecla* interpreted a pre-1986 CGL policy, which had defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which result in ... property damage, *neither expected nor intended from the standpoint of the insured.*" 811 P.2d at 1086 (emphasis added). The *Monterra Homes* division did not explain how to reconcile the two different "occurrence" definitions. However, the "occurrence" definition at issue here does not focus on the *expectations or intentions* from the insured's standpoint. Thus, our interpretation of the term here need not be limited to the expectations or intentions of the insured.

C. Consequential Damage

As discussed above, the HOA complaint alleged various construction defects and deficiencies, which were also incorporated into the DRH third-party complaint. Based on the allegations within the four corners of those complaints, the terms of the insurance policies at issue, and the plain meaning of "accident," we conclude the trial court did not err in determining that the allegations did not trigger a duty to defend. Even viewing the allegations in the light most favorable to GSINDA, we are not persuaded that the underlying complaints alleged any damage beyond the work product of Foster Frames or the sub-subcontractors.

In reaching this conclusion, we reject GSINDA's further contention that a duty to defend was triggered by allegations in the HOA complaint of "other losses" and "consequential damage" to "various elements of the Project." At oral argument, GSINDA argued that additional property damage was alleged based on the list of defects contained in the HOA complaint. However, it did not provide any specific instances of the additional or "other property" damage. Further, GSINDA has not identified any allegations of consequential damages in the HOA complaint resulting from defective workmanship that ***538** would apply to Foster Frames or the sub-subcontractors. *See* C.R.C.P. 8(a) (pleading must include short and plain statement of claim showing the pleader is entitled to relief).

The DRH third-party complaint alleged that Foster Frames performed framing, siding installation, window installation, and sliding glass door installation for the project. Similarly, the Foster Frames complaint alleged the sub-subcontractors were hired to "perform framing, window installation, siding and sliding glass door work and other activities at Rock Creek."

The HOA complaint generally alleged faulty workmanship in construction of the entire project, which encompassed numerous contractors, subcontractors, and sub-subcontractors. This appeal is limited to Foster Frames and its sub-subcontractors. However, any potential consequential damage alleged in the HOA complaint concerns work on the project unrelated to Foster Frames, for example, "cracking of interior flooring materials (tile, etc.) from structural foundation movement." There are no allegations that Foster Frames was responsible for placement of the foundation, or for faulty workmanship that could have caused the foundation movement, or resulted in the interior floor cracking. Thus, there was no consequential damage alleged that would trigger a duty to defend.

Neither the DRH third-party complaint nor Foster

Frames' fourth-party complaint identified any consequential property damage relating to Foster Frames or the sub-subcontractors. Further, neither on summary judgment nor on appeal has GSINDA specified any allegations of consequential damages for which there was a duty to defend. The general allegations in the HOA complaint, such as "[o]ver-driven nails for the attachment of the horizontal hardboard siding," describe potential defects in the work product itself, not additional or consequential property damage.

GSINDA has cited no authority, and we have found none, holding that such conclusory allegations of consequential damages trigger a duty to defend. We agree with the trial court that the "allegations contain nothing substantive about the extent or nature of the property damages."

Therefore, the corollary rule providing coverage for consequential damages is not applicable, and the allegations in the underlying complaints could not impose a duty to defend under defendants' insurance policies as a matter of law.

III. Other Issues

Because we affirm the trial court, we need not address the other issues raised by defendants, including whether Foster Frames was an additional insured under the policies and whether the ongoing operations exclusion in certain policies precluded coverage.

The trial court's orders are affirmed.

Judge ROMÁN and Judge LICHTENSTEIN concur.
Colo.App.,2009.
General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.
205 P.3d 529

END OF DOCUMENT

Exhibit 4

Monday, January 25, 2010

Is there coverage for contruction defect claims in Colorado? Part 2: Did we go from bad to worse?

In Greystone Const., Inc. v. National Fire & Marine Ins. Co., 649 F.Supp. 2d 1213 (D. Colo. 2009), a contractor and one of its insurers brought an action against a second insurer after the second insurer refused to fund the contractor's defense in construction defect actions brought by homeowners.

Relying heavily upon the reasoning of the General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529 (Colo. App. 2009) court, the Federal District Court for Colorado closely examined whether the plaintiff's complaints for damages that would constitute an "occurrence" under the relevant insurance policy. The court found only "conclusory references to consequential damages," and a failure "to provide specifics by which [the insurance carrier] or [the] court could ascertain what those damages were and whether they involved something other than [the subcontractor's] work product." Greystone Const., 649 F.Supp. 2d at 1220. The Court went on to state that property damage only to the home itself was insufficient to create a duty to defend or indemnify under the subject commercial general liability insurance policy. Id.

This case emphasizes the need to be especially diligent and thorough when drafting complaints in construction defect matters. Additionally, the Greystone case makes clear that general allegations of "consequential damages" without specific explanation as to the nature of such damages, may fail to trigger insurance coverage and therefore an insurance carrier's duty to defend or to indemnify.

 If you have any questions regarding the Greystone case, or anything else pertaining to construction law or insurance coverage issues in Colorado, please contact Shawn Eady at (303) 987-9816 or by e-mail at eady@hhmrlaw.com. For a more full explanation of construction law in Colorado please visit our website or request a copy of our Overview of Construction Defect Litigation in Colorado.

Posted by Shawn Eady at 8:31 PM 0 comments Links to this post

Labels: Colorado construction attorneys, Colorado construction litigation, construction defect, Denver construction attorneys

--- F.Supp.2d ----, 2009 WL 2568521 (D.Colo.)
(Cite as: 2009 WL 2568521 (D.Colo.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
GREYSTONE CONSTRUCTION, INC., Peter J. Hamilton, the Branan Company, Carl K. Branan, Michael C. Branan, and American Family Mutual Insurance Company, Plaintiffs,
v.
NATIONAL FIRE & MARINE INSURANCE COMPANY, Defendant.
Civil Action No. 07-cv-00066-MSK-CBS.

Aug. 18, 2009.

Lelia Kathleen Chaney, David Steven Leigh, Michael S. Power, Lambdin & Chaney, LLP, Denver, CO, Steven Paul Bailey, Jacob F. Kimball, Steven Paul Bailey, Anderson, Dude & Lebel, PC, Colorado Springs, CO, for Plaintiffs.

Peter J. Morgan, Tory Drew Riter, Robert M. Baldwin, Baldwin Morgan & Rider, PC, Denver, CO, for Defendant.

OPINION AND ORDER GRANTING, IN PART, MOTIONS FOR SUMMARY JUDGMENT

MARCIA S. KRIEGER, District Judge.

***1 THIS MATTER** comes before the Court pursuant to Plaintiffs Greystone Construction, Inc. and Peter Hamilton (collectively, "Greystone") and American Family Mutual Insurance Company's ("American Family") Motion for Partial Summary Judgment **(# 149),** and Defendant National Fire & Marine Insurance Company's ("National Fire") response **(# 156);** the parties' Joint Motion to Bifurcate Coverage Issues **(# 151);** National Fire's Motion for Summary Judgment **(# 152)** as against all Plaintiffs, Plaintiffs The Branan Company, Carl Branan, and Michael Branan's (collectively, "Branan") and American Family's response **(# 155),** Greystone and American Family's response **(# 158);** and Branan and American Family's Motion for Partial Summary Judgment **(# 153),** and National Fire's response **(# 157).**

FACTS

The parties have stipulated **(# 150)** to the facts they believe are necessary to resolve the issues presented here. Greystone and Branan are both businesses engage in the construction of residential homes. Both Greystone and Branan have obtained commercial general liability insurance policies from both National Fire and American Family. As discussed in more detail below, both builders were named in construction defect lawsuits by purchasers of their homes, and both builders sought defense and indemnification against those suits by both National Fire and American Family. American Family ultimately tendered a defense to the builders in both suits, but National Fire refused to do so.

The *Hull* suit

In 2001, Richard and Lisa Hull purchased a home constructed by Greystone. That home suffered property damage due to soil subsidence, water intrusion, and other instances of what the parties here agree was allegedly "poor workmanship." In 2005, the Hulls sued Greystone ("the *Hull* suit"), alleging that: (i) Greystone failed to recognize defects in the soil upon which the house was built, and (ii) that portions of the house were not adequately designed to withstand "abutting loads." The *Hull* suit asserted claims for negligence, negligent misrepresentation, violation of the Colorado Consumer Protection Act, breach of warranty, and other claims.

Upon being served with the *Hull* suit, Greystone contacted its insurers, National Fire and American Family. American Family agreed to undertake Greystone's defense of the claim, subject to a reservation of rights. However, National Fire refused to defend Greystone in the suit, relying primarily on endorsements to Greystone's policy: (i) excluding coverage for damage "incepting prior to" National Fire's coverage, (ii) requiring an insured to make an express election among co-insurers of the company it wished to undertake defense of a suit, and (iii) providing that National Fire's coverage would be deemed in excess of any other coverage carried by the insured. In addition, National Fire reserved its right to invoke other endorsements, including one those excluding coverage for subcontractor actions and one relating to ground subsidence, among others.

*2 Greystone, through American Family, ultimately settled the *Hull* suit for approximately $300,000.

The *Giorgetta* suit

In 1999, Douglas and Sandra Giorgetta purchased a home from Branan. As with the Hulls, the Giorgetta's home began suffering property damage apparently relating to soil conditions, among other things. In 2006, the Giorgettas brought suit against Branan ("the *Giorgetta* suit"), alleging claims similar to those asserted by the Hulls against Greystone. Branan promptly notified both American Family and National Fire of the suit. American Family agreed to tender a defense to Branan, but National Fire refused. The parties' stipulation of facts does not identify the particular grounds upon which National Fire refused Branan's request for defense and indemnification.

Branan, through American Family, ultimately settled the *Giorgetta* suit by buying back the home for $565,000. Those funds were paid entirely by American Family.

In their Complaint **(# 1)** in this action, the Plaintiffs assert claims for: (i) declaratory relief, in that National Fire has a duty to both defend and indemnify (on a pro rata basis with American Family) both Greystone and Branan; (ii) contribution/equitable subrogation by American Family for the amounts paid in settlement of the *Hull* and *Giorgetta* suits; (iii) breach of contract; (iv) bad faith breach of contract; and (v) violation of the Colorado Consumer Protection Act.

Pursuant to Fed.R.Civ.P. 42(b), the parties have agreed and jointly move to bifurcate **(# 151)** questions requiring interpretation of policy language-in order to determine whether coverage exists for the *Hull* and *Branan* suits-from the remaining issues in this case. Based on the stipulated facts discussed above, Greystone/American Family, Branan/American Family, and National Fire all move for judgment in their favor on the issue of coverage.

As discussed below, it is not necessary to reach-and thus, not necessary to recite-the parties' respective positions on a variety of issues raised in the briefing. It is sufficient to note that, with regard to the first question of whether the *Hull* and *Giorgetta* suits alleged an "occurrence" falling within the general coverage provisions of the policies, National Fire's motion **(# 152)** argues that the suits essentially asserted "poor workmanship" as the cause of the property damage, and that "poor workmanship" does not constitute an accidental "occurrence" under the terms of the policies. Greystone's motion **(# 149)** argues that coverage was available for the *Hull* lawsuit because the general historical trend and majority rule in most states recognize faulty workmanship as being an "occurrence" covered by general liability policies. Branan's motion **(# 153)** raises similar arguments, incorporating many of Greystone's arguments by reference (and sometimes setting forth Greystone's arguments verbtaim), and specifically argues that the damages claimed in the *Giorgetta* suit constitute an "occurrence" under the policy.

ANALYSIS

A. Standard of review

***3** Although nominally captioned as summary judgment motions, the parties here have stipulated to all of the facts necessary to resolve the question of policy interpretation and the scope of coverage, and thus, the normal inquiry prompted by summary judgment motions-the determination of whether a genuine factual dispute exists requiring trial-is not appropriate here. Rather, the Court merely applies the law to the undisputed facts and enters judgment as appropriate.

B. Standards governing interpretation of policy language

Because this Court's subject-matter jurisdiction arises due to the diversity of citizenship of the parties, the Court applies Colorado's substantive law governing the interpretation of insurance policy language. *See Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 426-27 (1996). Under Colorado law, insurance policies are construed under the same traditional principles that govern the interpretation of any contract. *Compass Ins. Co. v. City of Littleton,* 984 P.2d 606, 613 (Colo.1999).

When attempting to construe language in an insurance policy, the Court's ultimate goal is to ascertain and give effect to the reasonable expectations of the parties to the policy. *Pompa v. American Family Mut. Ins. Co.,* 520 F.3d 1139, 1143 (10th Cir.2008). The strongest indication of the parties' reasonable expectations is the policy language itself, and thus, the Court's first step is to give effect to the plain and ordinary meaning of its terms, as those terms would be understood by a person of ordinary intelligence. *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.,* 558 F.3d 1184, 1190 (10th Cir.2009), *citing Farmers Ins. Exch. v. Dotson,* 913 P.2d 27, 30 (Colo.1996); *Pompa,* 520 F.3d at 1143. In other words, the Court construes the policy language not as the insurer intended it to mean, but according to what the ordinary reader and purchaser would have understood it to mean. *Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co.,* 35 F.3d 494, 496 (10th Cir.1994). The same rules apply to provisions in insurance policies that exclude certain situations from otherwise available coverage; exclusionary terms must also be construed according to their plain and apparent meaning. *Worsham Contr. Co. v. Reliance Ins. Co.,* 687 P.2d 988, 990 (Colo.App.1984). The Court must not construe terms of a policy in isolation; it must consider the policy as a whole. *Simon v. Shelter General Ins. Co.,* 842 P.2d 236, 239 (Colo.1992).

When terms in a policy are susceptible to more than one reasonable interpretation, the Court must construe the ambiguous term against the drafter-the insurer-and in a manner that would promote, rather than deny, coverage. *Blackhawk-Central City Sanitation Dist. v. American Guarantee & Liab. Ins. Co.,* 214 F.3d 1183, 1191 (10th Cir.2000). However, a term is not ambiguous simply because the parties disagree as to its meaning, or where hypothetical or abstract sets of facts create the potential of ambiguity. *Allstate Ins. Co. v. Juniel,* 931 P.2d 511, 513 (Colo.App.1996).

***4** The duty to defend and duty to indemnify are discrete obligations under an insurance policy, and are subject to differing analyses. A duty to indemnify arises only when the policy terms *actually* cover a judgment or settlement against an insured. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.,* 74 P.3d 294, 299 (Colo.2003). By contrast, a duty to defend arises when the underlying compliant against the insured alleges facts that might *arguably* fall within the terms of the policy. *Hecla Mining Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083, 1089 (Colo.1991). An insurer disclaiming any duty to defend bears a "heavy burden" of showing that no set of facts consistent with those alleged in the underlying complaint could give rise to a situation

where coverage existed under the policy. *Id.* at 1089, 1090.

C. Whether the property damage constitutes an "occurrence"

The first issue on which the parties disagree is whether the damage to the Hull or Giorgetta properties constitutes the result of an "occurrence." The core policy language defining coverage in both the Greystone and Branan policies provides property damage "caused by an occurrence" falls within the scope of the policy. *Docket* # 150, ¶ 36. An "occurrence," in turn, is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*, ¶ 37.

The parties have framed up this issue as largely a legal one: can property damage resulting from poor workmanship constitute an "occurrence" as that term is used in the policy? Although both the *Hull* and *Giorgetta* complaints contain, among other things, claims of defective design, misrepresentation, and deceptive trade practices, the parties' briefs appear to limit their arguments to the question of whether the policies cover damages arising out of poor workmanship.[FN1] National Fire's position is that an essential element of a general liability policy is that the damages insured against be "fortuitous," and extending coverage to the insured where the claimant alleges only poor workmanship would convert the general liability policy into a performance bond warrantying the insured's products. *Citing, among others, Union Ins. Co. v. Hottenstein,* 83 P.2d 1196, 1202 (Colo.App.2003). The Plaintiffs' position is that while poor workmanship, standing alone, may not constitute an "occurrence," poor workmanship that results in property damage does fall within such coverage. *Citing Hoang v.. Monterra Homes,* 129 P.3d 1028 (Colo.App.2005), *rev'd on other grounds,* 149 P.3d 798 (Colo.2007).

FN1. Greystone's motion makes a fleeting contention that "National Fire ignores the allegations of property damage from negligent repair and negligent misrepresentation," but does not elaborate on this argument. *Docket* # 149 at 8. To the extent Greystone intended to argue that the *Hull* suit involved more than just a claim of poor workmanship and that these non-workmanship claims also constitute an "occurrence," the Court finds that argument inadequately developed and does not consider it.

In February 2009, after the parties briefing, the Colorado Court of Appeals decided *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.,* 205 P.3d 529 (Colo.App.2009), which greatly clarified the issue. In *General Security,* interpreting identical policy language to that presented here, the court noted that a split existed among jurisdictions as to "whether a defective workmanship claim, standing alone, is an 'occurrence' under CGL [Commercial General Liability] policies." *Id.* at 534. It found that the majority of jurisdictions held that "claims of poor workmanship, standing alone, are not occurrences that trigger coverage," while the minority rule was "damage resulting from faulty workmanship is an accident, and thus, a covered occurrence." *Id.* at 535. The court also observed a "corollary" to the majority rule: that even when faulty workmanship is the cause, an "occurrence" is present "when consequential property damage has been inflicted upon a third party as a result of the insured's activity." *Id.* The *General Security* court concluded that the majority rule was most consistent with prior Colorado and 10th Circuit caselaw and properly accounted for the necessary element of fortuity. 205 P.3d at 535. The court distinguished *Hoang,* one of the primary cases relied upon by the Plaintiffs here, finding it "unpersuasive" in several respects. *Id.* at 536-537.

*5 After adopting the majority rule-that faulty workmanship alone cannot give rise to an "occurrence"-the *General Security* court then turned to the question of the corollary. Finding that the complaints of property damage in the underlying suit did not "allege[ ] any damage beyond the work product" of the insured,[FN2] the court concluded that the corollary did not apply. *Id.* at 537. Thus, the court found that the policy did not impose a duty on the insurer to defend the underlying suit. *Id.* at 538.

> FN2. *General Security* involved a claim against the insurer of a subcontractor responsible for framing of windows and door installations and installation of siding. The *General Security* court noted that the underlying suit alleged poor workmanship on the part of the subcontractor, such as "over-driven nails for the attachment of the horizontal hardboard siding," but observed that these allegations "describe potential defects in the work product itself, not additional or consequential property damage." *Id.* at 538. The underlying suit did allege some forms of actual property damage, such as "cracking of interior flooring materials (tile, etc.) from structural foundation movement," but the court observed that the window and door subcontractor could not possibly be deemed to be at fault for such damages. *Id.*

With a small exception, *General Security* effectively resolves the parties' dispute here as to whether poor workmanship can constitute an "occurrence" under a general liability policy. The rule derived from *General Security* is that a claim alleging poor workmanship does not constitute an "occurrence" under that policy language (the same language present here) unless that claim alleges consequential property damages running to third parties. Perhaps anticipating Colorado's adoption of the majority rule, the Plaintiffs argue that the *Hull* and *Giorgetta* suits fall within what *General Security* ultimately referred to as the "corollary." Specifically, the Plaintiffs argue that the *General Security* rule applies only when there are allegations of poor workmanship that nevertheless result in no material property damage (e.g. "over-driven nails"). The Plaintiffs here contend that the corollary is invoked-and coverage extends-when the poor workmanship results in actual property damage to the work product itself. Here, the Plaintiffs argue, the poor workmanship has resulted in actual property damage to the Hull and Giorgetta homes, and thus, the poor workmanship here constitutes a fortuitous "occurrence."

A close reading of *General Security* and the cases it relies upon reveals the Plaintiffs' position to be untenable. It is clear from both the discussion in *General Security* and those cases it cites that the "damage inflicted on a third party" necessary to invoke the corollary refers to faulty workmanship causing property damage to something *other than* the work product itself. *Id.* at 535, *citing J.Z.G. Resources, Inc. v. King,* 987 F.2d 98, 102 (2d Cir.1993) ("this circuit has held that a CGL policy did not provide coverage for a claim against an insured for the repair of faulty workmanship that damaged only the resulting work product"). In other words, under the corollary, poor workmanship that resulted in property damage only to the home itself would not be considered an "occurrence," but poor workmanship that resulted in damage to, say, personal property of the homeowner kept inside the house or damage to neighbor's houses could be considered an "occurrence." *J.Z.G.,* 987 F.2d at 102 (distinguishing a case in which coverage was found when poor workmanship "caused damage to *other* property of the purchaser") (emphasis added); *see also Auto-Owners Ins. Co. v. Home Pride Companies, Inc.,* 684 N.W.2d 571, 545 (Neb.2004) ("a standard CGL policy does not provide coverage for faulty workmanship that damages only the *resulting work product,* if faulty workmanship causes bodily

injury or property damage to *something other than the insured's work product,* an unintended and unexpected event has occurred, and coverage exists") (emphasis added), *cited in General Security,* 205 P.3d at 535.

***6** With this rule in mind, this Court turns to the complaints in the *Hull* and *Giorgetta* suits to see whether the plaintiffs there claimed to have suffered damage to anything other than the homes-the work products-that Greystone and Branan had built. The complaint in the *Hull* suit makes reference to damage to "living areas, ... the porch, patio, garage, and driveway." *Docket* # 150, ¶ 5(9). It makes a reference to the Hulls "los[ing] the use of parts of their Home because of the property damage," and later, conclusorily recites "damages including, by way of illustration, actual property damage, consequential loss of use of the value of their Home, and other direct economic costs, repair costs, and aggravation, inconvenience, annoyance, discomfort, and/or emotional distress." *Id.,* ¶ 5(10), (16). Nothing in the *Hull* complaint gives an indication that the Hulls were claiming property damage to anything other than the house itself.[FN3] Accordingly, because the parties agree that the *Hull* suit focused only on poor workmanship, and the stipulated facts yield no indication of property or consequential damage to anything other than Greystone's work product (i.e. the home) itself, the rule in General Security requires a conclusion that the *Hull* suit did not, on its face, involve an "occurrence" under the terms of the policy, and thus, National Fire had neither the duty to defend nor indemnify Greystone or American Family with regard to that suit.

> FN3. The Hulls' conclusory recitation of various types of "consequential" or other damages is insufficient to permit the corollary to be invoked. *General Security,* 205 P.3d at 538 (refusing to find that "conclusory allegations of consequential damages trigger a duty to defend" and stating that "allegations [that] contain nothing substantive about the extent or nature of the property damages" do not convert a claim of poor workmanship into a covered "occurrence").

The allegations in the complaint of the *Giorgetta* suit are slightly more expansive than in the *Hull* suit, but no more availing. The *Giorgetta* complaint alleges that the homeowners suffered "movement of the basement floor system, damage to and movement of the foundation, damage to the upper level living areas, and damage to porches, patios, garage, and driveway." *Docket* # 150, ¶ 32(14). It also recites damage to or the loss of use of "some or all of the Home," due to "improper installation of the building envelope system and related building envelope failures, as well as resulting and consulting and consequential property damage to other elements of the Home's construction." *Id.,* ¶ 32(16). As in the *Hull* suit, the Giorgettas claimed a conclusory litany of injuries, including "property damage, diminished value of the Home, costs of repairs, loss of improvements, loss of use of all or portions of the Home, aggravation, inconvenience, annoyance, and discomfort and other consequential damages." *Id.,* ¶ 32(23). As with the Hulls, the *Giorgetta* suit's specific claims of injury all relate to property damage to the home itself, not to any of the Giorgetta's personal property or to the property of third parties. Once again, the *Giorgetta* suit makes conclusory references to "consequential damages," but fails to provide specifics by which National Fire or this Court could ascertain what those damages were and whether they involved something other than Branan's work product. Accordingly, property damage only to the home itself is insufficient to remove the *Giorgetta* suit from the general rule that poor workmanship does not constitute an "occurrence" sufficient to create a duty to defend or indemnify under the National Fire policy.

***7** Because the Court has determined that neither the *Hull* nor *Giorgetta* suits fell within the policy's

general language extending coverage for "occurrences," the Court need not reach the remaining arguments regarding the policy's endorsements.

CONCLUSION

For the foregoing reasons, the parties' Joint Motion to Bifurcate Coverage Issues **(# 151)** is **GRANTED.** Greystone/American Family's Motion for Partial Summary Judgment **(# 149)** and Branan/ American Family's Motion for Summary Judgment **(# 153)** are **GRANTED IN PART,** insfoar as the Court determines that there is no genuine issue of fact requiring a trial, and **DENIED IN PART,** insofar as neither Greystone, Branan, or American Family are entitled to judgment given the parties' stipulated facts. National Fire's Motion for Summary Judgment **(# 152)** is **GRANTED** in its entirety. Judgment in favor of National Fire and against all Plaintiffs shall enter contemporaneously with this Order.

D.Colo.,2009.
Greystone Const., Inc. v. National Fire & Marine Ins. Co.
--- F.Supp.2d ----, 2009 WL 2568521 (D.Colo.)

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FILED
United States Court of Appeals
Tenth Circuit

June 2, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GREYSTONE CONSTRUCTION, INC., PETER J. HAMILTON, THE BRANAN COMPANY, CARL K. BRANAN, MICHAEL C. BRANAN, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

NATIONAL FIRE & MARINE INSURANCE COMPANY,

Defendant-Appellee.

No. 09-1412

(D. of Colo.)
(D.C. No. 07-CV-66-MSK-CBS)

CERTIFICATION OF QUESTION OF STATE LAW

Greystone Construction, Inc., The Branan Company, and American Family Mutual Insurance Company (American) appeal the federal district court's grant of summary judgment in favor of National Fire and Marine Insurance Company (National). At issue is whether National owed Greystone and Branan defenses under their commercial general liability insurance policies.

The district court ruled National was not obligated to defend Greystone and Branan, finding the complaints brought against them did not allege covered "occurrences" under the policies' standard terms. The district court, applying a recent case by the Colorado Court of Appeals, *General Security Indemnity*

Company of Arizona v. Mountain States Mutual Casualty Company, 205 P.3d 529 (2009), held that claims for damages arising solely from faulty workmanship do not allege accidents that constitute covered "occurrences."

Because the disposition of this appeal turns on an important and unsettled question of Colorado law, we respectfully request the Colorado Supreme Court exercise its discretion to accept the following certified question in accordance with Tenth Circuit Rule 27.1 and Colorado Appellate Rule 21.1:

Question Presented

> Is damage to non-defective portions of a structure caused by conditions resulting from a subcontractor's defective work product a covered "occurrence" under Colorado law?

I. Background

The relevant material facts are undisputed. Richard and Lisa Hull purchased a house built by Greystone in June 2001. Greystone employed subcontractors to perform all the work on the house. In November 2005, the Hulls sued Greystone, asserting defective construction by the subcontractors. The Hulls claimed several elements of the house were damaged, including the upper-level living areas, porch, patio, garage, and driveway, as a result of a subcontractor's negligent design of the house's soil-drainage and structural elements. Greystone tendered the suit to American; Greystone is insured under commercial general liability (CGL) policies with American for the period April 18, 2001 to April 18, 2003. American hired defense counsel for Greystone and

defended the builder subject to a reservation of rights. Greystone tendered the suit to National in February 2006; Greystone is insured under CGL policies with National for the period April 18, 2003 to April 23, 2006. National denied it owed Greystone a defense.

Douglas and Sandra Giorgetta bought a house built by Branan in August 1999. Branan hired subcontractors to perform all of the work on the house. In January 2006, the Giorgettas sued Branan, asserting claims mirroring those the Hulls brought against Greystone. Branan is insured under CGL policies with American for the period August 12, 1998 to June 20, 2003, and under CGL policies with National for the period June 20, 2003 to June 20, 2005. American provided Branan defense counsel and defended the construction contractor subject to a reservation of rights. National denied it was obligated to defend Branan.

The terms of Greystone's and Branan's CGL policies with National are the same in all material respects. The coverage grant contained in the policies states:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" . . . .

R. at 146.

An "occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." R. at 147. The policies do not define the term "accident."

The policies do not provide coverage for damage to work performed by the insured. The policies exclude from coverage:

> j. "Property damage" to:
>
> * * * *
>
> 5. That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> 6. That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> Paragraph 6 of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> *This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.*

Id. (emphasis added).

In the district court, Greystone, Branan, and American sought to recover a portion of their defense costs from National. The parties moved for summary

judgment on the duty to defend and coverage issues. Relying on *General Security*, the district court awarded National summary judgment, holding the Hull and Giorgetta complaints did not allege "occurrences" under National's policies.

II. Analysis

On appeal, Greystone, Branan, and American challenge the district court's summary judgment ruling. They contend the underlying complaints alleged "occurrences" under National's policies. National defends the district court's decision, arguing the district court's "occurrences" rationale was correct. This appeal implicates an important question of Colorado insurance law.

In *General Security*, the Colorado Court of Appeals held a subcontractor's insurer could not recover costs associated with defending the subcontractor against a third-party indemnification suit brought by the general contractor from sub-subcontractors' insurance companies. *See* 205 P.3d at 531–32. The sub-subcontractors held post-1986 CGL policies containing terms essentially identical to those present in the policies at issue in this case. *See id.* at 533. The Court of Appeals found the duty to defend contained in the sub-subcontractors' policies was not triggered because the underlying complaints did not allege a covered "occurrence." *See id.*

The Court of Appeals noted the term "accident," as used in CGL policies, had been defined in Colorado as "an unanticipated or unusual result flowing from

a commonplace cause," *id.* at 534 (citing *Hoang v. Monterra Homes LLC*, 129 P.3d 1028, 1034 (Colo. Ct. App. 2005); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1201 (Colo. Ct. App. 2003)), and as a "fortuitous event," *id.* (citing *McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521, 525 (Colo. Ct. App. 2004)). The Court of Appeals acknowledged the Supreme Court of Colorado, in *Hecla Mining Company v. New Hampshire Insurance Company*, 811 P.2d 1083 (1991), interpreted the terms "accident" and "occurrence" to exclude from coverage only "those damages that the insured knew would flow directly and immediately from its intentional act," *id.* at 1088, but discounted the applicability of that understanding because it was based on a reading of a pre-1986 CGL policy, *see General Security*, 205 P.3d at 537.

Based on its conclusion that an "accident" necessarily includes an element of fortuity, the Court of Appeals stated, "a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence . . . ." *Id.* at 534. In making that statement, the Court of Appeals explained it was joining a majority of jurisdictions that has held damage caused by poor workmanship—even if unintended—is not an accident,[1] rather

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[1] In identifying the majority position, the Court of Appeals cited the following circuit and state supreme court decisions: *J.Z.G. Res., Inc. v. King*, 987 F.2d 98 (2d Cir. 1993); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33 (S.C. 2005); *Auto-Owners Ins. Co. v.*

(continued...)

than a minority of jurisdictions that has held "damage resulting from faulty workmanship is an accident, and thus, a covered occurrence, so long as the insured did not intend the resulting damage."[2] *Id.* at 535. The Court of Appeals also identified a corollary to the majority rule: "an accident and occurrence are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity." *Id.*

Because the claims against the subcontractor and the sub-subcontractors in *General Security* were limited to allegations that their poor workmanship caused damage to their own work product, the Court of Appeals ruled no "accident" or "occurrence" took place and therefore the insurer had no duty to defend. *See id.* at 537–38. In the course of discussing the rationale for its ruling, the Court of Appeals suggested a general contractor's CGL policy would not provide coverage for a subcontractor's faulty work product by stating: "the minority rule has been criticized as improperly shifting the burdens of a subcontractor's poor

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[1](...continued)
Home Pride Cos., Inc., 684 N.W.2d 571 (Neb. 2004); *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999).

[2] The following cases are representative of what the Court of Appeals identified as the minority position: *Architex Assoc., Inc. v. Scottsdale Ins. Co.*, --- So.3d ---, 2010 WL 457236 (Miss. Feb. 11, 2010); *Revelation Indus. v. St. Paul Fire*, 206 P.3d 919 (Mont. 2009); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007); *Travelers Indem. Co. v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn. 2007); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (Kan. 2006); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004).

workmanship from the contractor to the [insurer] . . . . [T]he minority rule would dissuade contractors from avoiding unqualified subcontractors because the [insurers], not the contractors, would pay for the consequences of a subcontractor's defective workmanship." *Id.* at 536.

Applying *General Security*, the district court held the Hull and Giorgetta complaints did not allege "occurrences" under National's policies, because they did not allege damages to anything beyond Greystone's and Branan's work product. The district court ruled consequential damages were not adequately alleged because the complaints only identified damages to elements of the houses, and not other forms of property. On that basis, the district court concluded National did not owe Greystone and Branan defenses under the standard terms of the CGL policies, and the district court awarded National summary judgment.

Despite the Colorado Court of Appeals' recent holding in *General Security*, we are uncertain of the status of Colorado caselaw on the coverage issue before us. As *General Security* indicates, the Colorado Supreme Court has not defined the terms "accident" and "occurrence," as those terms are used in post-1986 CGL policies, and other state supreme courts are split on the meaning and effect of those terms.[3]

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[3] *See supra* at n. 1–2; *see also Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541 (S.C. 2009); *French v. Assurance Co. of Am.*, 448 F.3d 693 (4th Cir. 2006).

Also, the basis for the Colorado Court of Appeals' understanding of the terms "accident" and "occurrence" is an important matter of Colorado law. The cases to which the Court of Appeals cited in *General Security* regarding the majority position provide two rationales for denying coverage for poor workmanship alone: (1) "the rule has been justified on public policy grounds"—i.e., "the cost to repair and replace damages caused by faulty workmanship is a business risk"; and (2) the rule has been justified as a matter of contract interpretation—i.e., "the fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Auto-Owners Ins. Co. v. Home Pride Cos., Inc.*, 684 N.W.2d at 577 (cited by *General Security*, 205 P.3d at 534).

Moreover, neither the Colorado Supreme Court nor the Colorado Court of Appeals has considered how the coverage grant and subcontractor exception to the "your work" exclusion found in post-1986 CGL policies operate in conjunction with one another.[4] We are mindful that a contract should be interpreted in its entirety with the aim of harmonizing and giving effect to all its provisions so that none will be rendered meaningless. *See Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009). We also note the Supreme Court of South Carolina and the Fourth Circuit have addressed the coverage

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[4] *See* the coverage grant and exclusion l, quoted above at pages 3–4.

grant, the subcontractor exception to the "your work" exclusion, and the corollary identified in *General Security* in concluding post-1986 CGL policies provided coverage for general contractors where their subcontractors' poor workmanship caused conditions that resulted in damage to otherwise non-defective work product. *See Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541, 543–46 (S.C. 2009); *French*, 448 F.3d at 698, 700–06.

III. Certification of the Question to the Colorado Supreme Court

In light of the lack of precedential decisions on point and the split of authority, and in furtherance of comity and federalism, we conclude the Colorado Supreme Court should have the opportunity to answer this important question in the first instance. We recognize the discretion of the Colorado Supreme Court to reformulate the question posed herein.

The Clerk of this court shall transmit a copy of this certification order to counsel for all parties. The Clerk shall also forward, under the Tenth Circuit's official seal, a copy of this certification order and the briefs filed in this court to the Colorado Supreme Court.

This appeal is ordered ABATED pending resolution of the certified question.

Dated this 2nd day of June, 2010

Timothy M. Tymkovich, Circuit Judge
United States Court of Appeals
for the Tenth Circuit

Exhibit 5

Damage To Your Work Exclusion Endorsements

Introduction

We are introducing two endorsements which amend the damage to your work exclusion with respect to construction defects.

Background

Since the building boom of the 1980's and large scale construction of condominium housing, litigation and claims relating to construction defects has skyrocketed. While no official definition of construction defects exists, generally speaking, a construction defect has been described as the failure to erect the building or any component thereof in a reasonably workman-like manner or to erect a building that is able to serve the purpose intended by the manufacturer or reasonably expected by the buyer.

The CGL excludes coverage for "damage to your work". "Your work" includes work or operations performed by you (the named insured) or on your behalf. The rationale behind the "damage to your work" exclusion is that damage to an insured's work is considered a business risk, which is not intended to be covered under a CGL policy. For the most part, courts throughout the country have ruled that construction defects, as defined above, fall within the "damage to your work" exclusion.

However, an exception to the "damage to your work" exclusion exists. The exception provides coverage for damaged work resulting from work performed by a subcontractor who is working on behalf of the named insured. The rationale behind the exception is that the named insured has not directly performed the work and has limited control over the work of a subcontractor and should have coverage available if the work performed by the subcontractor should result in damage.

Explanation of Changes

In some cases, subject to other provisions of the policy, the exception mentioned above can result in coverage for construction defects resulting from work performed by the named insured's subcontractor. While there is no coverage for damage to an insured's work arising out of his work, potential scenarios where coverage would be provided for damage caused by a negligent subcontractor include:

- Coverage for damage to the contractor's work arising out of a subcontractor's work;
- Coverage for damage to the insured's work arising out of a subcontractor's work; and
- Coverage for damage to a subcontractor's work, or if the insured is a subcontractor, to a general contractor's work or another subcontractor's work, arising out of the insured's work.

Coverage for construction defects can be significantly affected if an insured uses subcontractors.

After an in-depth analysis of the issue at hand, and the rise in litigation related to this issue, we are introducing two optional endorsements which amend Exclusion l. (damage to your work) of Section I - Coverage A - Bodily Injury And Property Damage Liability in order to completely exclude construction defects from the CGL. These endorsements will allow insurers to underwrite contractors who use subcontractors and exclude coverage as appropriate. The endorsements are as follows:

- **CG 22 94** Exclusion - Damage To Work Performed By Subcontractors On Your Behalf. This is a blanket-type endorsement which will amend the above referenced exclusion by deleting the subcontractor exception for all exposures.

- **CG 22 95** Exclusion - Damage To Work Performed By Subcontractors On Your Behalf - Designated Sites Or Operations. This is a schedule-type endorsement which will amend the above referenced exclusion by deleting the subcontractor exception for sites and operations listed in the schedule of the endorsement.

Impact

Coverage

These endorsements provide a restriction in coverage.

Rating

Any premium adjustment resulting from the use of these endorsements will be on a refer to company basis.

New Forms

- CG 22 94 - Exclusion - Damage To Work Performed By Subcontractors On Your Behalf
- CG 22 95 - Exclusion - Damage To Work Performed By Subcontractors On Your Behalf - Designated Sites Or Operations.

COMMERCIAL GENERAL LIABILITY
CG 22 94 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion l. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

N

E

W

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 22 95 10 01

EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF – DESIGNATED SITES OR OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Designated Sites Or Operations

N

(If no entry appears above, information required to completed this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to those sites or operations designated in the Schedule of this endorsement, Exclusion **l.** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

E

W

Exhibit 6

circular

January 29, 1979

BROAD FORM PROPERTY DAMAGE COVERAGE EXPLAINED

General Liability GL 79-12
(Rules/Forms)

BACKGROUND	Because Broad Form Property Damage Coverage is difficult to understand, companies and agents have requested that we make available an explanation of this coverage as provided by Advisory Endorsements ADV-3005 and ADV-3006. This coverage is also provided in Standard Endorsement G222 (GL 04 04 07 76), Broad Form Comprehensive General Liability Endorsement.
ISO ACTION	We have established a comparative analysis showing the advisory endorsement language and the explanation of intent.
ATTACHMENT	Explanatory Memorandum for Broad Form Property Damage Coverage

Graham V. Boyd, Jr.
Manager
General Liability Division
(212) 487-4672

EXPLANATORY MEMORANDUM*
BROAD FORM PROPERTY DAMAGE COVERAGE

The Broad Form Property Damage Endorsements ADV.-3005 and ADV.-3006 are intended primarily for contracting risks. However, when either endorsement is used in connection with a Comprehensive General Liability Policy, the result is to broaden and clarify property damage coverage for any risk covered thereunder. Although the effect of these endorsements is to extend property damage coverage, the approach is to modify the application of the property damage exclusion. The following explanation of intent corresponds to the appropriate sections of the endorsements. It should be pointed out that these endorsements are the same, except for the difference between exclusion (x) and (z), and will therefore be discussed together.

ADVISORY ENDORSEMENT LANGUAGE	EXPLANATION OF INTENT
It is agreed that the insurance for property damage liability applies, subject to the following additional provisions:	
A. The exclusions relating to property damage to (1) property owned, occupied or used by or rented to the insured or in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control and (2) work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith, are replaced by the following exclusions (w) and (x),	A. This paragraph is self explanatory and refers to certain exclusions to which this Advisory Endorsement applies.
(w or y) to property damage	
(1) to property owned or occupied by or rented to the insured, or, except with respect to the use of elevators, to property held by the insured for sale or entrusted to the insured for storage or safekeeping,	(w or y)(1) - Property owned by the insured is excluded in accordance with the traditional approach in liability policies but considerable difficulty has been found in defining owned property in connection with contracting risks. It is intended that property manufactured or purchased by the insured and contructed or installed at premises not owned by the insured shall be considered property owned by the insured until the construction or installation is accepted by the owner. Property of others which is constructed or installed on premises owned by the insured becomes property owned by the insured only when the construction or installation thereof is completed and the insured has the right to use such property (z)

*This explanation also applies to that portion of Endorsement G222 that pertains to Broad Form Property Damage Coverage.

The exclusion of property occupied by the insured is not intended to apply to occupancy in the sense of the insured's mere presence therein. The exclusion applies only to property which is formally occupied over a specific period of time for a specific purpose, as in the case where a general contractor is given the exclusive use of an area in a building as headquarters for his construction operations.

The exclusion of property held by the insured for sale is intended to apply only to property which is in his possession for that purpose. The exclusion of property entrusted for storage or safekeeping is intended to apply whether or not the insured retains possession of such property. These exclusions do not apply to the use of elevators.

(2) except with respect to liability under a written sidetrack agreement or the use of elevators to

(w or y)(2) - It must be kept in mind that this paragraph of the exclusion does not apply to property owned or rented to the insured, for such property is already specifically excluded by paragraph (1). The exception with which this paragraph commences follows the present exception to the property damage exclusion and has the effect of giving coverage for damage to property for which the insured is liable under a sidetrack agreement and for damage to property with respect to which the insured has purchased elevator property damage insurance. Thus, while property at the insured's premises is excluded generally under (w and y)(2)(a), if such property is damage because of the use of an elevator, then the damage is covered. Property damage which results solely out of the existence of the property while on the elevator is not covered. The property damage must result from the use of the elevator.

(a) property while on premises owned by or rented to the insured for the purpose of having operations performed on such property by or on behalf of the insured,

(2)(a) - This exclusion is intended to apply to the insured who is engaged in operations at his own premises, such as a television repairman. The exclusion applies from the time property is brought onto the premises until it is taken away therefrom. The language is not intended to exclude coverage for damage to property brought onto the insured's premises in connection with his operations or to be installed for the insured. For example, consider a general contractor who is performing construction operations on premises which he owns. If a subcontractor brings property that the subcontractor owns onto the insured premises for the purpose of installation or construction, and the general contractor damages this property owned by the subcontractor, such damage is intended to be covered. As another example, consider an insured manufacturer who order a piece of machinery. The machinery is brought onto the insured manufacturer's premises to be installed by the seller, and the insured damages the machinery during the installation. Coverage is intended for such damage.

(b) tools or equipment while being used by the insured in performing his operations,

(2)(b) - Tools and equipment not excluded under paragraph (1) are excluded while actually being used by the insured. The word "equipment" is intended to mean any property used to implement the operations of the insured and particularly any mechanical device, whether it is permanently installed at the premises or whether it is brought onto the premises by the insured. Property damage to cranes, hoists, etc., not formally rented to the insured but borrowed temporarily would be excluded under this section. Property damage arising out of the occasional use by the insured of an elevator on the premises to carry materials would not be excluded, but if the insured were performing operations on an elevator shaft and using the elevator as a platform for such operations, then the elevator would be regarded as "equipment" and property damage to such equipment would be excluded.

(c) property in the custody of the insured which is to be installed, erected or used in construction by the insured,

(2)(c) - This exclusion is intended to apply to property furnished to the insured for construction or installation from the time such property is delivered to the insured until the time the insured commences the construction or installation. For example, the owner of premises may turn over to the general contractor an expensive piece of machinery, such as an air-conditioning unit, to be installed in a building which is being erected by the general contractor-insured. Damage to such property is excluded.

(d) that particular part of any property, not on premises owned by or rented to the insured,

(2)(d) - This paragraph is intended to precisely define the extent to which damage to property on which the insured is actually working is to be excluded. Under the present policy language, with respect to general contracting risks, the exclusion relating to property in the care, custody or control of the insured is intended to remove from coverage all property damage caused by an insured in many situations.

Under this care, custody or control exclusion, if the general contractor who is in charge of a project damages a portion of it, the damage is excluded even though that portion may be work being performed by a subcontractor. On the other hand, if a subcontractor damages some portion of the job beyond his own scope of operations, the damage would be covered. The intent under these endorsements is to give the same coverage to both the general and subcontractor for damage arising out of their own operations and to exclude only damage to the particular property on which the insured is working.

The exclusion is intended to apply only to the part of the property on which the operations are being performed. In this context, "property" is intended to mean any unit of property which may become the subject of liability. For example, consider an insured subcontractor who is erecting steel beams furnished to him by the general contractor. Having erected four steel beams, the subcontractor is in the process of erecting a fifth steel beam and this beam falls, resulting in damage to all five beams. "That particular part" of the property would be the fifth beam. As another example, if the insured were an electrical subcontractor and, in the process of installing a switch which was furnished to him, he damaged the switch which resulted in burning out the electrical system, the switch would be "that particular part" of the property

(i) upon which operations are being performed by or on behalf of the insured at the time of the property damage arising out of such operations, or	(2)(d)(i) - This clause excludes the property on which the insured is actually working at the time of the property damage. It also excludes property damage caused by subcontractors of the insured while they are actually working on the property. Where the damage caused by the insured in the performance of his operations goes beyond damage to the property on which he is working, this section limits the exclusion to the particular part on which he is working.
(ii) out of which any property damage arises, or	(2)(d)(ii) - This section excludes property damage to the particular part of any property which was in use when damage occurred even though work on that part has been completed and also where it cannot be established that the damage was the result of faulty workmanship. For example, if the insured has installed a valve on a pressure vessel, and, while being tested, the valve fails to function because of a defect in the valve which causes the vessel to explode, only the damage to the valve is excluded.
(iii) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured;	(2)(d)(iii) - This section excludes property damage to that particular part of any property which occurs after work on that part has been completed and where it can be established that the property damage was the result of faulty workmanship by the insured or his subcontractor. This section has particular application to the insured who undertakes to repair property.

(The following applies to exclusion (x) in Advisory Endorsement ADV. 3005-Broad Form Property Damage Endorsement)
(Excluding Completed Operations)

(x) with respect to the completed operations hazard (if the insurance otherwise applies to property damage included within such hazard) and with respect to any classification stated below as "including completed operations", to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.	(x) - This paragraph repeats the policy exclusion but makes it clear that the exclusion applies only to the completed operations hazard, thus avoiding any apparent conflict between this policy exclusion and exclusion (w)(2)(d) of endorsement ADV-3005.

(The following applies to exclusion (z) in Advisory Endorsement ADV.-3006-Broad Form Property Damage Endorsement)
(Including Completed Operations)

(z) with respect to the completed operations hazard and with respect to any classification stated below as "including completed operations", to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

(z) - This exclusion in endorsement ADV.-3006, which modifies the corresponding policy exclusion, provides broad form completed operations property damage coverage by excluding only damages caused by the named insured to his own work. Thus,

(1) The insured would have no coverage for damage to his work arising out of his work.

(2) The insured would have coverage for damage to his work arising out of a subcontractor's work.

(3) The insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.

(4) The insured would have coverage for damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.

B. The insurance afforded by this endorsement shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof) available to the insured, such as but not limited to Fire and Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage, and the "Other Insurance" Condition is amended accordingly.

B. This paragraph is included to clarify the intent that endorsement coverage provided under these endorsements is to be excess over first party coverages available to the insured.

The following are specific examples showing the application of coverage provided under these endorsements:

Situation	Result
Painter decorating a home damages furniture while moving it out of the way.	Covered since it is not property to be used in connection with the insured's operations.
Painter damages chandelier while painting the interior of a home, the keys to which had been turned over to him.	Covered since it is not property used in connection with the insured's operations, nor is it property on which operations are being performed.
Contractor borrows a crane to set steel. The steel is not at the job site, and the crane is damaged (while at the site).	Covered since the borrowed crane is not actually being used.
Subcontractor brings equipment on job which is damaged by the insured general contractor who is not performing operations upon such equipment.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Insured general contractor damages light fixture being inscalled by subcontractor while moving concrete forms.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Insured general contractor pouring concrete floor for tenth story of new building. Forms used for construction of the tenth story collapse damaging rough plumbing being installed by a subcontractor.	Covered since equipment is not property to be installed, erected or used in operations by the insured.
Contractor replaces relief valve on a pressure vessel. As he is testing the vessel, it bursts because the relief valve does not function.	Covered with respect to the pressure vessel. Only the valve ("that particular part") is excluded.
Painter is burning paint off a house with a torch and sets fire to the house.	Covered except for "that particular part" to which the torch was applied.
Serviceman working on television in owner's home blows out picture tube while tinkering with another tube, or tips set over damaging other parts.	Covered since picture tube or other parts are not "that particular part" on which operation are being performed.

Exhibit 7

820 P.2d 1183
(Cite as: 820 P.2d 1183)

Colorado Court of Appeals,
Div. III.

UNION INSURANCE CO., Plaintiff-Appellee,
v.
Kristi KJELDGAARD, Dean Kjeldgaard, Kathryn Ross and Harold Ross, Defendants-Appellants.
No. 89CA2160.

Oct. 24, 1991.

Insurer brought action seeking declaratory judgment that it was not obligated, under comprehensive general liability policy, to pay judgment entered against insured for damages for defective construction. The District Court, Delta County, Thomas A. Goldsmith, J., granted summary judgment in favor of insurer, and defendants appealed. The Court of Appeals, 775 P.2d 55, reversed on ground that summary judgment had been improperly granted on the basis of a policy exclusion that insurer had failed to plead, and remanded. On remand, the District Court granted insurer's motion to amend its complaint and entered summary judgment in favor of insurer. Defendants appealed. The Court of Appeals, Tursi, J., held that: (1) insurer could amend complaint following appeal, (2) unambiguous policy provision excluded coverage for property damages.

Affirmed.

West Headnotes

[1] Pleading 302 ⚿236(7)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k236 Discretion of Court
302k236(7) k. New or Different Cause of Action or Defense. Most Cited Cases
Trial court had broad discretion to grant parties leave to amend pleadings to assert additional theories of recovery or defense at any stage of litigation, including after appeal, as long as matters already settled by appellate court were not relitigated. Rules Civ.Proc., Rule 15(a).

[2] Declaratory Judgment 118A ⚿395

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak395 k. Determination and Disposition of Cause. Most Cited Cases
Law of the case did not preclude insurer from amending its complaint on remand after appeal where appeal mandate had not directed entry of judgment and reversal did not expressly or impliedly preclude amendment. Rules Civ.Proc., Rule 15(a).

[3] Pleading 302 ⚿233.1

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k233.1 k. In General. Most Cited Cases
(Formerly 302k233)
Leave to amend pleadings should be freely given in the absence of resulting delay, undue expense, or demonstrable prejudice to the opposing party. Rules Civ.Proc., Rule 15(a).

[4] Pleading 302 ⚿233.1

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k233.1 k. In General. Most Cited Cases
(Formerly 302k233)
Expense alone is not sufficient basis upon which to deny leave to amend pleadings. Rules Civ.Proc., Rule 15(a).

[5] Pleading 302 ⚿245(1)

302 Pleading
302VI Amended and Supplemental Pleadings and

Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k245 Condition of Cause and Time for Amendment
302k245(1) k. In General. Most Cited Cases

Pleading 302 ⚿258(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k255 Amendment of Plea or Answer
302k258 Condition of Cause and Time for Amendment
302k258(1) k. In General. Most Cited Cases
When leave to amend pleading is untimely requested, trial court should determine whether movant has satisfied burden of demonstrating lack of knowledge, mistake, or inadvertence, and whether the interests served by amendment outweigh prejudice accruing to those opposing amendment. Rules Civ.Proc., Rule 15(a).

[6] Declaratory Judgment 118A ⚿324

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak324 k. Amended and Supplemental Pleadings. Most Cited Cases
Insurer did not act in bad faith or with dilatory motive in failing to seek leave to amend its complaint earlier in proceeding, rather than waiting until after appeal, where trial court had permitted insurer to argue and rely upon the unpled claim as basis for its summary judgment motion. Rules Civ.Proc., Rule 15(a, b).

[7] Equity 150 ⚿72(1)

150 Equity
150II Laches and Stale Demands
150k68 Grounds and Essentials of Bar
150k72 Prejudice from Delay in General
150k72(1) k. In General. Most Cited Cases
Application of laches to bar action as matter of law is occasioned by unreasonable delay resulting in demonstrated prejudice, but sustained prejudice must exceed inconvenience and expense of further litigation.

[8] Declaratory Judgment 118A ⚿324

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak324 k. Amended and Supplemental Pleadings. Most Cited Cases
Laches did not bar insurer's post-appeal amendment of its complaint, where insurer failed to demonstrate any prejudice other than delay and expense and delay was partly caused by trial court's order allowing argument on unpled exclusion. Rules Civ.Proc., Rule 15(a, b).

[9] Insurance 217 ⚿2278(21)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) k. In General. Most Cited Cases
(Formerly 217k512(1))
Exclusion in comprehensive general liability policy of coverage for breach of warranty of fitness and workmanlike performance excluded coverage for property damages, including lost profits, resulting from defects in insured's work product.
***1184** Hall & Evans, Alan Epstein, Denver, for plaintiff-appellee.

Hugh D. Wise, III, Aspen, for defendants-appellants.

Opinion by Judge TURSI.

In this declaratory judgment action, defendants, Kristi and Dean Kjeldgaard and Kathryn and Harold Ross, appeal certain orders of the trial court and the summary judgment entered in favor of plaintiff, Union Insurance Co. We affirm.

Underlying this action is a lawsuit filed by the defen-

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dants in which Union's insureds were found to be liable for damages caused by their defective construction of defendants' horse stall barn and arena. Following entry of judgment in that action, Union commenced this action against defendants and the insured seeking a declaration that it was not obligated to pay the defendants their damages.

In considering Union's request for judgment, the trial court rejected Union's contention that its comprehensive general liability insurance policy specifically excluded coverage for liability arising from its insureds' breach of contract. However, the court entered judgment on the pleadings in favor of Union on the basis that the policy's "work product exclusion" applied to the defendants' claims, precluding coverage***1185** for lost profits and repair or replacement of the barn and arena.

The defendants appealed, contending that the trial court had erroneously relied upon the work product exclusion when entering its judgment. This court agreed and held that judgment should not have been entered on the basis of an exclusion which Union had failed to put into issue in its pleadings, even though the policy was attached as an exhibit to Union's complaint. Accordingly, that portion of the judgment predicated upon the work product exclusion was reversed, and the cause was remanded to the trial court "for further proceedings." *Union Insurance Co. v. Kjeldgaard,* 775 P.2d 55 (Colo.App.1980).

Upon remand, the trial court granted Union's motion to amend its complaint for declaratory judgment to plead the work product exclusion with specificity. Union was subsequently granted leave to amend to plead the application of three other exclusions.

The parties filed cross-motions for summary judgment, and judgment was entered in favor of Union on the grounds that the policy exclusions excepted coverage of defendants' claims. Defendants now appeal the trial court's orders granting Union leave to amend its complaint, as well as its entry of summary judgment in favor of Union.

I.

Defendants first contend that because the law of the case requires the trial court to enter judgment in their favor upon remand, the trial court committed reversible error by permitting Union to amend its complaint to plead the application of additional exclusions subsequent to appeal. We disagree.

[1] C.R.C.P. 15(a) vests the trial court with broad discretion to grant parties leave to amend their pleadings "where justice so requires." *Eagle River Mobile Home Park v. District Court,* 647 P.2d 660 (Colo.1982). That discretion to permit amendment of pleadings exists "at any stage of the litigation." 6 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1484 (2d ed. 1990).

A trial court may grant parties leave to amend their pleadings upon remand so long as matters already settled by the appellate court are not relitigated. *See Smith v. Schlink,* 44 Colo. 200, 99 P. 566 (1908). Therefore, if the amended pleading does not run counter to a mandate which explicitly or implicitly precludes amendment, directs entry of a particular judgment, or restricts retrial to certain issues, the court may exercise its discretion to grant a party leave to amend and plead additional theories of recovery or defense. *Rogers v. Hill,* 289 U.S. 582, 53 S.Ct. 731, 77 L.Ed. 1385 (1933); *R.E.B., Inc. v. Ralston Purina Co.,* 525 F.2d 749 (10th Cir.1975); 3 *Moore's Federal Practice* § 15.11 (2d ed. 1991).

[2] Here, the mandate issued by this court following the previous appeal did not direct entry of judgment in favor of the defendants, nor did the reversal of the trial court judgment on procedural grounds preclude amendment expressly or by implication.

Therefore, the trial court was not prohibited by the law of the case from considering Union's motion to amend its complaint upon remand.

II.

The defendants next contend that the trial court abused its discretion by granting Union's motions to amend its pleading. We disagree.

[3] Leave to amend should be freely given in the absence of resulting delay, undue expense, or demonstrable prejudice to the opposing party. C.R.C.P. 15(a); *Eagle River Mobile Home Park, Ltd. v. District Court, supra.*

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[4] Delay is not a consideration in this case inasmuch as the trial court was required to declare rights of the parties based upon its construction of the same underlying insurance policy. And, expense alone is not a sufficient basis upon which to ***1186** deny leave to amend. *Eagle River Mobile Home Park, Ltd. v. District Court, supra.*

[5] However, when leave to amend is untimely requested, the trial court should determine whether the movant has satisfied its burden of demonstrating lack of knowledge, mistake, inadvertence, or other reason for having not stated the amended claim earlier. It should additionally consider whether the interests served by amendment outweigh the prejudice accruing to those opposing amendment. *Gaubatz v. Marquette Minerals, Inc.*, 688 P.2d 1128 (Colo.App.1984).

[6] Before this case was first appealed, the trial court permitted Union, over defendants' objection, to argue and rely upon the unpled exclusion as a basis for its motion for summary judgment. Although the trial court's judgment was subsequently reversed, it did consider the improperly-pled exclusion amended pursuant to C.R.C.P. 15(b), and negated Union's obligation to move to amend its pleading pursuant to C.R.C.P. 15(a). Under these circumstances, Union did not act in bad faith or with dilatory motives when it failed to state its amended claim earlier.

Moreover, the amendment arises out of the same transaction underlying the original complaint. In light of the policy promoting the liberal amendment of pleadings for the purpose of determining actions on their merits, *see Varner v. District Court,* 618 P.2d 1388 (Colo.1980), we conclude that the interests served by allowing the amendment outweigh the prejudice accruing to the Kjeldgaards.

Therefore, the trial court acted within the bounds of discretion when it granted Union's motions to amend its complaint.

III.

The defendants' contention that the doctrine of laches bars Union's post-appeal amendment of its pleadings is also without merit.

[7] The doctrine of laches "contemplates an unconscionable delay in asserting one's rights which works to the defendant's prejudice or injury in relation to the subject matter of the litigation." *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc.*, 624 P.2d 1343 (Colo.App.1981). Application of laches to bar an action as a matter of law is occasioned by unreasonable delay resulting in demonstrated prejudice, *Caldwell v. District Court,* 644 P.2d 26 (Colo.1982), but the sustained prejudice must exceed the inconvenience and expense of further litigation. *Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., supra.*

[8] Here, the defendants have failed to demonstrate any resulting prejudice from the amendment other than the associated delay and expense. And, because Union's delay was caused, at least in part, by the trial court's previous order allowing the unpled exclusion, we conclude that the trial court did not err in refraining from barring the amendment on the basis of laches.

IV.

The defendants also contend that the trial court committed reversible error when it found the policy's controlling exclusions to be unambiguous without determining whether they conflict with the grant of coverage. Because we conclude that the policy provisions do not conflict and are unambiguous, we disagree.

Union's comprehensive general liability insurance policy protects its insureds against injury or property damages resulting from an accident or occurrence to which the insurance applies, subject to certain exclusions. The trial court declared that three exclusions apply to preclude Union from any liability for payment of lost profits and repair or replacement of the barn and arena resulting from its insureds' defective work.

The defendants, however, contend that Union's definition of the term "contract" within the policy grants coverage for damages arising from the insured's breach of warranty of fitness and workmanlike performance by exception to the exclusion. They further contend that this purported grant of coverage conflicts with the exclusions which expressly deny such coverage, ***1187** resulting in ambiguity which must be construed against Union.

The policy defines the term "contract" as:

a written agreement of the following type made prior to loss:

1. A lease of premises or side track agreement.

2. Any other contract; but only to the extent that you have agreed to hold other parties harmless from their liability at law for injury and property damage to third persons.

This does not include liability under a warranty of fitness or quality of your products. It also does not include warranty that work performed by or for you will be done in a workmanlike manner. (emphasis supplied)

[9] This definition plainly excludes coverage for breach of warranty of fitness and workmanlike performance. Because we cannot discern any ambiguity upon examination of the grant of coverage and exclusions, we hold the policy provisions clearly exclude coverage for property damages arising from defects in the insured's work product.

The language of this policy differs materially from the language construed in *Worsham Construction Co. v. Reliance Insurance Co.*, 687 P.2d 988 (Colo.App.1984) and *Colard v. American Family Mutual Insurance Co.*, 709 P.2d 11 (Colo.App.1985). The policy provisions construed in those cases contained conflicting language pertaining to coverage for damages caused by the insured's defective work, obviously creating an ambiguity.

Likewise, the policy language construed in *Flatiron Paving Co. v. Great Southwest Fire Insurance Co.*, 812 P.2d 668 (Colo.App.1990), contains conflicting provisions regarding coverage for damage to property which is caused by work performed in derogation of the insured's warranty to perform workmanlike manner while in its "care, custody, and control." However, the language in Union's policy is distinguishable since it does not cover damages caused by the insured's breach of workmanlike performance.

Therefore, because we may not rewrite plain policy terms which do not conflict, *Ohio Casualty Insurance Co. v. Imperial Contractors, Inc.*, 765 P.2d 1060 (Colo.App.1988), the trial court's construction of Union's unambiguous policy is affirmed.

V.

The defendants finally contend that they are entitled to lost profits and prejudgment interest. However, because the lost profits are damages resulting from the defective performance of Union's insureds, they, too, are excluded. *See Ohio Casualty Insurance Co. v. Imperial Contractors, Inc., supra.*

The judgment and orders of the trial court are affirmed.

CRISWELL and PLANK, JJ., concur.

Colo.App.,1991.
Union Ins. Co. v. Kjeldgaard
820 P.2d 1183

END OF DOCUMENT

Exhibit 8

Please read this endorsement carefully. This endorsement limits the coverage provided by this policy.

EXCLUSION OF DAMAGES COMMENCING PRIOR TO POLICY PERIOD BROAD FORM EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

This insurance does not apply to any "property damage" or "bodily injury" caused by an "occurrence", if any such "property damage" or any such "bodily injury" "commences" in whole or in part prior to the first day of the policy period of this Policy. This exclusion applies even if the "property damage" or "bodily injury" continues, is alleged to continue, or is deemed to continue during the policy period of this Policy.

All exposure to a certain condition or related conditions and all damages involving or arising out of the same product, category of products, completed operation, job site, act or event, regardless of the frequency or repetition of those conditions or damages or the number of claimants shall be considered a single "occurrence".

For the purposes of this Endorsement only, "commences" shall mean: (i) first occurs, is alleged to first occur or is deemed to first occur; or (ii) incepts, is alleged to incept or is deemed to incept; or (iii) first manifests, is alleged to have first manifested, or is deemed to have first manifested. "Commences" is the earliest point in time of (i), (ii) or (iii).

This insurance does not apply to any "personal and advertising injury" caused by an offense, if that offense was first committed or alleged to have been committed prior to the first day of the policy period of this Policy. This exclusion applies even if the offense resulting or alleged to have resulted in "personal and advertising injury" continues, is alleged to continue, or is deemed to continue during the policy period of this policy.

Repeated instances of the same or similar conduct or acts, regardless of the frequency or repetition thereof, shall be considered a single offense.

This insurance does not apply to a claim or "suit" unless an insured has notified us of that claim or "suit". Notification of a claim or "suit" by a person who is not an insured shall not be considered notification for the purposes of this Policy.

If any insured requests an insurance company, including us, to defend, pay or indemnify any amount or otherwise respond to any claim or "suit" under any insurance policy incepting prior to the first day of the policy period of this Policy, this Policy shall not apply to damages sought in that claim or "suit". The previous sentence does not apply to the request for defense, payment or indemnification of any claim or "suit" to any insurance carrier with regard to a policy which is specifically written to be excess of this Policy.

Exhibit 9

PRE-EXISTING DAMAGE EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to paragraph **2. Exclusions** of **SECTION I – COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY** and paragraph **2. Exclusions** of **SECTION I – COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY**:

This insurance does not apply to:

1. Any damages arising out of or related to "bodily injury" or "property damage", whether such "bodily injury" or "property damage" is known or unknown,

   (a) which first occurred prior to the inception date of this policy (or the retroactive date of this policy, if any; whichever is earlier); or

   (b) which are, or are alleged to be, in the process of occurring as of the inception date of the policy (or the retroactive date of this policy, if any; whichever is earlier) even if the "occurrence" continues during this policy period.

2. Any damages arising out of or related to "bodily injury" or "property damage", whether known or unknown, which are in the process of settlement, adjustment or "suit" as of the inception date of this policy (or the retroactive date of this policy, if any; whichever is earlier).

We shall have no duty to defend any Insured against any loss, claim, "suit", or other proceeding alleging damages arising out of or related to "bodily injury" or "property damage" to which this endorsement applies.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED