TCD and *Colorado Pool*—The Bogeyman Lurks

by Ronald M. Sandgrund and Leslie A. Tuft

This article summarizes two Colorado Court of Appeals decisions concerning whether the consequences of negligent construction constitute an "accident" under standard-form commercial general liability insurance policies. It also discusses why a definitive answer to this question has proven to be so elusive and considers whether Colorado's Construction Professional Commercial Liability Insurance Act, CRS § 13-20-808(3), offers resolution.

The crux of the difficulty in reconciling current Colorado state and federal authority regarding insurance coverage for property damage caused by construction defects is a fundamental conflict between two lines of contract interpretation. The first line of authority requires that the undefined term "accident" in standard commercial general liability (CGL) insurance policies be given its plain and ordinary meaning, and has found that term to encompass any faulty construction (negligent, defective, or shoddy work) done either unwittingly or without the subjective intent or expectation it would result in property damage to the work itself or other work. The second line of authority seeks to give meaning to all of the policy's terms, but implicitly also seeks to avoid a purportedly unreasonable construction that might open the floodgates to insurance coverage for the cost of repairing all improperly performed work, and has found that the term "accident" does not include faulty construction without accompanying damage to non-defective property.

Some commentators have proposed resolving this conflict by: applying the standard-form CGL policy's plain and ordinary meaning, including a common understanding of the word "accident," which encompasses all negligent conduct that results in property damage whether to the negligent work itself or other work; not "implying" limitations on coverage that are not expressly set out in the policy; but, limiting coverage by applying, as relevant, the policy's myriad "business risk" exclusions (there are at least seven[1]). These commentators argue that the insurance industry drafted these exclusions to demarcate precisely what is and is not covered when the insured's negligent, shoddy, or defective work causes property damage. The same commentators argue against assuming that simply because poor construction may reasonably or foreseeably result in the need to repair or remedy deficient work, poor construction constitutes a non-accident, because this assumption rests on the unproven inference that the insured knew in the first instance that it performed its work improperly and repairs would be required.

Alternatively, in light of the CGL policy coverage ambiguities identified by the Colorado Court of Appeals and the U.S. Court of Appeals for the Tenth Circuit, policyholders argue that retroactively applying the Colorado Legislature's proffered reasonable construction of these ambiguities, codified in the Construction Professional Commercial Liability Insurance Act (Act), CRS § 13-20-808(3), does not implicate the prohibition against unconstitutional retrospective legislation. Policyholders argue that the ambiguous meaning of the undefined word "accident" nullifies the argument that applying the Act retroactively would improperly upset an insurer's reasonable expectations regarding coverage for the consequences of negligent construction, especially in light of the Act's preservation of the policy's business risk exclusions.[2]

The insurance industry rejects both the policyholder and legislative responses to the problem, arguing that under no circum-

Coordinating Editor

William P. Godsman of the Law Office of William Godsman, Denver—(303) 455-6900, willgodsman@gmail.com

About the Authors

Ronald M. Sandgrund (of counsel) and Leslie A. Tuft (associate attorney) are with the Sullan[2] Sandgrund, Perczak & Nuss Construction Defect Group of Burg Simpson Eldredge Hersh & Jardine, P.C. The firm represents commercial and residential property owners, homeowner associations and unit owners, construction professionals, and insurers in construction defect and insurance coverage disputes. Sandgrund and Tuft have authored many *amicus* briefs from the policyholder's perspective, and filed *amicus* briefs in the *Colorado Pool* case discussed here; Sandgrund helped write most of Colorado's Construction Professional Commercial Liability Insurance Act, CRS § 13-20-808.

Tort and Insurance Law articles provide information concerning current tort law issues and insurance issues addressed by practitioners representing either plaintiffs or defendants in tort cases. They also address issues of insurance coverage, regulation, and bad faith.

stances should an insurer be liable to correct deficiencies in or damage to the insured's own work, regardless of whether that work is defective. The industry strongly inveighs against the legislature trying to regulate what risks insurers should and should not underwrite, warning that such efforts only interfere with the free market and, ultimately, make insurance less available or more costly.

The *TCD, Inc. v. American Family Mutual Insurance Co.* Opinion

In *TCD, Inc. v. American Family Mutual Insurance Co.*, a general contractor, TCD, sued its insurer for declaratory judgment, breach of contract, and negligence arising from the insurer's refusal to defend and indemnify the contractor against counterclaims asserted in an underlying action.[3] Specifically, the developer claimed in the underlying action that TCD's subcontractor had improperly installed a roof that would not pass a certificate of occupancy inspection; that the work did not meet contract specifications; that TCD's subcontractor walked off the job; that TCD failed to correct the roof's deficiencies; and that the work was not performed in a workmanlike manner due to its various defects.[4]

The Colorado Court of Appeals affirmed the trial court's summary judgment grant, holding that the developer's counterclaims against TCD sounded in both tort and contract, but that the counterclaims did not seek damages because of "property damage," as the policy defined that term, and did not implicate an accident, a necessary prerequisite to establishing an "occurrence" (also a defined term) sufficient to trigger coverage. The court refused to retroactively apply § 808(3) of the Act, which requires courts to presume that property damage resulting from construction defects, including damage to a construction professional's work itself, is an accident, unless the construction professional intended and expected the resulting damage or the policy otherwise excludes coverage for the damage.[5]

In response to TCD's contention that the developer's counterclaims alleged property damage covered by the insurer's CGL policy (under which TCD was an additional insured), the court observed that the gist of the underlying allegations, sounding both in tort and contract law, was that TCD's subcontractor had improperly installed the roof, "resulting in a defective roof and causing TCD to breach its contract with [the developer]."[6] The court held that the allegations did not "fit within the fair, natural, and reasonable meaning of 'property damage'" as defined by the policy, and that "'a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence. . . .'"[7] The court also held that although coverage may attach "when consequential property damage has been inflicted *upon a third party* as a result of the insured's activity," because the counterclaims did not contain a "specific allegation" of "consequential damage to a third party or nondefective property," this corollary coverage principle did not apply.[8] The *TCD* court then refined this corollary principle, as previously enunciated by a different Colorado Court of Appeals panel in *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.* (*General Security*), by adopting the Tenth Circuit's broader view of what constitutes such corollary covered consequential damage, articulated in *Greystone Construction v. National Fire & Marine Insurance Co.* (*Greystone*).[9]

The *TCD* court also refused to broaden Colorado's four corners rule, which gauges an insurer's duty to defend by comparing the allegations within the four corners of the complaint to the policy's coverage, and therefore did not permit TCD to offer evidence outside the counterclaims to determine the insurance company's duty to defend.[10] In doing so, the *TCD* panel distinguished two Tenth Circuit decisions that had predicted the Colorado Supreme Court would deviate from the four corners rule under very narrow circumstances that TCD admitted did not apply to its claims.[11] Finally, *TCD*, following *Greystone*, held that Colorado's General Assembly did not intend CRS § 13-20-808(3) to apply retroactively, and that the Act did not apply to liability policies whose policy term expired before the Act's May 21, 2010 effective date.[12]

The *Colorado Pool Systems, Inc. v. Scottsdale Insurance Co.* Opinion

In *Colorado Pool Systems, Inc. v. Scottsdale Insurance Co.*, a swimming pool contractor, Colorado Pool, and its owner sued its insurer and the insurer's independent claims adjuster for reimbursement of losses arising from the cost of demolishing and replacing an improperly constructed pool.[13] Colorado Pool agreed to build a community swimming pool and, through subcontractors, constructed the pool's concrete shell by pouring it around a rebar frame within an excavation. After Colorado Pool poured the concrete shell, an inspector found that some of the shell's rebar was misplaced and rejected Colorado Pool's proffered fixes of the defective shell. As a result of the defective concrete shell, the property owner lost the use of the pool. Ultimately, Colorado Pool demolished and re-

placed the shell, and in the process had to demolish many non-defective appurtenant improvements, including decks, retaining walls, and conduits. Colorado Pool claimed that its insurer's independent claims adjuster/agent told Colorado Pool during discussions regarding how to address the problem that the insurance policy would cover the remedial costs. Colorado Pool asserted that it reasonably relied on these representations to its detriment.

The Colorado Court of Appeals reversed in part the trial court's grant of summary judgment, holding that the policy covered Colorado Pool's damages liability for the cost of tearing out and replacing its subcontractor's non-defective work to get to and replace the defective work that resulted in the loss of use of the pool, but not the cost to demolish and replace the pool's defective shell itself.[14] The court did not address any of the policy's exclusions because the district court had not considered them in ruling on the insurer's summary judgment motion.[15] In contrast to *TCD*, *Colorado Pool* found that the General Assembly intended CRS § 13-20-808(3) to apply retroactively,[16] but held that applying the Act retroactively would be unconstitutionally retrospective.[17] The court also held that disputed issues of fact existed regarding whether the insurer was estopped to deny coverage, and whether the adjuster was liable for its negligent misrepresentations concerning coverage.

Colorado Pool*'s Resolution of the Post-1986 CGL Policy's Ambiguity*

Colorado Pool held that the CGL policy's use of the undefined term "accident," when coupled with other policy provisions, could reasonably be interpreted to have different meanings and, thus, was ambiguous.[18] Following *Greystone*, *Colorado Pool* resolved this ambiguity by holding that "injuries flowing from improper or faulty workmanship constitute an 'occurrence' so long as the resulting damage is to nondefective property, and is caused without expectation or foresight."[19] (Colorado Pool's insurance policy defined "property damage" to include the loss of use of tangible property.[20]) Applying this rule to the facts before it, the court held that the policy did not cover the insured's legal liability to pay damages for the costs incurred in demolishing and replacing the defective pool shell itself, but did cover the costs associated with tearing out and replacing non-defective work, including work performed by the insured's subcontractors, such as damage to the pool's deck, sidewalk, retaining wall, and electrical conduits.[21]

Damages Liability for Property Damage to Defective Versus Non-Defective Work

Colorado Pool, like *Greystone*, distinguished coverage for the insured's legal liability to pay damages for the cost of repairing property damage to non-defective work versus defective work. As noted in an earlier article in *The Colorado Lawyer*, "*Greystone* and Insurance Coverage for 'Get To' and 'Rip and Tear' Expenses," *Greystone* did not find a basis for this distinction in any express policy provision, such as the policy's exclusions.[22] Rather, *Greystone* extracted it from the CGL policy's "logic," "inherent structure," and implicit distinctions.[23]

Colorado Pool apparently agreed with this reasoning because it cited and followed *Greystone*'s defective versus non-defective distinction, and relied on the same Fourth Circuit Court of Appeals decision that *Greystone* relied on, *French v. Assurance Co. of America*.[24] In *French*, the Fourth Circuit held that the CGL policy did

not cover the cost of repairing defectively applied synthetic stucco, but that it did cover the cost to repair water intrusion to other parts of the home caused by the defective synthetic stucco. *French* treated coverage for the defective synthetic stucco and resulting water intrusion damage separately and differently, because the defective stucco was not alleged to have itself sustained property damage. Thus, *French* did not need to address whether the policy covered the cost to repair any property damage to the defective stucco itself, separate and distinct from the cost of correcting the defect. Neither *Greystone* nor *Colorado Pool* analyzed this distinction.

Two of the *Colorado Pool* court's other observations deserve further analysis. First, the court said, quoting *Greystone*, "'[t]he obligation to repair defective work is neither unexpected nor unforeseen under the terms of the construction contract or the CGL policies.'"[25] Second, the court found it necessary to try to reconcile the undefined term "accident" with an express policy exclusion excepting from coverage property damage "expected or intended" from the standpoint of the insured, and held that defining accident as an incident resulting in unexpected or unintended damage would render the expected or intended exclusion superfluous.[26]

As to the *Colorado Pool* court's assumption that contractors should expect defective work to require repair, policyholders argue that it is not true that contractors always or even usually know when they have performed their work defectively or, in those instances when they are aware of this fact, that they know that property damage will "flow directly and immediately" from the defective work. To date, the Colorado Supreme Court has held that what makes damages non-accidental are "the knowledge and intent of the insured," and that 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.[27]

Rather, the Colorado Supreme Court has said coverage 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.[28]

Greystone seemed to implicitly acknowledge that unintended negligent construction does not necessarily result in expected or intended damage when it noted, "by definition, only damage caused by purposeful neglect or knowingly poor workmanship is foreseeable. . . ."[29]

With regard to the *Colorado Pool* court's perceived need to reconcile the undefined term "accident" with the expected or intended policy exclusion, policyholders argue that the 1986 change to the standard-form CGL policy adding the expected or intended exclusion was meant simply to clarify that the insurer rather than the insured bore the burden of proof to establish whether the insured intended or expected property damage, and not to narrow the meaning of accident or occurrence.

The post-1986 CGL policy form defines "occurrence" as follows, and sets forth the following exclusion:

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[30]
>
> . . .
>
> [This insurance does not apply to] "bodily injury" or "property damage" expected or intended from the standpoint of the insured. . . .[31]

The post-1986 policy also requires a causal connection between the occurrence and resulting property damage for coverage to exist:

> This insurance applies to . . . "property damage" only if . . . [t]he . . . "property damage" is caused by an occurrence . . . [and] [t]he . . . "property damage" occurs during the policy period. . . .[32]

In contrast, before 1986, the standard-form CGL policy defined "occurrence" as follows, and contained no separate intended or expected injury exclusion:

> 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.[33]

This pre-1986 definition led to disputes regarding whether the insured had the burden of proving a negative in every case—that is, that it did not intend or expect the property damage or other harm to result from its conduct, or whether this part of the definition should be treated as an exclusion, on which the insurer bore the burden of proof, as many courts held.[34] Commentators have urged that the 1986 revision that led to the new definition of "occurrence," coupled with an exclusion for expected or intended damage, was effected to resolve this burden of proof debate:

> The fact that ISO [the Insurance Services Organization] moved the provision to the exclusion section in the 1986 policy probably represents ISO's tacit agreement or acquiescence to that principle. The practical significance of this distinction is to shift the burden of proof to the insurer to prove that the damage or injury was expected or intended.[35]

If one accepts this history, it supplies a foundation for understanding part of the reason for this 1986 CGL policy form change, and a rational means to reconcile the undefined term "accident" with the separate CGL policy exclusion excepting from coverage expected or intended damage. Moreover, policyholders argue that given that dictionary definitions of the term "accident" are varied, broad, and sometimes contradictory,[36] and that Colorado courts have deemed the term ambiguous on more than one occasion,[37] construing the term in a way that maximizes coverage is consistent with well-settled Colorado law.[38] Courts have deemed much injurious conduct to be an accident, including where insurers argued the consequences of such conduct must have been obvious to the

insured, such as damaging the environment due to mining activities, driving over rough terrain with a hair-trigger pistol resting in one's lap, and ignoring a structural engineer's construction recommendations.[39]

Grant, Then Dismissal, of Certiorari *in* Colorado Pool

Given the importance and widespread effect of the issues, and the clear conflict between aspects of *TCD*'s and *Colorado Pool*'s holdings, the Colorado Supreme Court granted *certiorari* on the following issues in *Colorado Pool*:

> Whether the court of appeals erred in (a) holding that section 13-20-808, CRS (2012) would be unconstitutionally retrospective as applied to Colorado Pool's commercial general liability (CGL) policy and (b) Whether the court of appeals further erred in its interpretation of the CGL policy under the common law[.]

After the opening brief and three supporting *amici* briefs were filed, the case was settled and the appeal dismissed.[40]

The Bogeyman

The "bogeyman" looming over many court opinions analyzing whether CGL policies cover damages liability arising from construction defects is the specter raised by insurance companies of opening the door to insurance company liability for making good the shoddy work of their insured contractors.[41] Policyholders counter that they paid substantial premiums for insurance coverage against liability for accidental injury to a third party's property due to negligent construction.

One commentator has observed that fear of this bogeyman—unmoored from the actual insurance contract language—has led to "a hodgepodge of exceptions based on policy considerations and other unstated concerns," and, ultimately, to "ad hoc reasoning," which is "neither good policy, nor proper contract interpretation."[42] Another commentator has said:

> The courts that find coverage for property damage caused by defective construction find it in the express language of the CGL policy. The courts that refuse to find coverage do so by ignoring the express language of the policy.[43]

Policyholders also argue that the drafting history and contemporaneous industry commentary that accompanied the insurance industry's adoption of the current CGL policy form with its myriad business risk exclusions establishes that the industry was well aware of this concern and strove to address it when drafting the standard CGL policy. American Family Mutual Insurance Company compiled this legislative history in its *Greystone* appellate briefing arguing in favor of coverage for all property damage arising from construction defects due to an insured's subcontractors' negligence, and the court cited this historical record with approval.[44] Although Colorado courts have disfavored resorting to extrinsic evidence of policy intent in policy interpretation,[45] § 808(4)(c) of the Act allows a court to consider these kinds of materials in resolving policy ambiguities.[46] Because this aspect of the Act is procedural, not substantive, it is subject to a different kind of retroactive/retrospective analysis than the statutory provision expressly considered in *Colorado Pool*.[47]

Policyholders then argue that two conclusions flow from this industry drafting effort: First, that the policy directly addresses coverage for property damage caused by defective work, and a court need simply apply the language as written to resolve negligent construction coverage disputes. Second, if the policy language is unclear or ambiguous, courts should construe any ambiguity reasonably, but must resolve any doubts in favor of coverage.[48]

Insurers respond that CGL policies are not intended to guarantee the adequacy of an insured's construction, and that the meaning of the word "accident" cannot be reasonably expanded to include careless or shoddy workmanship and its resulting damage. Insurers also argue that much of the extrinsic evidence on which policyholders rely as evidence of the policy drafters' intent was not generated by an insurance rating or policy drafting organization so as to render it admissible under the Act.

A Possible Solution Applying Existing Precedent

Several commentators suggest a potential resolution of this ongoing debate, consistent with Colorado law construing insurance contracts:

1) apply the policy language's plain and ordinary meaning, including the common understanding of the word "accident" as including all negligent conduct that results in unintended damage, and including all resulting property damage; and
2) do not imply limitations on coverage that are not clearly set out in the policy—instead reasonably limit coverage by applying the policy's myriad express business risk exclusions, because such exclusions were drafted to demarcate precisely what is and is not covered when the insured's negligence causes property damage.[49]

A Possible Legislative Solution

Recognizing the uncertainty created by *General Security*, as engendered by decisions like that of the U.S. District Court for the District of Colorado in *Greystone*, before the Tenth Circuit Court of Appeals reversed that decision, and in the face of testimony from at least one insurance industry attorney and lobbyist during legislative hearings that court decisions denying coverage for damage caused by construction defects were a "shock" to insurers and went "too far,"[50] the Colorado Legislature passed the Act. The Act sought to give reasonable meaning to the ambiguous term "accident" found in CGL policies as applied to construction defect claims. In light of this ambiguity, and assuming the Colorado Supreme Court finds that the meaning given the term by the legislature is rational and not arbitrary or capricious, because it is based on the meaning given that term by the highest courts in several states,[51] the Colorado Supreme Court may uphold this legislative resolution of the issue.

Given the split between *Colorado Pool*'s finding that the Colorado Legislature intended the Act to apply retroactively to CGL policies issued before the Act's effective date, regardless of when the policy periods ended, and *TCD*'s opposite conclusion, the Colorado Supreme Court may eventually have to decide whether the Act is intended to apply retroactively to policies in existence or issued before the Act's effective date (May 21, 2010) and, if so, whether applying it retroactively would be unconstitutionally retrospective—that is, whether, among other things, its retroactive application upsets the contracting parties' reasonable expectations.[52] However, where the contract provision itself is ambiguous—as *Colorado Pool* holds—this arguably gives rise to competing and conflicting reasonable expectations of what the contract means.

Policyholders will argue that *Colorado Pool*'s concern that applying the Act retroactively would "alter the reasonableness" of the insurer's actions in refusing to defend or indemnify its insured, implicitly giving rise to possible bad faith liability, could be addressed in one of two ways—either by finding, as a matter of law, that the insurer either should or should not have reasonably anticipated the passage of the Act and its effect, or by allowing the jury to consider the fact of the unsettled state of the law when the policy issued, and the policy's ambiguities, in gauging the reasonableness of the insurer's actions.

The Insurance Industry Response

The insurance industry rejects both the policyholder and legislative responses to the problem. The industry maintains that no part of the Act can be applied to change the common law meaning or effect of insurance policies entered into before the Act's effective date, because this would constitute an improper legislative rewriting of its contracts and a *post hoc* change in the scope of the risk of loss for which insurers assumed liability. The industry also argues that neither *Greystone* nor *Colorado Pool* went far enough, and that under no circumstances should an insurer be liable to correct deficiencies or damage to the insured's own work, regardless of whether that work is defective. Finally, the insurance industry strongly objects to the heavy hand of the legislature trying to reach back and regulate what risks the insurance industry should and should not underwrite, warning that such efforts only interfere with the free market and, ultimately, make insurance less available or more costly.[53] Policyholders respond that liability insurance remains available to construction professionals working in the many jurisdictions holding that damage arising from negligent construction constitutes an accidental occurrence, and that construction industry representatives testified during the legislative hearings that while the Act might result in premium increases, the withdrawal of some insurers from the market, and stricter underwriting requirements, the greater certainty and fairness the Act would afford was worth this cost.

Conclusion

The Colorado Supreme Court will eventually need to decide the thorny issues of CGL policy coverage for insureds' damages liability for property damage arising from their and their subcontractors' negligent construction. Construction professionals and property owners damaged by negligent construction will argue that the issue should be decided based on longstanding principles of insurance contract interpretation, including construing ambiguities in favor of coverage rather than based on amorphous policy concerns. They will urge that relying on implicit distinctions based on the CGL policy's structure is inconsistent with Colorado contract law, serves to rewrite the contract, and renders meaningless other policy provisions that specifically address such coverage distinctions. Insurers will argue that the law cannot construe CGL policies so as to render insurers guarantors of their insureds' work quality or to allow insureds to improperly shift business risks, such as repair warranty liability, to their insurance companies. Both sides to the debate know that the bogeyman lurks until the Colorado Supreme Court definitively addresses these issues.

Notes

1. The business risk exclusions include exclusions typically labeled b, j(1), j(2), j(5), j(6), l, and m, not including exclusion "a," the intended or expected injury exclusion. Nearly all these standard exclusions contain exceptions that restore coverage under varying circumstances. Some of the exclusions apply only to injury arising during the course of ongoing construction operations. One important exclusion—the "your work" exclusion—applies only to injury that occurs after the work is completed or put to its intended use.

2. *See generally Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 881-82 (Minn. 2002) (noting importance of applying express exclusions in CGL policy for deficient construction rather than implying exclusions).

3. *TCD, Inc. v. Am. Family Mut. Ins. Co.*, 296 P.3d 255 (Colo.App. 2012).

4. *Id.* at 258.

5. *See generally* Sandgrund and Sullan, "House Bill 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims," 39 *The Colorado Lawyer* 89, 89-96 (Aug. 2010).

6. *TCD, Inc.*, 296 P.3d at 258.

7. *Id.* (quoting *Gen. Sec. Indem. Co. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529, 534 (Colo.App. 2009)). *Cf.* Sandgrund and Tuft, "Liability Insurance Coverage for Breach of Contract Damages," 36 *The Colorado Lawyer* 39, 41 (Feb. 2007) (construction defect that does not cause property damage, such as injury to or loss of use of tangible property, is probably not an occurrence).

8. *TCD, Inc.*, 296 P.3d at 258-59 (emphasis in original).

9. *Id.* at 259. *Compare General Security*, 205 P.3d at 534, *with Greystone Constr. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1289 (10th Cir. 2011).

10. *TCD, Inc.*, 296 P.3d at 259.

11. *Id.* (discussing *Apartment Inv. & Mgmt. Co. (AIMCO) v. Nutmeg Ins. Co.*, 593 F.3d 1188 (10th Cir. 2010) and *Pompa v. Am. Family Mut. Ins. Co.*, 520 F.3d 1139 (10th Cir. 2008)).

12. *TCD, Inc.*, 296 P.3d at 260.

13. *Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, No. 10CA2638, 2012 WL 5265981 (Colo.App. Oct. 25, 2012) (not yet released for official publication), *cert. granted*, No. 12SC1000, 2013 WL 4714283 (Colo. Sept. 3, 2013), *cert. dismissed*, No. 12SC1000 (Colo. Jan. 31, 2014).

14. *Id.* at *7.

15. *Id.*

16. *Colorado Pool* disagreed with *Greystone*'s and *TCD*'s holdings that the General Assembly did not intend CRS § 13-20-808 to apply retroactively. *Greystone* and *TCD* found that a policy no longer "exists" once its

policy period terminates, even though the policy continues to provide coverage for "occurrences" within the policy period and remains subject to claims that are made after the policy period ends. In contrast, the *Colorado Pool* court noted:

> In enacting the legislation, the general assembly stated that the act "applies to all insurance policies *currently in existence* or issued on or after the effective date of this act." And in the statute itself, the general assembly stated that the act is intended to guide *pending* actions, on policies that *have been* issued: "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."

Id. at *4 (internal citations omitted; emphasis in original). The *Colorado Pool* court then found that the General Assembly intended the Act to apply retroactively, because occurrence policies remain in existence after their policy periods terminate. *Id. See also Vill. Homes of Colo., Inc. v. Travelers Cas & Sur. Co.*, 148 P.3d 293, 296 (Colo.App. 2006) ("an occurrence policy does not expire, but, rather, continues in effect after the policy period ends"). *Cf. Ballow v. PHICO Ins. Co.*, 875 P.2d 1354, 1357 (Colo. 1993) ("an occurrence policy provides coverage for all 'occurrences' which take place during a policy period, regardless of when the claim is made.").

17. *Colorado Pool*, 2012 WL 5265981 at *3-5. *Cf. Taylor Morrison of Colo., Inc. v. Bemas Constr., Inc.*, No. 12CA2428, 2014 WL 323490, 2014 COA 10 (Colo.App. Jan. 30, 2014) (anti-waiver provision of Homeowner Protection Act unconstitutionally retrospective if applied to void engineering firm's liability limitation agreement with commercially sophisticated builder-developer; retroactive application would defeat engineering firm's reasonable expectations, nothing in record suggested firm had any reason to believe legislation concerning clause would be forthcoming, and anti-waiver provision's incidental and speculative effect of serving HPA's underlying purpose of protecting Colorado residential property owners' rights and remedies outweighed by immediate and substantial effect on engineer's contractual rights).

18. *Id.* at *5.

19. *Id.* at *6 (quoting *Greystone*, 661 F.3d at 1284).

20. *Id.* at *3.

21. *Id.* at *7.

22. Sandgrund, "*Greystone* and Insurance Coverage for 'Get To' and 'Rip and Tear' Expenses," 41 *The Colorado Lawyer* 69, 69-75 (March 2012).

23. *Id.* at 72 (citing *Greystone*, 661 F.3d at 1284-86).

24. *French v. Assurance Co. of Am.*, 448 F.3d 693, 700 (4th Cir. 2006).

25. *Colorado Pool*, 2012 WL 5265981 at *6 (quoting *Greystone*, 661 F.3d at 1286).

26. *Id.*

27. *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1088 (Colo. 1991) (*Hecla*) (quotations and citations omitted).

28. *Id.* (quotations and citations omitted). *See also State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785, 793 (Colo. 1996) (holding term "accident" ambiguous; must be construed to mean incidents not expected or intended by the insured).

29. *Greystone*, 661 F.3d at 1285-86.

30. *Id.* at 1278; *Colorado Pool*, 2012 WL 5265981 at *3.

31. *General Security*, 205 P.3d at 537.

32. *Greystone*, 661 F.3d at 1277-78.

33. *Hecla*, 811 P.2d at 1086.

34. *See generally* Turner, *Insurance Coverage of Construction Disputes* § 9:1 (2d ed., West, 2012) (discussing 1986 change and collecting cases); Palley *et al.*, *Construction Insurance*, 72-73 (2011) (accord). *Cf. Standard Constr. Co. v. Md. Cas. Co.*, 359 F.3d 846 (6th Cir. 2004) (whether exclusionary language is part of "occurrence" definition or stated as separate exclusion, effect is same, and burden of proof of exception's application remains with insurer); Witt and Achenbach, "Insuring the Risk of Construction Defects in Colorado: The Tenth Circuit's *Greystone* Decision," 90 *U. Denver L.Rev.* 621, 633 n.89 (2012) (whether change in policy language provides "a valid basis for departing from binding precedent [of *Hecla*]" is "dubious"). *But see* 4 Bruner and O'Conner, *Construction Law* § 11:69 (West, 2013) (under 1986 ISO revision, "the 'expected or intended' language became part of a new exclusion. While this change was organizational in nature, at least one court has found it to have substantive implications. Other courts have been less willing to read too much significance into this organizational change." (citations omitted)). For additional discussion, including the insurance industry's explanation for the change, *see* Graves *et al.*, "Shoddy Work, Negligent Construction and Reconciling the Irreconcilable Under the CGL Policy," 38 *The Colorado Lawyer* 43, 46 n.46 (Nov. 2009).

35. Turner, *supra* note 34.

36. *Compare* "accident" as defined by dictionary.com, dictionary.reference.com/browse/accident:

> 1. an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, or loss; casualty; mishap: *automobile accidents.*
> 2. *Law.* such a happening resulting in injury that is in no way the fault of the injured person for which compensation or indemnity is legally sought.
> 3. any event that happens unexpectedly, without a deliberate plan or cause.
> 4. chance; fortune; luck: *I was there by accident.*
> 5. a fortuitous circumstance, quality, or characteristic: *an accident of birth*;

with Merriam–Webster Dictionary, www.merriam-webster.com/dictionary/accident:

> 1 *a*: an unforeseen and unplanned event or circumstance
> *b*: lack of intention or necessity: chance <met by *accident* rather than by design>
> 2 *a*: an unfortunate event resulting especially from carelessness or ignorance
> *b*: an unexpected and medically important bodily event especially when injurious <a cerebrovascular *accident*>
> *c*: an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured but for which legal relief may be sought;

with Black's Law Dictionary (9th ed., 2009):

> 1. An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. 2. *Equity practice*. An unforeseen and injurious occurrence not attributable to the victim's mistake, negligence, neglect, or misconduct; an unanticipated and untoward event that causes harm.

37. *See Hoang v. Monterra Homes (Powderhorn) LLC*, 129 P.3d 1028, 1034 (Colo.App. 2005), *rev'd on other grounds sub nom. Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007); *Colo. Pool Sys.*, 2012 WL 5265981. *See also* Graves, *supra* note 34 at 44, n.12-13 (meaning of word "accident" may depend on type of insurance contract at issue).

38. *See Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11, 13 (Colo.App. 1985) (CGL policy "term 'occurrence' is to be broadly construed against the insurer.").

39. *See, e.g., Hecla*, 811 P.2d 1083 (mining activities); *State Farm Mut. Auto. Ins. Co. v. Partridge*, 514 P.2d 123 (Cal. 1973) (hair trigger pistol); *Ohio Cas. Ins. Co. v. Terrace Enters.*, 260 N.W.2d 450, 452 (Minn. 1977) (building construction), cited with authority in *Colard*, 709 P.2d at 13 (Colo.App. 1985).

40. *Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, No. 12SC1000, 2013 WL 4714283 (Colo. Sept. 3, 2013) (order granting *certiorari*), *cert. dismissed*, No. 12SC1000 (Colo. Jan. 31, 2014).

41. For recent cases discussing or touching on this "bogeyman" concern, and ultimately rejecting it in whole or in substantial part, *see, e.g., Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508 (W.Va. 2013) (overturning longstanding precedent by adopting "majority view" finding coverage for defective work); *K & L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 829 N.W.2d 724, 729-37 (N.D. 2013) (overruling earlier cases and joining "modern trend" holding that faulty workmanship may constitute an occurrence); *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961 (Conn. 2013) (defective workmanship may constitute basis for "accident" or

"occurrence" under CGL policy); *Scottsdale Ins. Co. v. R.I. Pools Inc.*, 710 F.3d 488, 492 (2d Cir. 2013) (CGL policies "unmistakably include defects in the insured's own work within the category of an 'occurrence.'"); *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co.*, 707 S.E.2d 369, 372 (Ga. 2011) (faulty workmanship causing unforeseen or unexpected damage to other property is an occurrence; rejecting out of hand assertion that intentional acts cannot be deemed an occurrence or accident under CGL policy); *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, 1160 (Miss. 2010) (CGL policy's "occurrence" definition did not exclude coverage for property damage caused by subcontractor's alleged negligence); *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 171 (Ind. 2010) ("If the insuring provisions do not confer an initial grant of coverage, *then there would be no reasons* for a 'your work' exclusion." (emphasis added)) (followed in *Cincinnati Ins. Co. v. Beazer Homes Invs., LLC*, No. 08-5967, 399 F. App'x 49 (6th Cir. Oct. 8, 2010) (unpublished) (*vacating Cincinnati Ins. Co. v. Beazer Homes Invs., LLC*, 594 F.3d 441 (6th Cir. 2010), and remanding for reconsideration in light of *Sheehan*)). *Cf. Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011) (property damage due to water infiltration caused by negligently installed stucco constitutes an "occurrence"). *But see Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, No. 1120764, 2013 WL 5298575 (Ala., Sept. 20, 2013) (not yet released for publication) (faulty workmanship may lead to occurrence if it damages parts of structure outside scope of insured's work; opinion does not address effect of subcontractor exception to "your work" exclusion"); *Liberty Mut. Fire Ins. Co. v. Kay & Kay Contracting, LLC*, No. 12-5791, 2013 WL 6084276 (6th Cir. Nov. 19, 2013) (unpublished) (holding subcontractor's faulty preparation of building pad that resulted in structural damage was not a covered occurrence).

42. Bruner and O'Conner, *supra* note 34 at § 11:76.

43. O'Connor, "What Every Court Should Know About Insurance Coverage for Defective Construction," 5 *Am. College of Construction L.J.* 1 (2011). *See also* French, "Construction Defects: Are They 'Occurrences'?" 47 *Gonzaga L.Rev.* 1 (2011–12) (surveying case law and finding most cases hold construction defects are covered "occurrences").

44. *Greystone*, 661 F.3d at 1287-88 (discussing rationale for and history of CGL policy's 1986 changes). *See also* Witt and Achenbach, *supra* note 34 at 623-27 (discussing CGL policy drafting history).

45. *See Miller v. Hartford Cas. Ins. Co.*, 160 P.3d 408, 410 (Colo.App. 2007) (insurance policy words given plain and ordinary meaning unless parties' intent, as expressed in the policy, establishes an alternative interpretation was intended; courts should not rewrite clear and unambiguous contract provisions; courts may use dictionaries to assist in determination of plain and ordinary meaning of words, and any ambiguities are construed against the insurer); *Am. Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955 (Colo.App. 1990) (because all insurance contract ambiguities must be construed against insurer, term "occurrence" broadly construed in favor of insured). *Cf. Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 16 (Colo.App. 1996) (trial court did not err in holding extrinsic evidence inadmissible to establish ambiguity of exclusion or policy as whole; although court may conditionally admit extrinsic evidence such as evidence of local usage to determine ambiguity, court may not consider parties' own extrinsic expressions of intent; court properly excluded depositions, insurer's internal memoranda, and communications with insurance officials).

46. This subsection provides:

(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 the attorney-client privilege, work-product privilege, or article 72 of title 24, CRS, 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.

CRS § 13-20-808(4)(a) to (c) (emphasis added).

47. *See In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002) (although retroactive application of a statute is disfavored, it is not necessarily unconstitutional; it is permitted where the statute effects a change that is procedural or remedial); *Day v. Madden*, 48 P. 1053, 1056 (Colo.App. 1897) (to have controversy determined by existing evidentiary rules not a vested right; evidentiary changes are not retrospective because they are to be applied in future trials and do not affect previous trials); *Krumback v. Dow Chem. Co.*, 676 P.2d 1215, 1218 (Colo.App. 1983) ("[C]hanges in the burden of proof are procedural only and should be retroactively applied."); *United Sec. Corp. v. Bruton*, 213 A.2d 892, 893-94 (D.C.App. 1965) (holding "[t]here is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence, applies to all proceedings after its effective date even though the transaction occurred prior to its enactment").

48. *See Pappageorge v. Fed. Kemper Life Assurance Co.*, 878 P.2d 56, 59 (Colo.App. 1994) (any doubt or ambiguity created by insurance clause must be resolved against insurer and in favor of coverage).

49. *See generally* Witt and Achenbach, *supra* note 34 at 644; Bruner and O'Conner, *supra* note 42; O'Connor, *supra* note 43; French, *supra* note 43; Turner, *supra* note 34 at § 6.64. *Cf. Thommes*, 641 N.W.2d at 881-82 (holding courts should apply CGL policy's express exclusions to limit coverage for property damage caused by deficient construction rather than implying such limitations).

50. Sandgrund and Sullan, *supra* note 5 at 90 (citing legislative testimony).

51. *See* cases collected in note 34, *supra*.

52. *Cf. Taylor Morrison of Colo., Inc.*, No. 12CA2428, 2014 WL 323490, 2014 COA 10 (Colo.App. Jan. 30, 2014) (finding another statute unconstitutionally retrospective because applying it retroactively would upset the contracting parties' reasonable expectations).

53. *See generally* Sandgrund and Sullan, *supra* note 5 at 94 (noting that construction professionals testified during the Act's legislative hearings that although the Act might result in premium increases, withdrawal of some insurers from the market, and stricter underwriting requirements, the greater certainty and fairness the Act would afford was worth this cost). ■