Shoddy Work, Negligent Construction, and Reconciling the Irreconcilable Under CGL Policies

by Harmon S. Graves, Ronald M. Sandgrund, and Leslie A. Tuft

Shoddy work and unintended negligent construction causing latent property damage find their way into construction projects, but access to insurance coverage for resulting liability is restricted. This article discusses the recent opinion, General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company, *the court's analysis of an "occurrence" under a commercial general liability policy, and the implications for liability insurers and their policyholders.*

In *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co.* (*General Security*),[1] the Colorado Court of Appeals held that defective workmanship alone does not constitute an occurrence under a commercial general liability (CGL) insurance policy, and vague allegations of other or consequential damages are insufficient to give rise to an insurer's duty to defend. Neither rehearing nor *certiorari* was sought. This article discusses *General Security* and its ramifications, especially relating to liability insurers timely defending insured contractors in construction defect lawsuits.

Case Background

The dispute arose from a homeowner association (HOA) construction defect claim against a builder-developer (Developer). The HOA asserted that Developer's negligence and breach of express and implied warranties resulted in property damage to various condominium common elements and units.

Developer brought a third-party indemnity action for breach of contract, breach of express warranty, and negligence against many of its subcontractors, including Foster Frames. Foster Frames filed a fourth-party complaint against its own subcontractors (Sub-Subcontractors) seeking indemnity. Developer's third-party complaint later was dismissed and the dismissal affirmed on appeal. The trial court stayed Foster Frames' fourth-party claims during the pendency of Developer's appeal of the dismissal of its third-party claims.

General Security Indemnity Company of Arizona (GSINDA) insured Foster Frames and defended it against Developer's claims. Six other insurers insured Foster Frames' Sub-Subcontractors. These other insurers' policies allegedly named Foster Frames as an additional insured, but they refused to participate in Foster Frames' defense. GSINDA sued these other insurers (Insurer Defendants), seeking a declaratory judgment that the underlying claims triggered one or more of these Insurer Defendants' duties to defend, equitable contribution, equitable subrogation, equitable indemnity, and damages for reimbursement. The trial court granted Insurer Defendants' summary judgment motions against GSINDA's claims, determining that the property damage alleged by the HOA

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was not caused by an "occurrence," as defined by Insurer Defendants' policies. GSINDA appealed.

None of the usual adversaries in a construction defect case, such as an insured builder/contractor and its insurer or a subrogated homeowner, were involved in the appeal. Coverage issues, which profoundly affect homeowners damaged by negligent construction, were advocated by insurance companies from whom damaged homeowners traditionally seek recovery of last resort. Insurer versus insurer disputes litigated in such off-label appeals may present a poor forum for determining significant insurance coverage questions.[2]

Procedural Posture and Standard of Review

The Colorado Court of Appeals determined that the threshold question, to be examined *de novo*, was whether, construing the underlying pleadings in the light most favorable to finding coverage, a reasonable potential for coverage existed under any of Insurer Defendants' policies—that is, whether the underlying pleadings alleged an occurrence.[3] An insurer's duty to defend arises when allegations in a complaint potentially implicate the insurer's indemnity obligation.[4]

CGL Policy Provisions

The policy provisions at issue conformed generally to the standard Insurance Services Office, Inc.'s[5] (ISO) post-1986 policy form, and provided, in pertinent part:

1. Insuring Agreement

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. . . .

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

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

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

The policies defined the word "occurrence," with some minor differences among them, as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Accordingly, all policies required an accident resulting in property damage, as defined by the policies, to occur during the applicable policy period to trigger coverage.[6]

Holding

GSINDA argued that because Sub-Subcontractors did not know, intend, or expect property damage to result from their work, the HOA's complaint and Developer's third-party complaint sufficiently alleged that Developer's defective workmanship resulted from an occurrence (or an accident, under some of the policies). The Colorado Court of Appeals held that "a claim of defective workmanship, standing alone, does not allege an occurrence," and affirmed summary judgment in favor of Insurer Defendants, finding the underlying construction defect complaints did not allege an occurrence triggering a duty to defend.[7]

The Court's Examination of the Policy Language

The court concluded that allegations of negligent construction, without more, such as consequential property damage or loss of use arising from the negligence, do not constitute allegations of a covered occurrence. The complaint's allegations of essentially poor workmanship alone, causing unspecified property damage, did not allege a fortuitous event and, therefore, did not allege an accident. In contrast, the court said that an accident and an occurrence are present when a third party suffers consequential damage as a result of the insured's activity.[8]

General Security relied on the requirement that an occurrence involve an "accident," a term the policies did not define. In Colorado, undefined insurance policy terms must be given the broadest reasonable interpretation possible, with all doubts resolved in favor of coverage for the insured.[9] *General Security* said that other courts had equated an accident with a fortuitous event,[10] and noted that previous Colorado decisions had defined "accident" as "an unanticipated or unusual result flowing from a commonplace cause."[11] This particular definition of "accident" can be traced to life insurance cases[12] examining the distinction between "accidental means" and "accidental results."[13]

Reliance on *Hottenstein* and *McGowan*

The court of appeals previously concluded in *Union Insurance Co. v. Hottenstein*[14] that poor workmanship alone constituting a breach of a construction contract was not an occurrence. Drawing strength from *Yegge v. Integrity Mutual Insurance Co.*,[15] *Hottenstein* seemed to embrace the reasoning of an Iowa court that a breach of contract generally does not constitute an accident, and were it so construed, a CGL policy might be converted into a performance bond.[16]

In *Hottenstein*, the insurer did not contest coverage for those damages allocated to a negligent construction claim.[17] *General Security* then extended the *Hottenstein* rule, consistent with what it described as the majority rule, to all damages claims arising from poor workmanship, standing alone, whether founded in contract, tort, or breach of warranty.[18] The court rejected the minority rule (which some commentators view as the emerging or modern view), that damage resulting from faulty workmanship is an accident and covered occurrence, "so long as the insured did not intend the resulting damage."[19]

In *McGowan v. State Farm Fire and Casualty Co.*,[20] also cited by *General Security*, the trial court found that defective construction, for which a default judgment was entered against the builder based on tort and contract claims, constituted an occurrence under a CGL policy. Coverage, however, fell victim to a policy exclusion for damage to that part of any property that must be "restored, repaired or replaced because your work was incorrectly performed on it," and the court of appeals affirmed the trial court's judgment based on this policy exclusion. The *General Security* court's indiction that "poor workmanship is considered a business risk to be borne by the policy holder" rather than a fortuitous event, drawn from *McGowan*'s *dicta*,[21] supported its refusal to find an occurrence.[22]

General Security then cited cases from other jurisdictions holding that the fortuity implied by the word "accident" does not include a mere workmanship failure, criticizing contrary authority for concluding that "defective work is unforeseeable, and thus the property damage caused by such defective work [is] an accident that constitutes an occurrence."[23] The court suggested the minority rule encouraged hiring unqualified persons, because insurers, not insureds, would pay the consequences of shoddy work.[24] This argu-

ment could equally but unreasonably apply to any insured activity—that is, insuring the activity encourages less care by the insured because the insured may be effectively insulated from liability—but carelessness is the very reason one carries insurance.

An earlier Colorado Supreme Court decision, *Samuelson v. Chutich*, held that, in a liability insurance policy using the undefined term "accident" in the "occurrence" definition, "the word 'accident' 'clearly implies a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune.'"[25] *Samuelson* held that no accident exists without such concomitant damage.[26] *General Security* did not discuss *Samuelson*, but to the extent *General Security* is read simply for the narrow proposition that there can be no accident without resulting property damage (or loss of use), *General Security*'s holding is consistent with *Samuelson*. Future decisions may need to reconcile the two definitions of "accident" that appear in *Samuelson* and *General Security*.

Hottenstein and *McGowan* are consistent with the Tenth Circuit's defect without property damage cases.[27] These cases hold that, regardless of the legal theory asserted, unless the damages sought occurred because of property damage, as that term is defined by the policy, there cannot be a covered occurrence, because the definition of an "occurrence" requires the happening of such property damage—that is, something more than just a negligent act. Thus, according to these cases, defective construction that does not cause property damage is not covered.[28] (CGL policies generally define "property damage" as including the loss of use of tangible property that is not physically injured.)

Although holding that poor workmanship alone is not an occurrence, *General Security* affirmed the corollary to this rule 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."[29] Thus, an accident and occurrence exist "when additional, consequential property damages [a]re alleged as a result of the faulty workmanship."[30] Such damage to a third party includes damage to the work of other contractors.[31]

This is consistent with the many cases holding that the subcontractor exception to the CGL policy's "your work" exclusion restores coverage for property damage to or arising out of the insured's subcontractors' work.[32] Recognition of the corollary principle avoided the quandary faced by the South Carolina Supreme Court (in a case cited in *General Security*) when that Court inadvertently failed to explicitly recognize coverage for defective workmanship under these circumstances in its first opinion addressing the issue, then issued several later opinions recognizing and refining the corollary doctrine.[33]

General Security's Coverage Analysis

Confusion in insurance policy analysis can result from failure to adhere to the logical steps required to: (1) determine if coverage is triggered, and then (2) address and apply policy exclusions.[34] In distinguishing its ruling in *Hoang v. Monterra Homes (Powderhorn),*

LLC,[35] the *General Security* court followed this framework, beginning with analysis of the trigger of coverage under the "occurrence" definition.

Hecla and Monterra Distinguished

General Security first distinguished the two cases on which GSINDA mainly relied: *Hecla Mining Co. v. New Hampshire Insurance Co.*[36] and *Hoang v. Monterra Homes (Powderhorn) LLC.*[37] *Hecla* reversed a Colorado Court of Appeals decision holding that property damage caused by an insured mining company's activities was, as matter of law, intended or expected by the insured and, thus, excluded from coverage. It rejected the lower court's reasoning that the "results of one's intentional acts cannot be unexpected if they are the ordinary consequences of those acts."[38] Instead, *Hecla* held that damages are intended only if the insured knew they would "flow directly and immediately from its intentional act."[39] Quoting from a federal Second Circuit Court of Appeals decision, *Hecla* observed:

> In general, *what make injuries or damages expected 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. . . .[40]

General Security distinguished *Hecla* because the policies there defined "occurrence" differently, as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage, *neither expected nor intended from the standpoint of the insured*."[41] The italicized words do not appear in the definition of "occurrence" in the policy form at issue in *General Security*, but appear instead, in substance, in a policy exclusion.

In *Monterra*, the plaintiff homeowners obtained a judgment against their insured builder under tort and statutory theories,[42] and the trial court found an occurrence arising out of damage to homes caused by the pressures exerted by expansive soils. The CGL policy occurrence definition in *Monterra* matched the definition in the *General Security* policies, but the *Monterra* court took a different fork in the judicial highway. Relying on *Hecla*, which held that the existence of an accident must be ascertained from the knowledge and intent of the insured, *Monterra* found an occurrence, stating that the builder-insured:

> may have known, based on the soil reports and other engineering reports, that there was a substantial risk that damages would occur, but the evidence failed to show that [the insured, Monterra Homes] actually intended or expected the damages.[43]

General Security rejected *Monterra*'s analysis for three reasons: (1) the opinion did not address the out-of-state law to the contrary; (2) the standard applied would render superfluous another provision in the CGL policies at issue; and (3) *Monterra* relied on *Hecla*'s "occurrence" definition, which, as explained above, differed from that found in the *General Security* policies.[44]

Change in "Occurrence" Definition

Thus, *General Security*'s holding rested, in part, on a change in the ISO standard-form definition of "occurrence."[45] A number of court decisions and commentaries have discussed the history of and reasons for this language change, but *General Security* did not mention this history.[46] Insurance industry publications recognize that, even after the expected and intended clause was moved from the coverage grant to become a separate exclusion in 1986, "whether it can be said that . . . property damage is caused by an occurrence still hinges on fortuity,"[47] and that the industry still equates an occurrence with the insured neither expecting nor intending the injury or damage.[48]

Reconciling the Irreconcilable

General Security found that the "occurrence" definition at issue in the policies before it did not "focus on the *expectations* or *intentions* from the insured's standpoint."[49] The court sought to give meaning to the definition of "occurrence" that would not be redundant of the new, stand alone exclusions for property damage intended or expected from the standpoint of the insured or for the insured's malicious acts.[50] To this end, the court focused on the word "accident" contained in the definition of "occurrence," and concluded it refers to a "fortuitous event."[51] Focusing on the element of fortuity inherent in the ordinary meaning of "accident," *General Security* turned away from the subjective intent of the insured, and simply deemed poor workmanship, without more, not to be fortuitous and, hence, not an occurrence.[52]

An alternate view of the court's analysis suggests that it did not intend to substitute its judgment of what was and was not fortuitous for that of the factfinder. Rather, it merely sought to avoid redundancy by adopting a rule requiring examination of the in-

tent to cause the underlying damage giving rise to the insured's alleged liability objectively, from the standpoint of a "hypothetical insured," rather than subjectively, from the standpoint of *the* insured. However, because the underlying claims contained no specific property damage allegations tied to the insured's work, there was no need for the trial court or a jury to reach this factual question as a matter of law, because there was no occurrence.[53] This view helps reconcile *General Security*'s holding with *Samuleson*'s holding that an accident requires "misfortune with concomitant damage to a victim."[54]

In the course of its acceptance of what it characterized as the majority view,[55] the *General Security* court began its analysis of the CGL policies before it by applying well-recognized principles of insurance contract interpretation: (1) the words of an insurance policy are to be given their plain and ordinary meaning unless the policy evinces a contrary intent; (2) the policy provisions are to be read as a whole, rather than in isolation; (3) policy provisions cannot be rewritten, added, or deleted in the course of interpretation; and, if possible, (4) the court must give effect to every provision.[56] The court chose to emphasize the maxim that no provision should be rendered superfluous, which it concluded would occur if it were to deem poor workmanship an occurrence.[57]

However, as discussed below, the same conclusion is reached if poor workmanship is not deemed an occurrence, resulting in a judicial seesaw—neither argument outweighing the other. Thus, the court may have attempted to reconcile the irreconcilable and, in so doing, it inadvertently may have not given effect to other well-settled rules of insurance policy construction, such as by failing to construe the word "occurrence" broadly and in favor of coverage,[58] and by failing to resolve an irreconcilable conflict among policy terms resulting in an ambiguity in favor of coverage.[59]

The "Superfluous" Standard

Simply stated, an insurance policy should not be interpreted to render some provisions superfluous.[60] After stating this rule, the *General Security* court focused only on the policy exclusion for expected or intended damage. By defining an "occurrence" as in *Monterra*, as an event unexpected or unintended from the insured's standpoint, the court concluded that a separate exclusion for expected or intended damage would be rendered meaningless because, by *Monterra*'s definition of "occurrence," damage resulting from expected or intended conduct is already excluded by the "occurrence" definition,[61] rendering the exclusion superfluous.

However, the court failed to consider that if the insured's negligent work is not an occurrence, no reason exists for a policy exclusion based on certain damage arising from or to the insured's negligent work—that is, the your work exclusion[62] or for the subcontractor exception to the your work exclusion.[63] *General Security*'s holding, if read broadly, may render these provisions superfluous.

Builders/contractors and homeowners can be expected to point out that post-1986 CGL policies contain various exclusions for property damage to the insured's work arising while the insured is performing operations and for property damage arising after those operations are completed, as well as for damage to property that must be restored, repaired, or replaced because the insured's work was negligently performed, plus many exceptions to those exclusions.[64] These exclusions and exceptions provide a defined framework within which to determine whether, once an occurrence is proven, any part of the resulting property damage liability for or

arising out of an insured's shoddy or negligent work is excluded from coverage.[65]

Insurers can be expected to argue for a narrower interpretation of *General Security*'s corollary rule, which interpretation depends on the threshold question of whether the activity at issue qualifies as a fortuitous occurrence in the first instance. If not, insurers will argue that no coverage exists and there is no need to apply the policy's "your work," "performing operations," and "completed operations" exclusions and their exceptions. However, once a court begins to weigh which policy construction renders less of the policy superfluous, contractors and damaged property owners will urge that, because either choice renders significant parts of the policy superfluous, an ambiguity exists that must be resolved in favor of coverage. Many courts have recognized this potential ambiguity conflict and construed the post-1986 CGL policy in favor of coverage as a result.[66]

Duty to Defend

General Security also surveyed Colorado law regarding an insurer's duty to defend. The duty arises when a complaint "alleges any facts that might fall" within the policy's coverage, or when the complaint's allegations "could impose liability under the policy."[67] Put another way, the duty to defend arises if the complaint's allegations "state a claim [that] 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."[68]

Applying this test to the HOA's and Developer's pleadings, *General Security* recognized that the pleadings alleged both negligence and resulting property damage. The court then noted that the claims against Foster Frames and its Sub-Subcontractors were "limited to allegations that their poor workmanship caused property damage."[69] GSINDA conceded, however, that the only property damage alleged was the HOA complaint's "list of defects," and GSINDA failed to identify any specific consequential damage resulting from Foster Frames' or Sub-Subcontractors' defective workmanship.[70]

Viewing the allegations in the light most favorable to GSINDA, the court concluded that the underlying complaints did not allege any particular damage resulting from Foster Frames' or Sub-Subcontractors' faulty work product. Allegations, such as overdriven nails, described potential defects in Foster Frames' work, but not consequential damage.[71] The court held that conclusory allegations of consequential damage were insufficient to trigger a duty to defend; thus, the corollary rule providing coverage for consequential damages did not apply.[72]

Unresolved Questions

General Security's statement that "defective workmanship, standing alone, does not allege an occurrence"[73] raises several questions:

1. What are the contours of the corollary rule that an occurrence exists when consequential property damage has been inflicted on a third party as a result of the insured's activity?
2. How specific must a construction defect complaint's allegations be to give rise to a duty to defend?
3. What happens if a complaint's broad notice allegations do not trigger the duty to defend, but the evidence at trial establishes an insured's specific negligent acts (defective workmanship) with resulting property damage or loss of use?
4. What if defective workmanship results in consequential property damage and the insured is liable for the cost of removing and replacing other defective work that has not yet caused property damage to repair the consequential damage?[74]

The Corollary Rule

General Security held 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."[75] Policyholders will argue that this corollary rule should be read broadly to include consequential property damage to any part of a third-party owner's property, including damage to work the insured performed, as well as consequential property damage to work done by the insured's own subcontractors or to work of other contractors.

This construction finds support in the Colorado Supreme Court's *certiorari* review of *Monterra* in *Hoang v. Assurance Co. of America*, which held that "CGL insurance protects businesses from third party claims for . . . property damage resulting from accidents," but that such policies "often contain an exclusion for damage to property owned by the insured in order to prevent the CGL policy from serving as a property insurance policy."[76] *Hoang* held that the sale of a home after a CGL policy's expiration did not terminate coverage for the builder's liability to a homeowner for property damage that occurred during the policy period and when the house was owned by a predecessor homeowner.[77] Usually, physical damage to an insured's work product by the insured does not constitute damage to its own property, unless the insured owns the structure being built.

Discrete Work Damaging Other Work

From the Colorado Supreme Court's statement that "CGL insurance protects businesses from third party claims for . . . property damage resulting from accidents," one might reasonably conclude that, as long as the owner of the damaged property is not the insured contractor but, rather, a third party, absent an express exclusion, such property damage should be covered. *General Security* acknowledged this coverage potential by citing, as an example of the corollary's application, *Auto-Owners Insurance Co., Inc. v. Home Pride Companies*[78] in which the property owner's roof substrate was damaged due to the insured subcontractor's negligent shingle installation. Because the subcontractor's scope of work did not include installation or repair of the roof substrate, the court found coverage. Thus, the rub in applying the corollary may come with the search for consequential property damage, and a key question may be whether the insured's work is limited to the discrete work containing the defect or extends to all work the insured performs.

The HOA complaint in *General Security* alleged defects in the insured's work that caused actual property damage, loss of use, and consequential damage to various project elements.[79] However, viewing the principal complaint and the third party complaint incorporating it, the court was unable to find any specific allegation of damage caused by the insured subcontractor's allegedly deficient work that qualified as consequential damage.[80]

Courts have not hesitated, however, to find an occurrence when other property has been damaged, including, for example:

1) damage to exterior wall components, including structural elements and sheathing from moisture penetration, caused by negligent siding application;[81]
2) faulty installation of an HVAC system, which allowed moisture to penetrate and damage another part of the structure (not worked on by the HVAC subcontractor);[82]
3) improper fill material that caused roof trusses to corrode and the roof to collapse years later;[83]
4) failure to install shingles in a workmanlike manner that caused damage to roof structures;[84]
5) damage to an existing structure arising from poor workmanship in remodeling and constructing an addition;[85]
6) drapery and wallpaper damaged as a result of faulty window installation;[86] and
7) as the Louisiana Court of Appeals found, where the entire project—a marina—fell into a bayou.[87]

The distinction between damage to the work itself and damage to property other than the work is not without its critics. The Florida Supreme Court rejected this distinction, observing:

> If a defective masonry wall falls outward and damages a parked car, no one disputes the 'occurrence' of 'property damage,' but if it falls inward and damages the floor, the insurers label that a non-occurrence or not property damage.[88]

A leading insurance industry publication, which has been cited with authority by the Colorado Supreme Court, gives as an example of the coverage restored by the exception to the your work ex-

clusion, coverage for stucco work that peels and chips, but which work was performed by the insured's subcontractor:

> 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.[89]

How a court defines a contractor's "work product" may put the occurrence poodle on a longer leash. If, recognizing that builders and their subcontractors perform discrete work on a project, a court finds some of an insured contractor's discrete work to be separate from some of the same contractor's other discrete work, the physical damage to the other work requirement may be satisfied. *High Country Associates v. New Hampshire Insurance Co.*[90] supports this course. There, the work consisted of the entire condominium project, but faulty workmanship caused damage to other parts of the insured general contractor's work. Moisture penetration allowed by negligent application of siding caused damage to exterior wall components, including structural elements and sheathing. The New Hampshire Supreme Court found an occurrence.

Policyholder and property owner counsel will invite courts to consider exactly what constitutes the insured's work product given that: (1) subcontractors are involved in nearly all construction; (2) general contractors usually exercise minimal control over their subcontractors' work and typically contract for indemnity from their subcontractors for defective work;[91] (3) CGL underwriters intended to carve out an exception to the your work exclusion for work performed by subcontractors;[92] and (4) insured builders/contractors' reasonably expect that their CGL policy provisions will be read harmoniously as a whole.[93] If, as the court in *High County Associates* necessarily held that the insured's framing and siding were separate work products,[94] Colorado policyholders will seek to apply this rule to analogous situations, such as a contractor's faulty foundation or grading causing damage to the superstructure so that each part of a project, performed by different subcontractors, constitutes a separate work product.

The counter argument is found in cases holding that a contractor, responsible for construction of an entire home, necessarily accepts the entire project as its work product.[95] At a minimum, however, as long as subcontractors are involved, an element of fortuity exists when construction goes awry, allowing courts to treat, and the CGL underwriters to accept, the risk of insuring related damage as an accident.

The U.S. District Court for the District of Colorado has construed *General Security*'s main holding and corollary rule in two recent cases. These cases reached disparate conclusions when applying *General Security* to summary judgment motions regarding insurers' obligations to insured-builders under CGL policies. In *American Family Mutual Insurance Co. v. Teamcorp, Inc.*,[96] the court applied *General Security*'s corollary rule broadly to physical damage to a home under construction and the loss of use of the home, which had to be demolished and rebuilt as a result of the insureds' faulty design and engineering work. The court concluded that, "the 'property' at issue is the [homeowners'] real property and partially

constructed house."[97] The court then held that an occurrence, which must be broadly construed in favor of the insureds, was sufficiently alleged, giving rise to a duty to defend.[98]

In contrast, in *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*,[99] the court read *General Security* expansively to preclude coverage for all consequential property damage resulting from negligent construction (termed "poor workmanship" in the opinion) unless the negligent construction resulted in damage to something other than the insured's work product. Policyholders will argue, relying on *Teamcorp*, that the CGL policy contains no language supporting *Greystone*'s requirement that the insured's negligence must result in damage to something other than the insureds' work product, and that *Greystone* disregards the fact that a general liability insurance coverage grant is intended to protect builders and contractors from third-party claims for negligently inflicted property damage.[100]

Policyholders also will argue that *Greystone* fails to construe the policy as a whole, thus rendering surplusage multiple provisions that necessarily assume coverage for damage to the insured's work product, but that then exclude some of this coverage for: (1) property damage to that particular part of real property on which the insured or any contractors or subcontractors working directly or indirectly on the insured's behalf are performing operations, if the property damage arises out of those operations; (2) property damage to that particular part of any property that must be restored, repaired, or replaced because the insured's work was incorrectly performed on it, unless the damage occurs after the insured's operations are complete; and (3) property damage to the insured's work arising out of it or any part of it and that occurs after the work is complete, unless the damaged work or the work out of which the damage arises was performed on the insureds' behalf by a subcontractor.[101]

Finally, policyholders will urge that *Greystone* did not consider Colorado cases holding that tortfeasors may be liable for causing physical injury to their own work product,[102] and that an insured reasonably expects that its liability insurance will indemnify against these very liabilities unless they are clearly and unambiguously excluded.[103] Insurers will respond to all these arguments by urging that their policies do not guarantee the quality or performance of a policyholder's work, are not intended to serve as performance bonds, and should not be construed in a manner that encourages shoddy work.[104]

Shoddy Work and Negligent Construction Distinguished

Shoddy work and accidental negligent construction fall on the same defective construction continuum, and perhaps may be easily distinguished at the margins. However, difficult fact questions usually will preclude a court from deciding as a matter of law: (1) which defects are open and obvious and which are latent; and (2) whether any or all resulting property damage should have been expected to arise from any particular defect. Thus, *General Security* leaves unanswered many coverage questions where negligent construction occurs but, at the time of the work, the negligence or its consequences are not recognized.

Sometimes, negligence occurs without immediately causing any damage, and the contractor believes the work remains within tolerances and will not result in any property damage or loss of use, only to be sued much later for property damage arising from a latent defect. Insured contractors will argue that they should not be deprived of insurance coverage under these circumstances.[105] They will urge that it is doubtful courts would deny coverage where a contractor's unintended faulty workmanship leads to a fire that consumes a plaintiff-homeowner's house after sale, and no different result should obtain if a different kind of unintended poor workmanship results in a different kind of property damage to a house after sale, unless an express and unambiguous exclusion bars such coverage.

The Duty to Defend and the Duty to Indemnify

It has been said that where "a duty to defend does not exist, there cannot be a duty to indemnify," because the duty to defend is broader than the duty to indemnify.[106] If *General Security* is read to adopt a heightened pleading specificity standard to trigger an

insurer's duty to defend, an insurer may refuse to accept the tender of a construction defect claim defense and lose control over both defense and settlement, but face indemnity exposure if the evidence at trial establishes its insured's liability and coverage. This risk arises because Colorado's broad notice pleading requirements may not result in allegations sufficiently specific to establish a duty to defend under *General Security*'s demand for pleading specificity. Moreover, a claimant may not have reason or knowledge to particularize his or her damage allegations to link them to a particular subcontractor, whose identity and responsibilities may not be known to the claimant when the complaint is drafted.

Thus, the burden may fall on the insured developer, builder, or contractor to obtain this particularized claim information from the claimant during discovery or through Colorado's statutory notice of claim process, and then bring the information to the insurer's attention. This scenario raises questions about the insured's responsibility to communicate such information to the insurer and to renew its demand for a defense when the particularized information becomes available, as well as the ramifications of not doing so. Policyholders will question the wisdom of a rule that could deprive them of the early and timely provision of a legal defense, one of the most important benefits afforded by liability insurance.[107]

Finally, the danger will remain that particularized claim allegations may be disclosed through discovery but not result in an amended pleading, because the claimant is the "master of his own pleadings."[108] Colorado courts generally gauge an insurer's duty to defend by the four corners of the complaint and, as a result, a duty to defend may not arise even though the evidence amassed during pretrial discovery or during trial unequivocally establishes a potentially covered claim.[109]

Conclusion

Despite *General Security*'s narrow holding, the case creates uncertainties as to an insurer's and its policyholder's rights and responsibilities arising from a construction defect complaint, especially as they relate to the insurer's duty to defend in light of the insured's inability to ensure that the pleadings accurately or fully reflect the alleged consequential damages. Moreover, there is no bright line between shoddy workmanship and negligent construction, or the fortuity of resulting damage from either. A finding of coverage for property damage arising from such conduct must rest on the insurance contract language as understood by a reasonable person and not on amorphous policy arguments addressing what ought or ought not be covered by liability insurance.

As discussed above, although *General Security*'s construction of the post-1986 CGL policies before it arguably avoided rendering one policy provision superfluous, such construction may render other provisions superfluous. The Colorado Supreme Court will have to decide whether *General Security*'s holding can be reconciled with its prior precedent and rules of insurance policy construction.

Notes

1. *General Security Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo.App. 2009).

2. Because liability policies often are standardized, an insurer in a dispute with another insurer faces the prospect of winning the coverage battle but losing the war if an insured turns the insurer's winning coverage arguments against that insurer in a different case. Thus, insurers do not have the same incentives when litigating these issues as their policyholders or injured-party beneficiaries of their policy proceeds.

3. *General Security, supra* note 1 at 532.

4. *Hecla Mining Co. v. N. H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991).

5. The Insurance Service Office, Inc. is an industry organization responsible for drafting the industry-wide standard forms used by many insurers. The evolution of the modern commercial general liability (CGL) policy form with regard to insuring home construction risks is described in *Am. Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 82-83 (Wis. 2004) and *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1, 11-12 (Tex. 2007). As discussed in this article under the headings "Change in Occurrence Definition" and "Reconciling the Irreconcilable," significant differences exist between the pre-1986 and post-1986 policy forms, and cases construing the pre-1986 form may be of limited relevance.

6. "Triggering" of coverage occurs when a threshold event implicates an insurance policy's coverage. *See Public Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 938 n.11 (Colo. 1999).

7. *General Security, supra* note 1 at 530, 532, 534. The court's "intended and expected" analysis appears also to have considered Foster Frames' intent as an "additional insured" under Sub-Subcontractors' policies.

8. *Id.* at 535.

9. *See Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613 (Colo. 1999) ("when a contractual provision is reasonably susceptible to different meanings it must be construed against the drafter and in favor of providing coverage to the insured"); *Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11, 13 (Colo.App. 1985) ("the term 'occurrence' is to be broadly construed against the insurer").

10. Generally, "fortuitous" means "happening or produced by chance; accidental." *See* dictionary.reference.com/browse/fortuitous. A loss may be fortuitous for insurance purposes even if it occurred before a policy issues, if the loss is unknown to both policyholder and insurer. *Cf. Hunt v. Aetna Cas. & Sur. Co.*, 387 P.2d 405, 406 (Colo. 1963) (there are "certain circumstances [where parties may] enter into contracts of insurance to protect against loss that, unknown to the parties, has already occurred").

11. *General Security, supra* note 1 at 534, *citing 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); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1201 (Colo.App. 2003); *Fire Ins. Exch. v. Bentley*, 953 P.2d 1297, 1300 (Colo.App. 1998).

12. *See Carroll v. CUNA Mut. Ins. Soc'y*, 894 P.2d 746, 752-53 (Colo. 1995) (construing "accident" in life insurance policy; "distinction between accidental means and accidental results is too illusory to be useful"), *citing with approval Bobier v. Beneficial Standard Life Ins. Co.*, 570 P.2d 1094 (Colo.App. 1977) (construing "accident" in accidental death insurance policy). *Bobier* relied on *Equitable Life Assurance Soc'y v. Hemenover*, 67 P.2d 80 (Colo. 1937), which distinguished between "accidental means" and "accidental result" in construing a life insurance policy. Policyholders may argue that this definition of "accident" should not be applied to liability insurance cases. For example, intentionally driving well in excess of the speed limit is certainly inadvisable, and a resulting accident is probably not an "unanticipated or unusual result flowing from a commonplace cause," but this is precisely the type of negligent conduct for which a policyholder would reasonably expect liability coverage.

13. *See Carroll, supra* note 12 at 750. Under the accidental means test, the precipitating cause of the injury must be accidental or unintended. This test "encompasses one common understanding of the term accident as an unexpected action or event, such as a slip or a fall, which then causes injury." Under the accidental results test, only the injury itself, not the precipitating cause, must be unexpected for the injury to be considered accidental.

14. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1202 (Colo.App. 2003).

15. *Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995).

16. *Id.* at 103. A narrower view of *Hottenstein*'s reliance on *Yegge*, and a detailed discussion of the modern trend finding coverage for some con-

tractual liabilities, can be found in Sandgrund and Tuft, "Liability Insurance Coverage for Breach of Contract Damages," 36 *The Colorado Lawyer* 39 (Feb. 2007), cited in *General Security, supra* note 1 at 534. The performance bond analogy may be inapt because "an insurance policy spreads the contractor's risk while a bond guarantees its performance." Thus, "[a]n insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums; that is, losses are expected," while "a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur." Therefore, unlike insurance, "the performance bond offers no indemnity for the contractor; it protects only the owner." *Lamar Homes, Inc., supra* note 5 at 10 n.7. *Accord Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 674 (Tex.App. 2006). In addition to these distinctions, in the absence of an express provision or governing statute, a performance bond does not cover property damage for which the obligee may be liable and a liability policy does not guarantee completion of the work. *See Long v. Midway*, 311 S.E.2d 508, 512 (Ga.App. 1983); *DeVries v. City of Austin*, 110 N.W.2d 529, 539 (Minn. 1961).

17. *Hottenstein, supra* note 14.

18. *General Security, supra* note 1 at 534.

19. *Id.* Considering the more recent decisions, the split in authority is much closer than some courts and commentators suggest, and how to properly characterize the modern trend is subject to serious debate. *Compare* Cooper, "Construction Defect Claims: Strategies to Maximize Insurance Coverage (From the Policyholder's Perspective)," 88 *Mich. B.J.* 30, 31 (June 2009) (according to a 2007 International Risk Management Institute survey, "a majority of states—21 [versus 15 to the contrary]—are considered 'pro-insured' on the issue of whether defective work can result in an occurrence") *with* 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) (collecting cases) ("Courts from no [fewer] than 25 states have adopted the position that there is no coverage [under CGL policies] for construction defect claims."). *See also Lamar Homes, Inc., supra* note 5 at 14 (examining and rejecting dissent's reliance on nearly all the cases it draws on in establishing a "majority" view). *See also* 4 Bruner and O'Connor, Jr., *Bruner & O'Connor on Constr. Law* § 11:28.06 (2009) (because adhering to rigid no occurrence rule for poor workmanship is neither good policy nor proper contract interpretation, there has been a recent shift to a more nuanced and fact-based approach, as in Florida, Tennessee, Texas, and Wisconsin).

20. *McGowan v. State Farm Fire and Cas. Co.*, 100 P.3d 521, 523 (Colo. App. 2004).

21. *Id.* at 525.

22. *General Security, supra* note 1 at 535.

23. *Id.* at 536. Review of these out-of-state cases suggests that their holdings may not necessarily rest on findings that the defective work is unforeseeable, but rather that the property damage or loss of use arising from the defective work is accidental, unintended, and unexpected. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 884 (Fla. 2007); *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 309 (Tenn. 2007).

24. *General Security, supra* note 1 at 536.

25. *Samuelson v. Chutich*, 529 P.2d 631, 635 (Colo. 1974) (emphasis added), *quoting Century Mut. Ins. Co. v. Southern Ariz. Aviation, Inc.*, 446 P.2d 490, 492 (Ariz.App. 1968), followed in *Pike v. Am. States Preferred Ins. Co.*, 55 P.3d 212, 215 (Colo. 2002). The Colorado Supreme Court has held that an "occurrence," as used in the Governmental Immunity Act, means "'an accident, event, or continuing condition *that results in personal injury*.'" *City & County of Denver v. Crandall*, 161 P.3d 627, 634 (Colo. 2007) (emphasis added), *citing Black's Law Dictionary* 1107 (7th ed., 1999). The Court noted, "Many liability policies specifically include repeated exposure to substantially the same general harmful conditions when they define occurrence." *Id.* at 634 n.7.

26. Courts may find that negligent conduct alone, without resulting injury, is not an accident, but more akin to an accident "waiting to happen." *See, e.g., U.S. Fid. & Guar. Co. v. Dealers Leasing, Inc.*, 137 F.Supp.2d 1257, 1263 (D.Kan. 2001) ("This court does not believe that . . . negligent behavior . . . fits the generally accepted definition of 'accident.' Instead, *the events that often result from negligent behavior* fit the ordinary meaning of 'accident.'") (emphasis added).

27. *See, e.g., Bangert Bros. Constr. Co. v. Americas Ins. Co.*, No. 94-1412, 66 F.3d 338 (table), 1995 WL 539479 (10th Cir. 1995) (unpublished), *aff'g* 888 F.Supp. 1069 (D.Colo. 1994) (no coverage for improperly poured runway that failed to meet specifications); *Adair Group, Inc. v. St. Paul Fire & Marine Ins. Co.*, 477 F.3d 1186 (10th Cir. 2007), *aff'g* No. 04-CV-1996-PSF-PAC, 2005 WL 1522085 (D.Colo. June 28, 2005) (subcontractors' poor workmanship causing breach of general contractor's construction contract with owner, without resulting property damage or loss of use, was not covered event under CGL policy defining "event" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."); *DCB Constr. Co. v. Travelers Indem. Co.*, 225 F.Supp.2d 1230 (D.Colo. 2002) (no coverage for improperly soundproofed rooms that failed to achieve desired acoustic effect; no loss of use alleged). *But see Am. Fam. Mut. Ins. Co. v. Teamcorp, Inc.*, No. 07-CV-00200-WYD-MJW, 2009 WL 3077836 (D.Colo. Sept. 22, 2009) (distinguishing these cases on basis none involved consequential property damage).

28. *See id.* These cases do not reach the question of whether the presence of the defect may result in coverage due to: (1) loss of use (utility) of the larger thing in which the defective work is incorporated; (2) property damage to the larger thing incorporating the defective work or product due to the repair, replacement, or failure of the defect; or (3) diminution in value of the larger whole due to the presence of the defect. *See generally* Turner, "Insurance Coverage for Incorporation of Defective Construction Work or Products," 18 *Constr. Lawyer* 29 (April 1998).

29. *General Security, supra* note 1 at 535.

30. *Id.*

31. *Id., citing Auto-Owners Ins. Co. v. Home Pride Cos.*, 684 N.W.2d 571, 579 (Neb. 2004) (claim that roof structures and buildings experienced substantial damage as a consequence of insured contractor's faulty work went beyond damage to contractors' own work product and, therefore, claim alleged an occurrence).

32. *See generally* Sandgrund *et al.*, "Theories of Homebuilder Liability for Subcontractor Negligence—Part II," 34 *The Colorado Lawyer* 55 at 58-60 (July 2005) (discussing such cases).

33. The South Carolina Supreme Court withdrew and reissued its first defective workmanship coverage opinion. *See L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, No. 25854, 2004 WL 1775571 (S.C. Aug. 9, 2004), *withdrawn and superseded on rehearing*, 621 S.E.2d 33 (S.C. 2005). It then clarified that first holding in a subsequent unanimous ruling, which the Court then withdrew and reissued. *See Auto Owners Ins. Co. v. Newman*, No. 26450, 2008 WL 648546 (S.C. March 10, 2008), *withdrawn and superseded on rehearing*, 2009 WL 2851211 (S.C. Sept. 8, 2009) (NYRFOP).

34. *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169, 173 (Wis.App. 1999) (describing steps in analysis). In *Bangert Brothers, supra* note 27, the U.S. District Court skipped any analysis of occurrence, noted that finding coverage would convert the policies into performance bonds, and rejected coverage based on policy exclusions.

35. *Monterra, supra* note 11, *rev'd on other grounds*, 149 P.3d 798 (Colo. 2007).

36. *Hecla Mining Co., supra* note 4.

37. *Monterra, supra* note 11.

38. *Hecla Mining Co., supra* note 4 at 1087.

39. *Id.* at 1088.

40. *Id.* (citation omitted) (emphasis added).

41. *General Security, supra* note 1 at 537 (emphasis in original).

42. The trial court judgment also included damages for breach of implied warranty, but the opinion does not discuss this claim.

43. *Monterra, supra* note 11 at 1034.

44. *General Security, supra* note 1 at 536.

45. *Id.* at 537.

46. The insurance industry has argued that it changed the standard definition of "occurrence" in 1986 by removing the "intended and expected" language from the "occurrence" coverage grant and making it the first standardized exclusion, to change the focus in analyzing whether an "occurrence" happened from the result, to the cause of the result. At least one commentator has met this explanation with skepticism, concluding that the change was made to conform the policy to the great majority view that the burden of proving that property damage was neither intended nor expected by the insured resided with the insurer despite the fact the language was found in the occurrence coverage grant. Before the language was made an express exclusion, few courts had placed the burden on the insured of proving that the property damage was neither intended nor expected by it. *See generally* Turner, *Insurance Coverage of Construction Disputes* § 9:1 (2d ed., Thomson Reuters/West, 2008) (discussing 1986 change and collecting cases). *Cf. Standard Constr. Co., Inc. v. Maryland Cas. Co.*, 359 F.3d 846, 850 (6th Cir. 2004) (examining exclusion's history and holding unintended resulting damages accidental even if original acts intentional).

47. *See* Malecki and Flitner, *Commercial General Liability* 11 (8th ed., Nat'l Underwriter Co., 2005).

48. *See* Fire, Casualty & Surety Bulletins (FC&S Bulletins), Public Liability, A.3-4 (Nat'l Underwriter Co., July 2008).

49. *General Security, supra* note 1 at 537 (emphasis in original).

50. *Id.*

51. *Id.* at 536.

52. *Id.* at 535.

53. *Cf. Allstate Ins. Co. v. Troelstrup*, 789 P.2d 415 (Colo. 1990) (even where insured may not have subjectively intended harm due to sexual contact with minor, such intent may be inferred as a matter of law). *But see USF&G v. Armstrong*, 479 So.2d 1164, 1167 (Ala. 1985) (presumption in tort law that person intends natural or probable consequences of their acts has no application to insurance law; expected and intended injury cannot be equated with foreseeable injury).

54. *See Samuelson, supra* note 25 at 635.

55. As noted above, what does or does not constitute the majority view is subject to some debate. *See* note 19, *supra*.

56. *General Security, supra* note 1 at 532, 537.

57. *Id.* at 537.

58. *Colard, supra* note 9 at 13 ("the term 'occurrence' is to be broadly construed against the insurer").

59. *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748, 753 (Colo. 1990) (if an insurance policy is ambiguous or fairly susceptible to two reasonable interpretations, one of which is favorable to the insured and the other to the insurer, the policy must be construed strictly against the insurer as the drafter of the agreement and in favor of the insured).

60. *Id. See also Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009) ("The court should interpret a contract 'in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless.' "), *quoting Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984).

61. *General Security, supra* note 1 at 537.

62. *See U. S. Fire Ins. Co., supra* note 23 at 876 (discussing the your work exclusion). *Accord Am. Family Mut. Ins. Co., supra* note 5 at 81-83; *Kalchthaler, supra* note 34 at 173-74. The exclusion typically limits coverage for "property damage to your work or any part of it," subject to a broad exception.

63. *See Am. Family Mut. Ins. Co., supra* note 5 at 82-83 (discussing drafting history of subcontractor exception to your work exclusion). The exception to the your work exclusion nullifies the exclusion when the work is done on the insured's behalf by someone else. It generally reads: "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."

64. These exclusions typically apply to: property damage to property the insured owns, rents, or occupies; property damage to that particular part of real property on which the insured or its contractors or subcontractors are performing operations, if the property damage arises out of those operations; and property damage to that particular part of any property that must be restored, repaired, or replaced because the insured's work was incorrectly performed on it. However, this last exclusion generally is inapplicable if the damage arises from the insured's completed operations. The CGL policy's completed operations coverage generally excludes property damage to the insured's completed work, arising out of it or any part of it, but does not apply if the damaged work or the work out of which the damage arises was performed on the insured's behalf by a subcontractor. *See generally* Sandgrund, *supra* note 32 at 58-60 (discussing exclusion and its exception).

65. *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 such exclusions).

66. *See, e.g., Auto Owners Ins. Co., supra* note 33 at *4 (interpreting "occurrence" to exclude subcontractor's negligent acts "would render both the 'your work' exclusion and the subcontractor's exception to the 'your work' exclusion meaningless"); *U.S. Fire Ins. Co., supra* note 23 at 887 ("By incorporating the subcontractor exception into the 'your-work' exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance.") (disapproved by *General Security* on other grounds); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 494 (Kan. 2006) (court need only ask "why the CGL policy includes an exclusion for property damage to the insured's own work . . . to understand that it would be nonsensical for the policy to include such a provision if this kind of property damage could never be caused by an 'occurrence' "), *quoting* Shapiro, "The Good, the Bad and the Ugly: New State Supreme Court Decisions Address Whether an Inadvertent Construction Defect is an 'Occurrence' under CGL Policies," 25 *Constr. Lawyer* 9, 12 (Summer 2005); *Kalchthaler, supra* note 34 at 174 (interpreting case law without considering new exclusion's limiting language "would render [such] language superfluous"). *See also Stanley Martin Cos. v. Ohio Cas. Group*, No. 07-2102, 2009 WL 367589 at *3 (4th Cir. Feb. 12, 2009) (unpublished) (if definition of "occurrence" cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage any damage the insured's faulty workmanship causes to its own work is nugatory; if the definition of "occurrence" includes insured's faulty workmanship, such an exclusion functions as a meaningful "limitation or restriction on the insuring clause"). *Cf. Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 307 (Colo. 2003) (questioning why an insurer would include coverage for "completed operations," defined to include property damage arising out of "reliance upon a representation or warranty," if it never intended its policies' coverage grant to cover liability due to property damage arising from reliance on a representation).

67. *General Security, supra* note 1 at 532.

68. *Id.* at 533.

69. *Id.*

70. *Id.* at 537-38.

71. *Id.* at 538.

72. *Id.*

73. *Id.* at 532.

74. Because of space limitations, this article does not discuss this last question in detail. Courts outside Colorado have found coverage under these circumstances, but have not squarely addressed whether the coverage is limited to the cost to remove and replace the defective work with similarly defective work or includes the cost of installing non-defective work. *Compare Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 199 P.3d 376, 384 (Wash. 2008) (removal and replacement of poorly installed siding necessary to remedy underlying water intrusion damage was covered "property damage") *and French v. Assurance Co. of Am.*, 448 F.3d 693, 704-705 (4th Cir. 2006) (damage caused to surrounding nondefective components constitutes an occurrence under the initial coverage grant) *with Auto-Owners Ins. Co., Inc. v. Newman*, No. 26450, 2009 WL 2851211 (S.C. Sept. 8, 2009) (NYRFOP) (removal and replacement cost of defectively applied stucco necessary to repair consequential property damage excluded from coverage by "sistership" exclusion) *and Assurance Co. of Am. v. Lucas Waterproofing Co.*, 581 F.Supp. 2d 1201, 1209 (S.D.Fla. 2008) (fact

questions existed regarding how much of underlying judgment against insured subcontractor attributable to repairing damage to other parts of condominium buildings caused by defective work versus repairing defective work itself). The South Carolina's Supreme Court's reliance on the sistership exclusion in *Auto-Owners Ins. Co.* is unique, because that exclusion's application generally had been previously limited to recall efforts initiated before the insured's product or work has caused property damage. *See, e.g.*, Windt, "Sistership or Withdrawal from Market Exclusion," *Insurance Claims and Disputes* § 11:13, (3d ed., 2009). *See also id.* at § 34:3 (exclusion only applies to "recalls for preventative purposes").

75. *General Security, supra* note 1 at 535.

76. *Hoang, supra* note 11 at 802, *reversing in part Monterra, supra* note 11.

77. *Id.*

78. *Auto-Owners Ins. Co., supra* note 31.

79. *General Security, supra* note 1 at 533.

80. *Id.* at 537.

81. *High Country Assocs. v. N.H. Ins. Co.*, 648 A.2d 474 (N.H. 1994).

82. *Owners Ins. Co. v. Lang's Heating & Air Conditioning*, No. 2:05-2916, 2006 U.S. Dist. LEXIS 18898, at *10-11 (D.S.C. April 10, 2006).

83. *Am. Employers Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955 (Colo.App. 1990).

84. *Auto-Owners Ins. Co., supra* note 31 at 578.

85. *Ohio Cas. Ins. Co. v. Bazzi Constr. Co., Inc.*, 815 F.2d 1146, 1149 (7th Cir. 1987).

86. *Kalchthaler, supra* note 34. *See also Potomac Ins. of Illinois v. Huang*, No. 00-4013-JPO, 2002 U.S. Dist. LEXIS 4710, 2002 WL 418008 (D.Kan. March 1, 2002) (wood rot and interior damage).

87. *Martinez v. Wildey*, 612 So.2d 155, 157 (La.App. 1992).

88. *U.S. Fire Ins. Co., supra* note 23 at 885 (citation omitted).

89. FC&S Bulletins, Public Liability at ¶ M.10-3 (Nat'l Underwriter Co., Feb. 2002). This publication was cited with authority in *Hecla Mining Co., supra* note 4 at 1086.

90. *High Country Assocs., supra* note 81. Such a parsing of work in the context of insurance coverage is not foreign to Colorado courts. *See, e.g., Town of Silverton v. Phoenix Heat Source System, Inc.*, 948 P.2d 9, 12 (Colo. App. 1997), which held that a waiver of subrogation provision in a construction contract barred only claims for damages to the work required to be insured by the owner and not to other parts of the project.

91. *O'Shaughnessey v. Smuckler Corp.*, 543 N.W.2d 99, 102 (Minn. 1996), *abrogated on other grounds, Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002).

92. *See* FC&S Bulletins, *supra* note 89 at ¶ M.10-3; *Hoang, supra* note 11 at 803 (insurance policy must be construed to meet insured's reasonable expectations).

93. *U.S. Fire Ins. Co., supra* note 23 at 886.

94. *High Country Assocs., supra* note 81 at 477.

95. *See, e.g., Gene & Harvey Builders, Inc. v. Pa. Mfrs.' Ass'n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986) (this case may be of limited value because it construed the pre-1986 CGL policy form); *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, no. 07-cv-00066-MSK-CBS, 2009 WL 2568521 at * 5 (D.Colo. Aug. 18, 2009) (finding no coverage for builder where the only consequential property damage caused by poor workmanship was to builder's work product, the home itself) (appeal filed Sept. 17, 2008, case no. 09-1412).

96. *Teamcorp, Inc., supra* note 27.

97. *Id.* at 22.

98. *Id.*

99. *See Greystone Constr., Inc., supra* note 95. As with *General Security*, all parties that briefed the coverage issues in *Greystone* were represented by attorneys retained by insurance companies. American Family Mutual Insurance Company is arguing both sides of the coverage issues in *Greystone* and *Teamcorp., supra* notes 95 and 27, respectively. *Greystone* relied heavily on *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir. 1993). *J.Z.G.*, although apparently construing a post-1986 CGL policy form, relied exclusively on cases and commentary construing pre-1986 CGL policy forms. *Id.* at 102-03. *Greystone* also relied on *Irwin Investments v. Great Am. Ins. Co.*, 475 P.2d 633, 635 (Colo.App. 1970) (no coverage for breach of contract claims), but this 1970 case involved a CGL policy form that did not contain the term "occurrence," and that the court found did not contemplate coverage for "damage which occurs and reoccurs over a continued period of time," while the post-1986 policy form specifically defines an "occurrence" to include accidental property damage caused by "continuous or repeated exposure to substantially the same general harmful conditions." *Cf. DCB Constr. Co., supra* note 27 at 1232 (discussing *Irwin Investments*).

100. *See Assurance Co. of Am., supra* note 11 at 802.

101. *See* FC&S Bulletins, *supra* note 48 at A.3-12 (discussing intent and reach of ongoing and performing operations exclusion). *See also* Sandgrund, *supra* note 32 at 58-60 (discussing subcontractor exception to your work completed operations exclusion). *See also* cases collected in note 66, *supra*.

102. *See Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983) (builder owes independent tort duty to build home non-negligently; economic loss rule inapplicable); *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005) (subcontractor also owes independent duty of care to perform home construction non-negligently; economic loss rule inapplicable); *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 989 (Colo. 1975) (economic loss rule does not preclude consumer's strict product liability tort claim for injury to product itself arising from product defect).

103. *See generally* Sandgrund, *supra* note 16 at 43 (economic loss/independent duty rule, "merely defines the contours of the insured's liability to the claimant; the insurance policy, however, defines the insurer's liability to the insured"), *cited in General Security*, supra note 1 at 534. *See also Lamar Homes, Inc., supra* note 5 at 12 (economic loss rule not a useful tool for determining coverage). In reaching the opposite conclusion, *Greystone* relied on *J.Z.G. Resources, Inc., supra* note 99 (cost to relocate misplaced roads not caused by an "occurrence") and *Auto-Owners Ins. Co., supra* note 33 (damage resulting from insured contractor's faulty work extended beyond damage to contractors' own work product and, therefore, claim alleged an occurrence), both cited by *General Security, supra* note 1 at 535, for the proposition that defective workmanship, without more, is not an occurrence, but that defective workmanship resulting in damage to a third party's property is an occurrence.

104. The Texas and Florida Supreme Courts have the most complete discussions rejecting the performance bond analogy. *See Lamar Homes, Inc., supra* note 5, at 10-11; *U.S. Fire Ins. Co., supra* note 23 at 887-88. *See also supra* note 16 (discussing weaknesses in performance bond analogy).

105. *See Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450, 452-53 (Minn. 1977) (builder's construction of a structure in the face of the risk of site-induced damage or a contractor's violation of its engineer's recommendations or specifications does not, in and of itself, avoid coverage), cited with approval in *Colard, supra* note 9 at 13.

106. *Miller v. Hartford Cas. Ins. Co.*, 160 P.3d 408, 412 (Colo.App. 2007), *citing Cyprus Amax Minerals Co., supra* note 66 at 299-300; *Compass Ins. Co., supra* note 9 at 609.

107. *Cf. Pompa v. Am. Family Mut. Ins. Co.*, 520 F.3d 1139, 1146 (10th Cir. 2008) (because of insured's legitimate expectation of being afforded a defense, "the risk of the uncertainty of coverage should fall on the insurer"), *citing Hartford Ins. Group v. Dist. Ct.*, 625 P.2d 1013, 1017-18 (Colo. 1981). *See also Miller v. Westport Ins. Corp.*, 200 P.3d 419, 423 (Kan. 2009) (liability insurance could also be called "litigation insurance" because it protects insureds against financial costs associated with being sued).

108. *Carolina Aircraft Corp. v. Am. Mut. Liability Ins. Co.*, 517 F.2d 1076, 1077 (5th Cir. 1975).

109. *See Cyprus Amax Minerals Co., supra* note 66 at 299; *Bainbridge, Inc. v. Travelers Cas. Co. of Conn.*, 159 P.3d 748, 750 (Colo.App. 2006). ■