Liability Insurance Coverage for Breach of Contract Damages

by Ronald M. Sandgrund and Leslie A. Tuft

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.

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This article explores whether breach of contract damages can trigger liability insurance coverage. Although courts historically have been reluctant to find such coverage, recent trends reflect a greater willingness to find coverage for breach of contract damages under proper circumstances.

Many accept as hornbook law the proposition that liability insurance covers tort, not contract, liabilities. Recent cases question the continuing viability of this assumption. This article surveys case law regarding liability insurance coverage for purely contractual obligations, and discusses the analysis likely to be used by Colorado courts in addressing this insurance coverage issue. Finally, practical considerations for policyholders and claimants are discussed.

Historical Judicial Hostility

Many judicial decisions echo the general rule that liability insurance indemnifies against "liability sounding in tort, not in contract."[1] Some such decisions rely on policy language providing that coverage applies when the insured is "legally obligated to pay damages" to another, as well as the conclusion that "legally obligated to pay as damages" means liability arising *ex delicto* (from a tort) and not *ex contractu* (from a contract).[2]

Other cases rely on a policy's use of the term "accident" to define a covered "occurrence," holding that an "accident" refers to a fortuitous loss with resulting liability, but not liability "voluntarily assumed" pursuant to contract.[3] These decisions typically note, as one court put it:

> [T]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus, [and that extending coverage to contract liabilities presents the danger of] making the insurer a sort of silent business partner [with the insured, creating an] expansion of the scope of the insurer's liability . . . without corresponding compensation.[4]

Liability policies also typically contain an express "contractual liability" exclusion, which is discussed more fully below.[5] Many courts rely on this exclusion to find no coverage for contractual liabilities.[6]

Difficulties arise, however, even in jurisdictions that attempt to clearly demarcate coverage between tort and contract liabilities, because some liabilities may sound both in tort and contract. For example, implied warranty liability may arise pursuant to statute (such as a state's commercial code), or pursuant to public policy (such as implied warranties attendant to the sale of new homes). Thus, in Colorado, a seller or manufacturer may be liable for accidental property damage or bodily injury arising from a product defect that constitutes a breach of Colorado's implied warranties arising from the sale of goods.[7] Such liability may extend to damage to a consumer product itself.[8] Similarly, a new home builder-vendor may be liable for accidental property damage or bodily in-

jury arising from its breach of Colorado's implied warranties. Such implied warranty liability cuts across traditional tort and contract boundaries, because it involves actual physical injury to a consumer's person or property and not merely loss of the benefit of a bargain.[9]

Recently, several courts, including the California, Wisconsin, and North Dakota Supreme Courts, have begun to question whether (if the underlying conduct and resulting injury is the same) the form of action chosen by the plaintiff should dictate whether coverage exists.[10] These same courts have found that the "contractual liability" exclusion is more limited in scope than argued by the insurance industry.[11] These cases are discussed in more detail in the section entitled "Emerging Judicial Views."

Colorado Law

Many Colorado cases have held, based on particular facts or policy language before them, that the policy at issue did not cover an insured's liability for a purely contractual obligation.[12] A discussion of several of these cases follows.

The A.D. Irwin *Case*

A.D. Irwin Investments, Inc. v. Great American Insurance Co.[13] arose from claims that the faulty design and installation of a commercial air conditioning system caused various losses, including: the cost to replace the inadequate system and make accompanying ceiling repairs; the expense of wrapping pipes to prevent further ceiling damage from condensation; ceiling redecoration expenses; and wall repair expenses due to vibrations. The insured's liability insurance policy provided coverage "for all sums that [the insured] might become legally obligated to pay as damages because of injury to or destruction of property, including loss of use, which was caused by accident."[14]

The insured appealed the trial court's finding that the damage was not the result of an "accident." The Colorado Supreme Court held:

> damage which occurs and reoccurs over a continued period of time from the gradual accumulation of condensate or from the functioning or removal of inadequately powered and improperly installed motors is not the result of an accident.[15]

The court concluded that the case presented "a breach of contract," and that the insurer, by its liability insurance policy, did not "become a guarantor of perfect performance."[16] Because *A.D. Irwin* concerned a policy form that did not contain the broader term "occurrence" typically found in today's policies, its continuing vitality is unclear.

The Gerrity Co. *Case*

The plaintiff-insureds in *Gerrity Co. v. CIGNA Property & Casualty Insurance Co.*[17] had a liability policy covering bodily injury and property damage arising out of "an occurrence." The insureds sued their insurer for refusing to defend a lawsuit that sought to impose liability on the insureds under a continuing guaranty given to secure the performance of a contactor who walked off a government job, which resulted in various sureties paying to finish the work. The policy excluded coverage for contractual liability in a nonstandard exclusion, stating: "This insurance does not apply: (a) To liability by the insured under any contract or agreement except in incidental contracts."[18] The Colorado Court of Appeals found no coverage, because the underlying complaint did not allege that any contractual liability arose from an "incidental contract." In response to the plaintiffs' claim that the underlying complaint's negligence allegations triggered the insurer's duty to defend, the court held:

> all the allegations of negligence, if proven, would amount to nothing more than a breach of contract; they do not, and cannot, allege a separate tort claim. As such, the policy exclusion applies, and [insurer] properly denied a defense.[19]

The Hottenstein *Case*

In *Union Insurance Co. v. Hottenstein*,[20] the Colorado Court of Appeals analyzed coverage under the current Commercial General Liability (CGL) insurance policy form[21] for an arbitration award of $67,250 on a breach of contract claim, and $9,915 on a negligent construction claim arising from a renovation contractor walking off the job before completion. The court noted that the policy contained the undefined term "accident," which prior case law had construed to mean an unanticipated or unusual result flowing from a commonplace cause.[22] The court observed that "[a] breach of contract is not generally an accident that constitutes a covered occurrence."[23]

The *Hottenstein* court also analyzed the insured's contention that coverage existed under the policy's exception to the "contractual liability" exclusion, which exception restored coverage for "insured contracts," a defined term. The court found that the contract at issue was not an insured contract within the meaning of the policy, but noted that if a construction contract falls within the exception to the contractual liability exclusion, indemnity might be allowed for property damage resulting from the contractor's breach of its express warranties.[24] This statement, albeit dicta, suggests that the court conceived of some circumstances where breach of contract liability might arise from a covered "occurrence." The court also rebuffed the insured's suggestion that it "recharacterize" her contract damages as negligence damages, particularly where there was no evidence that the damage extended "beyond the scope of the contractor's work."[25]

Hottenstein's holding centers on the distinction between damages flowing from a breach of contract unrelated to any actual property damage or loss of use, such as a simple failure to build in accordance with the applicable contract documents, plans, specifications, or building code, and damages arising from actual property damage or loss of use.[26] *Hottenstein* relied on out-of-state authority for the proposition that:

> construing [a] contractor's breach of contract due to his poor performance as an accident would have converted a general business liability policy into a performance bond, a risk that the insurer clearly did not undertake.[27]

The court thus concluded that "poor workmanship constituting a breach of contract is not a covered occurrence here and that the policy's exception to the contract exclusion does not apply."[28]

The McGowan *Case*

McGowan v. State Farm Fire & Casualty Co.,[29] following *Hottenstein*, said that CGL policies are "not intended to be the equivalent of performance bonds," and held that the insurer's policy did not cover an approximate $400,000 default judgment obtained against a contractor who did faulty work and thus was terminated before the project could be completed. *McGowan* found that an express "faulty workmanship" exclusion for "damage to property that must be restored, repaired, or replaced because of incorrectly performed work by the contractor or someone acting on its behalf" precluded coverage.[30] The court also noted that because the contractor had not completed the work when

the property damage occurred, the damage could not fit within the policy's "completed operations" exception to the "faulty workmanship" exclusion.[31]

Distinguishing Defects From the Resulting Property Damage

The holdings in *A.D. Irwin*, *Gerrity*, *Hottenstein*, and *McGowan* parallel the "defect without resulting property damage" cases.[32] 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. Thus, a defect alone, which does not cause "property damage," may not be covered.[33] Some of these defect without resulting property damage cases characterize the underlying dispute before them as involving "pure economic loss."[34] At least one court has said that in analyzing coverage for an alleged breach of contract claim and "whether a particular loss falls within the scope of an insuring agreement, it is necessary to focus upon '[t]he nature of the damage and the risk involved. . . .'"[35]

Although a cursory reading of *Hottenstein* and *McGowan* might suggest otherwise, finding that a breach of a construction contract constitutes an occurrence does not *necessarily* transform a liability policy into a "surety" or "performance" bond.[36] This is because a surety bond generally *guarantees completion* of the insured's work and terminates on completion of the work, while a CGL policy affords coverage against certain liabilities arising from *actual property damage or loss of use of tangible property* occurring either during "ongoing" or following "completed" construction operations.[37]

In contrast to *A.D. Irwin*, *Gerrity*, *Hottenstein*, and *McGowan*, a separate line of Colorado authority led by *Simon v. Shelter General Insurance Co*.[38] holds that absent a clear, express, and unambiguous exclusion, coverage exists for property damage and bodily injury resulting from a contractor's breach of contractual warranties of performance, quality, fitness, or durability. These holdings, arising from a previous CGL policy form no longer in use, were based on an exception to an exclusion for "liability assumed by the insured under any contract or agreement except an incidental contract," which exception restored coverage for "a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner"[39]

Emerging Judicial Views

The highest courts in California, Wisconsin, and North Dakota, as well as some intermediate courts, have begun to reexamine whether liability insurance coverage may attach to certain contract obligations. These courts have found that such coverage may arise under proper circumstances.

California

The leading national case to seriously re-examine the origin and purposes of the general rule that liability insurance covers tort but not contract liabilities is *Vandenberg v. Superior Court*.[40] In *Vandenberg*, a landlord sued its tenant for contamination of the leased property resulting from the

tenant's improper installation, maintenance, and use of underground waste oil tanks. The California Supreme Court said that coverage should not be based on the fortuity of the form of action chosen by the injured party.[41]

Distinguishing a long line of cases purportedly supporting the general rule of noncoverage for contractual damages, the court held that the nature of the damage and the risk involved, in light of the particular policy provisions, control coverage.[42] The court found that the phrase "legally obligated to pay as damages" was reasonably understood to mean any obligation that is binding and enforceable under the law, whether pursuant to contract or tort liability.[43] The court noted that in many instances, the same underlying conduct may constitute both a breach of contract and a tort.[44] Citing several leading insurance treatises, the court concluded that "the legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered."[45]

Wisconsin

Expanding on the principles espoused in *Vandenberg*, *American Family Mutual Insurance Co. v. American Girl, Inc.*[46] rejected the contention that the underlying claims could not constitute "occurrences" simply because they were labeled breach of contract and warranty. Applying ordinary meanings to the word "accident," *American Girl* found nothing in the basic CGL coverage language supporting a "definitive tort/contract line of demarcation" in determining coverage.[47] Like *Vandenberg*, *American Girl* distinguished a line of authority allegedly supporting a rule of no coverage for contract damages. *American Girl* noted that if losses actionable in contract are never "occurrences" for purposes of the coverage grant, then the policy's series of "business risk" exclusions would be unnecessary.[48]

American Girl also analyzed application of the contractual liability exclusion. Following the majority of decisions and commentators, the court found that the exclusion for "liability assumed by the insured under any written contract" means an agreement by the insured to indemnify a third party, as in an indemnification or hold harmless agreement, and "does not operate to exclude coverage for any and all liabilities to which the insured is exposed under the terms of the contracts it makes generally."[49]

A lengthy dissent argued that because "[c]ontract law aims to protect a party's bargained-for obligations, while tort law seeks to protect society from unanticipated, overwhelming misfortunes," finding coverage for contract losses blurs the distinction between tort and contract, ignores previous case law equating an "accident" with negligence, and fits squarely within the purpose of CGL policy exclusions for business risks.[50]

New York

Another case adopting this line of reasoning, *Hotel des Artistes, Inc. v. General Accident Insurance Co. of America*,[51] held that an insured's "legal obligation to pay damages because of property damage" is not limited to the insured's liability in tort. The court found no language in the coverage grant excluding liability derived from a contractual obligation, and nothing in the policy's coverage terms that implied a distinction between liability acquired by contract or in tort.[52] The court concluded that the insured had a duty to defend because the policy potentially covered a ten-

ant's liability to its landlord for breaching its lease obligation to repair fire-damaged leased premises.[53] Adopting the reasoning from another case that "[i]t is not the form of the pleadings which determines coverage . . . it is the nature of the insured's conduct," the court held that it would not "read into the policy an exclusion for contract-based liability," and criticized the trial court for improperly "engrafting" onto the policy an exclusion for claims "sounding in contract."[54] In contrast, other New York cases ostensibly hold that damages arising out of the breach of a contract are not covered losses under a CGL policy.[55]

North Dakota

In *Acuity v. Burd & Smith Construction*,[56] the North Dakota Supreme Court held that a general contractor's CGL policy covered breach of contract claims because such policies cover tort claims, contract claims, and claims for statutory violations as long as the requisite accidental occurrence and property damage are present and not otherwise excluded. The court found that property damage caused by faulty workmanship is a covered occurrence to the extent the faulty workmanship causes bodily injury or damage to property other than the insured's work product, regardless of the legal theory pled.[57] The court also held that the contractual liability exclusion did not apply because that exclusion is limited to liability of another that the insured "assumes," in the sense of agreeing to indemnify or hold another person harmless.[58]

Other courts appear to be adopting the *Vandenberg/American Girl* coverage analysis, or at least revisiting previous case law addressing the question of coverage for contract claims.[59] The next few years will be telling as to whether there is a significant and widespread change in judicial philosophy on this issue.

Economic Loss Rule

Because some courts have superimposed the "economic loss rule" (Rule) on their coverage analysis pertaining to contract claims, a brief discussion of the Rule follows. Generally, tort law is designed to protect citizens from the risk of physical harm to their persons or their property, and legal duties of care arise without regard to any agreement or contract. Conversely, contract obligations typically arise from promises made between parties, and contract law is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining. In *Town of Alma v. Azco Construction, Inc.*,[60] the Colorado Supreme Court found that the essential difference between tort and contract obligations is the source of the duties between the parties.

Town of Alma adopted the Rule, also known as the "independent duty" rule, which often limits liability when a contract exists between parties. The Rule's principal purpose is to enable contracting parties to confidently allocate a bargain's economic risks and costs. The Rule is much more likely to be applied to commercial transactions not involving large disparities in bargaining power. *Town of Alma* noted that maintaining the focus on the source of the duty preserves a proper demarcation between tort and contract law, even if in some cases contract and tort duties simultaneously exist.[61]

In *A.C. Excavating v. Yacht Club II Homeowners Association, Inc.* (*Yacht Club II*),[62] the Colorado Supreme Court observed that *Cosmopolitan Homes, Inc. v. Weller*[63] imposed a duty of care on builders, independent of any contractual obligations, to build homes without negligence. The court then held that the Rule did not prevent a tort claim by a homeowner against various subcontractors allegedly responsible for a home's defective construction. An older case, *Hiigel v. General Motors Corp.*,[64] holds that physical injury to (and, perhaps, the loss of the use of) consumer goods, property, products, or work-product that is the subject of a contract remains actionable in tort.[65]

In *American Girl*, one dissent argued for the straightforward application of the Rule to the construction of a CGL policy, positing that applying the Rule would avoid blurring the line between contract and tort law; protect the parties' freedom to allocate economic risk through contract; and encourage the parties to assume, allocate, or insure against the risks involved in a commercial transaction.[66] Another dissent urged a close connection between the Rule and analyzing insurance coverage for contract liabilities, but acknowledged that the Rule "is not *directly* applicable to the insurance policy" at issue.[67] Thus, the Rule, if applicable, merely defines the contours of the insured's liability to the claimant; the insurance policy, however, defines the insurer's liability to the insured. Nothing prevents insurers from redefining their indemnity liability in light of future court decisions that might follow *American Girl* or policyholders from considering the availability of such coverage (or lack thereof) in allocating their risks under contracts with others.

Important Policy Provisions in the Contractual Coverage Analysis

Colorado courts employ a fairly standard analysis in deciding insurance coverage issues. Words used in an insurance policy should be given their plain and ordinary meaning unless the contract indicates that the parties intended an alternative interpretation.[68] The insurance contract's meaning and whether it contains conflicting provisions is not determined by reference to what experts in the interpretation of insurance contracts or those with a clear understanding of the legal effects of specific language might understand by reading a policy.[69] Rather, construction of an insurance contract must be ascertained by reference to the meaning a person of ordinary intelligence would attach to it.[70] Construction of an insurance policy and whether a policy provision is ambiguous are legal issues for the court.[71]

A policy's "coverage grant" describes the coverage afforded, subject to the policy's exclusions. Each exclusion then is subject to any exceptions to that exclusion. Where an exception to an exclusion restores coverage, and that coverage conflicts with another exclusion, a determination must be made as to whether the restoration of coverage and the separate exclusion from coverage can be reasonably harmonized.

"Occurrence" Definition

Most modern CGL policies contain a coverage grant that provides:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. . . . No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS—COVERAGES A AND B.
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> - The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]

"Contractual Liability" Exclusion and "Insured Contract" Definition

"Contractual Liability" Exclusion

[This insurance does not apply to] "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages: (1) That the insured would have in the absence of the contract or agreement; or (2) Assumed in a contract or agreement that is an "*insured contract*" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. . . .

"Insured Contract" Definition

"Insured contract," as used in subsection (1) of the contractual liability exclusion, means:

(a) A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract"; (b) A sidetrack agreement; (c) Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad; (d) An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality; (e) An elevator maintenance agreement; (f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

However, this exception to the exclusion typically does not apply to that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of: (a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection or engineering services.

- The "bodily injury" or "property damage" occurs during the policy period.[72]

An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[73] These standard-form policies typically define "property damage" as:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.[74]

"Bodily injury" is defined as:

bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time.[75]

Thus, a Colorado court's first step in its coverage analysis is to decide whether the facts and legal liability alleged by the plaintiff's claims, including any claims sounding in contract, fall within this coverage grant.

The "Contractual Liability" Exclusion, Exceptions, and Defined Terms

If the court finds that the coverage grant applies to the allegations, including any claims sounding in contract, the second step in its coverage analysis is to apply the policy's exclusions. This article examines only the "contractual liability" exclusion.

Most modern CGL policies exclude bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," in what is commonly referred to as the "contractual liability" exclusion.[76] (*See* sidebar regarding "Contractual Liability" Exclusion.) However, this exclusion typically does not apply if such liability is assumed in an "insured contract" (as long as the property damage occurs after execution of the agreement),[77] or where the insured would have had such liability in the absence of the agreement.[78] "Insured contract" is a defined term.[79] (*See* sidebar regarding "Insured Contract" Definition.) As noted above, most courts and commentators have found that, historically, the net effect of this exclusion and its exceptions was to confer coverage for liability arising pursuant to many kinds of indemnity agreements.[80]

One commentator has explained that the terminology used in the contractual liability exclusion to describe liability assumed by the insured under contract has been accepted by many in the insurance industry as a term of art to mean only the assumption of liability under an indemnity or hold harmless provision, and that the phrase has a "much narrower scope than the words' dictionary definition would indicate."[81] However, Colorado applies the plain and ordinary meaning of words used in an insurance policy, and such meaning is not determined by reference to what insurance or legal experts understand by reading a policy. Thus, Colorado courts may not accept such a narrow view of the exclusion.[82] The more broadly a court construes the range of contracts subject to the "contractual liability exclusion," the more contractual liabilities that may be subject to coverage due to the broad restoration of coverage in the exception to the exclusion. At least one court found the exclusion invalid due to ambiguity, because the word "contract" could mean any contract and not just an indemnity agreement.[83]

The exception for "insured contracts" contained in subsection (2) of the contractual liability exclusion restores coverage for some tort or warranty liability under agreements meeting the definition of an "insured contract," including "hold harmless" and indemnity agreements.[84] Such promises to indemnify or hold harmless another should not be confused with promises to purchase insurance on behalf of another or add another as an additional insured under an existing liability policy. Liability arising from the former likely is covered; liability arising from the latter probably is not.[85]

If the coverage grant is construed to include contractual liability for property

damage, and the "initial" contractual liability exclusion is not limited just to indemnity agreements, then the exception to the exclusion for "insured contracts" to include "a lease of premises" or "any easement or license agreement" could lead to coverage for many types of liabilities under lease, easement and license agreements, such as property damage liability resulting from the breach of covenants to maintain and repair. *Vandenberg* and *Hotel des Artistes, Inc.*,[86] discussed above, both involved lease disputes.

The other exception contained in the contractual liability exclusion applies to liability "[t]hat the insured would have in the absence of the contract." One commentator notes the following regarding this and similarly worded clauses: "where the express contract actually adds nothing to the insured's liability, the contractual liability exclusion clause is not applicable, but where [the] insured's liability would not exist except for the express contract, the . . . clause relieves the insurer of liability."[87] This statement preceded the *Vandenberg/American Girl* line of authority, and thus may understate the effect of the exception in light of those cases.

Coverage for Warranty Liability

Implied warranty claims, particularly those arising from property damage or bodily injury, likely will supply the most fertile ground for policyholder-insurer disputes regarding coverage for contractual liabilities. Where courts characterize such implied warranties as a hybrid of tort and contract liability, or as a form of statutorily imposed liability, they may be less hesitant to find coverage. No Colorado appellate court has squarely addressed the issue.[88] Where a jurisdiction strictly defines its implied warranties as just another way of describing a simple contractual promise implied in an agreement, comparison of the policy language to the factual allegations and legal claims is necessary to determine coverage. The U.S. District Court for the District of Utah has found a potential for liability coverage and, thus, a duty to defend, for a "breach of warranty claim . . . as a result of the negligent construction of its subcontractors."[89]

Policyholder Arguments

Consider a claim arising from Colorado's implied warranties accompanying the sale of new homes, where an electrical subcontractor defectively installed a home's wiring, causing the loss of the home to fire and severe burns to its owner-occupant years after sale; or, change the hypothetical slightly to an implied warranty claim arising from a fire caused by a defective oven sold with the home. Policyholders will argue that in both circumstances, the underlying facts giving rise to the implied warranty liability are nearly identical to those giving rise to ordinary tort liability, and those facts plainly describe an "accident"—an unanticipated or unusual result flowing from a commonplace cause.[90] Moreover, policyholders will argue that such liability hardly was voluntarily "assumed" by them in their contracts, but was imposed by law, under either statute (Colorado's Commercial Code) or public policy. Policyholders may argue that they tried to do all they could to disclaim an alleged assumption of this liability, but that their purported disclaimer was struck down or otherwise found inapplicable.[91]

Policyholders also will rely on out-of-state authority for the proposition that if the term "occurrence" is construed to exclude, by definition, any and all contractual liabilities, such construction would render other policy provisions meaningless and mere surplusage.[92] Policyholders will point to various policy exclusions whose application is predicated on the potential of coverage for certain kinds of contractual liabilities. For example, the typical CGL policy excludes property damage coverage under some circumstances to the insured's "work," which is defined to include "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work'. . . ."[93] The typical CGL policy also excludes coverage for property damage to "impaired property" arising out of "[a] delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms," but then excepts from this exclusion "the loss of use of other property arising out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use."[94]

Policyholders will rely on *Cyprus Amax Minerals Co. v. Lexington Insurance Co.*,[95] where the Colorado Supreme Court considered an insurer's contention that its policies were not intended to include a negligent misrepresentation within the definition of "occurrence." The court queried why the 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 arising from property damage arising from reliance on a representation. The court said that such a construction "vitiates this provision" and "is not acceptable," because courts are charged with seeking "to give effect to all provisions so that none will be rendered meaningless."[96]

Insurer Arguments

Insurers will argue that a breach of contract is not an "accident," in the sense that it is not the kind of fortuitous loss that insurance is intended to spread the risk of bearing across the insuring public. Rather, it is a private and voluntary allocation of risk between the contracting parties, limited to the subject matter of their contract. Insurers also will argue that references to certain "contractual" and "warranty" liabilities in CGL policy exclusions do not change the fact that a breach of contract cannot constitute an occurrence, but that other liabilities arising from a breach of contract may be granted coverage, but only if they derive from an underlying tort liability, such as an agreement to indemnify and hold another harmless from tort liability. Finally, insurers will urge that the "contractual liability" exclusion should be read as narrowly as possible, consistent with the industry's intent that its liability policies not be construed as a substitute for a proper surety bond or guarantee against an insured's shoddy work, and that the exclusion's exception is intended only to restore coverage for certain types of indemnity agreements.

Practical Considerations for Policyholders, Claimants, and Counsel

Courts will face the challenge in the coming years of analyzing coverage for truly fortuitous property damage and bodily injury damage claims that are pled as breaches of express or implied warranties in sales and home purchase contracts, or as breaches of express and implied covenants in leases. Where possible, many practitioners often pursue both tort and contract claims, as each has its advantages and disadvantages.

Trying contract versus negligence claims presents significant differences in proof, affirmative defenses, and recoverable damages. Negligence in tort requires evidence of defects in workmanship, supervision, or design as a responsibility of the individual defendant.[97] Unlike a breach of implied warranty claim, proof of a defect alone is not enough to establish a negligence claim.[98] Contract damages typically are limited to those within the contemplation of the parties at the time of contracting, while negligence damages generally include all foreseeable damages.[99] Punitive damages are available in tort but not contract actions.[100] Contract claims and damages may be restricted by liability limitations, warranty disclaimers, claim waivers, and similar clauses.[101] However, even if a contract exists between a negligence claimant and a defendant, the claimant's negligence claims may not be limited by such clauses, due to either limitations on the reach of exculpatory clauses or on public policy grounds.[102] Affirmative defenses vary greatly between contract and tort claims, including differing statutes of limitations,[103] and the likely inapplicability of the comparative negligence and pro rata and nonparty reduction of liability statutes to contract claims.[104]

Because plaintiffs often simultaneously pursue tort and contract claims, attorneys should counsel their clients to take steps that may help maximize the potential of liability insurance coverage for some contractual liabilities. One means of achieving this end may be to more readily enter into indemnity and hold harmless agreements, even under circumstances where a party is not required or asked to do so.[105]

A common circumstance leading to application of the exception to the "contractual liability" exclusion restoring insurance coverage is the typical agreement of subcontractors to indemnify homebuilders against claims and losses arising from the subcontractor's defective work.[106] Such agreement appears to fall squarely within the definition of an "insured contract," and the insurance industry purposefully wrote its contractual liability coverage and definition of "insured contracts" to provide indemnity against this type of contractual liability.[107] In the construction contract context, standardized agreements developed by the American Institute of Architects may provide a start in drafting a covered indemnity obligation. Coverage for liability under other contracts also may qualify, as long as those contracts meet the definition of "insured contracts."

Conclusion

Although courts have been reluctant to find CGL insurance coverage for breach of contract damages, recent decisions indicate that the legal theories pled may not be controlling, and that underlying facts giving rise to the alleged liability and the nature of the claimed damages will be the focus of the courts' inquiries. The underlying contractual liability still must be imposed because of "bodily injury" or "property damage" due to an "occurrence." However, a modern trend appears to be emerging to analyze coverage by comparing the insurance contract terms to the alleged facts, and not summarily concluding without such analysis that liability for breach of a contractual obligation is not covered. Circumstances suggesting an increased likelihood of triggering coverage probably will involve breach of contract damage claims arising from the occurrence of property damage or bodily injury, such as liability for breach of warranties implied by law associated with the sale of goods and new homes.

NOTES

1. *Action Ads, Inc. v. Great Am. Ins. Co.*, 685 P.2d 42, 44 (Wyo. 1984). *See, e.g., VBF, Inc. v. Chubb Group of Ins. Cos*., 263 F.3d 1226, 1231 (10th Cir. 2001) (applying Oklahoma law); *Data Specialties, Inc. v. Transcon. Ins. Co.*, 125 F.3d 909, 911 (5th Cir. 1997) (predicting Texas law); *Cont'l Ins. Co. v. Bussell*, 498 P.2d 706, 709-10 (Alaska 1972); *Kisle v. St. Paul Fire & Marine Ins. Co.,* 495 P.2d 1198, 1200-01 (Or. 1972); *Pa. Mfrs.' Ass'n Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178, 1181 (Pa.Super.Ct. 2003); *Redevelopment Auth. of Cambria County v. Int'l Ins. Co.*, 685 A.2d 581, 589 (Pa.Super.Ct. 1996); *Boiler Brick & Refractory Co. v. Md. Cas. Co.,* 168 S.E.2d 100, 102 (Va. 1969). *See also* 7A Russ and Segalla, *Couch on Insurance 3d* § 103:14 (Thomson-West, 2005) ("[Although] the phrase 'legal liability' includes liability assumed by contract, the phrases 'liability imposed by law,' and 'legally obligated to pay as damages' do not."); 1 Long, *Law of Liability Insurance* § 1.07[1], at 1-42 (Matthew Bender, 2006) ("'Liability imposed by law for damages', or damages which the insured becomes 'legally obligated' to pay, excludes liability which the insured may have voluntarily assumed. . . ."); 1 Ostrager and Newman, *Handbook on Insurance Coverage Disputes* § 7.01 (Aspen Law & Bus., 13th ed., 2006) ("The phrase 'legally obligated to pay as damages' or 'liability imposed by law' refers to the liability of the insured arising from the breach of a duty that exists independent of any contractual relationship between the insured and the injured party."). *But see* Stempel, *Law of Insurance Contract Disputes* § 14.14 at 14-142 (Aspen Law & Bus., 2d ed., 2002) ("in some instances, insurers may be held responsible to cover claims framed by the third-party claimant as breach of contract

rather than in tort"); Malecki and Flitner, *Commercial General Liability* at 6 (Nat'l Underwriter Co., 6th ed., 1997) ("The expression 'legally obligated' connotes legal responsibility that is broad in scope. It is directed at civil liability [that] can arise from either unintentional tort, under common law, statute or contract.").

2. *See Vandenberg v. Super. Ct.*, 982 P.2d 229, 244 (Cal. 1999) (explaining and disagreeing with this rationale).

3. *Action Ads, supra* note 1 at 44-45. *See also* 16 Holmes, *Holmes' Appleman on Insurance 2d* § 117.4(B)(k) (Lexis, 2000) ("breach-of-contract cause of action is not an 'accident' and hence cannot be a covered 'occurrence'").

4. *Redevelopment Auth. of Cambria County, supra* note 1 at 590-91.

5. *See Fire, Cas. & Sur. Bulletins* (*FC&S Bulletins*), Public Liability, A.3-5 (Nat'l Underwriter Co., 2006).

6. *See generally* Drechsler, Annot., "Scope and Effect of Clause in Liability Policy Excluding from Coverage Liability Assumed by Insured Under Contract Not Defined in Policy, Such as One of Indemnity," 63 A.L.R.2d 1122 (1959 & Supp. 2006).

7. *See* Colorado's Product Liability Act, CRS §§ 13-21-401 *et seq.* (all claims against manufacturers and sellers related to products, whether sounding in negligence, strict product defect, warranty, or otherwise, subject to Act's provisions); CRS §§ 4-2-314, -315, -316, and -318 (describing implied warranties arising from sale of goods, conferring rights on third parties suffering personal injury from breach of warranties, and voiding disclaimers of personal injury liability arising from such breach).

8. *See Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 989 (Colo. 1975).

9. *See generally* 3 Bruner and O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 9:3 (Thomson-West, 2006).

10. *Vandenberg, supra* note 2 at 244 (refusing to adopt a per se rule that a liability policy can never afford coverage to contract damage claims); *Hotel des Artistes, Inc. v. Gen. Accident Ins. Co. of Am.*, 775 N.Y.S.2d 262 (N.Y. App. Div. 2004) (accord); *Acuity v. Burd & Smith Construction*, 721 N.W.2d 33 (N.D. 2006) (accord); *Am. Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004) (accord).

11. *See id.*

12. *See, e.g., McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521 (Colo.App. 2004); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196 (Colo.App. 2003); *Gerrity Co. v. CIGNA Prop. & Cas. Ins. Co.*, 860 P.2d 606 (Colo.App. 1993); *A.D. Irwin Invs. Inc. v. Great Am. Ins. Co.*, 475 P.2d 633 (Colo.App. 1970).

13. *A.D. Irwin, supra* note 12.

14. *Id.* at 634.

15. *Id.* at 635.

16. *Id.*

17. *Gerrity, supra* note 12.

18. *Id.* at 608.

19. *Id.* Other courts similarly have found that "clever drafting" cannot turn a contract claim into a tort claim. *See, e.g., VBF, Inc.*, 263 F.3d at 1231; *Redevelopment Auth. of Cambria County, supra* note 1 at 589.

20. *Hottenstein, supra* note 12.

21. Most major carriers write their insurance contracts on standardized forms adopted by an industry group, the Insurance Services Organization (ISO). *See In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991*), aff'd in part, rev'd in part*, 509 U.S. 764 (1993).

22. *Hottenstein, supra* note 12 at 1201.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See id.* at 1202. *Hottenstein* distinguished *Wells Dairy, Inc. v. Travelers Indem. Co.*, 241 F.Supp.2d 945 (N.D. Iowa 2003), which found coverage for breach of contract damages because the damages arose from an explosion, fire, and ensuing property damage, not simply poor workmanship. The court also discussed a second case, *Auto-Owners Ins. Co. v. Toole*, 947 F.Supp. 1557 (M.D.Ala. 1996), that "arose out [of] a business dispute." *Hottenstein, supra* note 12 at 1202. This latter case declined to proclaim a broad rule that claims sounding in contract are not occurrences.

27. *Hottenstein, supra* note 12 at 1201-02 (relying on *Pace Constr. Co. v. United States Fid. & Guar. Ins. Co.*, 934 F.2d 177 (8th Cir. 1991) and *Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995)).

28. *Id.* at 1202.

29. *McGowan, supra* note 12 at 525.

30. *Id.* at 525.

31. *Id.* at 525-26.

32. *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); *DCB Constr. Co. v. Travelers Indem. Co.*, 225 F.Supp. 2d 1230 (D.Colo. 2002) (no coverage for improperly sound-proofed rooms that failed to achieve desired acoustic effect). These cases fall into the "defect alone does not equal property damage" line of cases, because the defects at issue did not result in any actual property damage.

33. This broad statement does not reach the thornier issues of whether the mere presence of the defect may result in coverage due to: (1) the loss of use of the larger thing in which the defective work is incorporated; (2) the imposition of legal liability because of property damage to the larger thing incorporating the defective work or product, due to the repair, replacement, or failure of the defect, or to mitigate property damage or personal injury that may be caused by the defect; or (3) the 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).

34. *See, e.g.*, Ostrager and Newman, *supra* note 1; *Hommel v. George*, 802 P.2d 1156 (Colo. App. 1990) (damages constituted injury to investments rather than injury to property where investors sued general partner who failed to complete construction of condominium units for investment losses and lost profits); *Lamar Truck Plaza, Inc. v. Sentry Ins.*, 757 P.2d 1143, 1144 (Colo.App. 1988) (mere economic loss alleged to arise from employment discrimination claims is not covered property damage).

35. *Detroit Water Team Joint Venture v. Agric. Ins. Co.*, 371 F.3d 336, 340 (6th Cir. 2004) (although "property damage" is a risk insured under liability policy, insured's contractual obligation to repair property damage caused by third party not sufficiently definite as to constitute a legal obligation for which the insuring agreement provides coverage, *citing Vandenberg, supra* note 2 at 244). *See also Hartford Accident & Indem. Co. v. A.P. Reale & Sons, Inc.*, 644 N.Y.S.2d 442, 443 (N.Y.App.Div. 1996) (purpose of liability policy is "to provide coverage for tort liability for physical damage to others and not for contractual liability of the insured for economic loss. . . .").

36. *See O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99, 104-05 (Minn.App. 1996), *abrogated on other grounds*, *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002); *Fid. & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212, 1218 (D.Kan. 2002). *See also Thommes v. Milwaukee Ins. Co.*, 641 N.W. 2d 877, 880, and 884 (Minn. 2002) (refusing to recognize "implied" exclusions in CGL policy for deficient construction).

37. *See O'Shaughnessy, supra* note 36; *Fid. & Deposit Co. of Maryland*, *supra* note 36. *See also FC&S Bulletins, supra* note 5 at Public Liability, A.2-10–A.2-11.

38. *See Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236 (Colo. 1992); *Flatiron Paving Co. v. Great Southwest Fire Ins. Co.*, 812 P.2d 668 (Colo.App. 1990); *Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11 (Colo.App. 1985); *Worsham Constr. Co. v. Reliance Ins. Co.*, 687 P.2d 988 (Colo.App. 1984).

39. *Simon, supra* note 38 at 239.

40. *Vandenberg, supra* note 2 at 244.

41. *Id.*

42. *Id.*

43. *Id.* at 245.

44. *Id.*

45. *Id.* at 245-46 (citations omitted).

46. *American Girl, supra* note 10.

47. *Id.* at 77.

48. *Id.* at 78 ("If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it.").

49. *Id.* at 80-81. The court recognized that a minority of decisions applied the exclusion to obviate coverage under circumstances where an insured "assumes liability (that is, a duty of performance, the breach of which will give rise to liability) whenever one enters into a binding contract," but held that the term "assumption" must be interpreted to add something to the phrase "assumption of liability" in a contract or agreement. *Id.*

50. *Id.* at 87-89.

51. *Hotel des Artistes, supra* note 10 at 267-69.
52. *Id.* at 268-69.
53. *Id.* at 270-71.
54. *Id.* (citations omitted). Curiously, the policy contained an exclusion for certain contractually assumed liabilities, but this exclusion was not considered by the court because the insurer had not reserved it as a defense. *Id*. at 265.
55. *See Perras Excavating Inc. v. Transp. Ins. Co*., 737 N.Y.S.2d 692, 693 (N.Y.App.Div. 2002); *Structural Bldg. Prods. Corp. v. Bus. Ins. Agency, Inc.*, 722 N.Y.S.2d 559, 562 (N.Y.App. Div. 2001).
56. *Acuity, supra* note 10.
57. *Id.* at 39. *But see* Sandgrund and Sullan, *Residential Construction Law in Colorado* § 14.2.20 at 201-03 (CBA–CLE, 2005) (an exception to the "your work" exclusion provides coverage for damage to the insured's work product if the work was performed by subcontractors).
58. *Acuity, supra* note 10 at 40.
59. *See, e.g., Auto-Owners Ins. Co. v. NewMech Cos.*, 678 N.W.2d 477 (Minn.Ct.App. 2004) (contractual liability exclusion did not exclude coverage for condominium developer's liability for property damage caused by faulty mechanical systems, even though plaintiff-homeowners based claims on repair agreements with developer, where developer also was liable for damages under statutorily imposed warranties that were not contractual liabilities); *Clark Const. Group, Inc. v. Eagle Amalgamated Serv., Inc*., No. 01-2478-DV, 2005 WL 2092998 (W.D.Tenn. 2005) ("there are times when an insurance policy provides coverage for claims that are partly based in breach of contract"). *See also* Stempel, *supra* note 1 at § 14.14, 14-142 ("in some instances, insurers may be held responsible to cover claims framed by the third-party claimant as breach of contract rather than in tort.").
60. *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000).
61. *Id.* at 1262-63.
62. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005).
63. *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041 (Colo. 1983).
64. *Hiigel, supra* note 8.
65. Courts recognize that the risk of physical injury to a person or his or her property is not likely to be the subject of informed consumer analysis as part of the purchase of property, goods, or services. Coupling this factor with the individual consumer's relative lack of bargaining power and knowledge, the widespread availability of liability insurance covering property damage and bodily injury, and the ability of businesses to spread the risk of loss across the market through pricing suggests that courts will be strongly inclined to recognize an independent tort duty in cases of physical injury to a consumer's person or property.
66. *American Girl, supra* note 10 at 87-88.
67. *Id.* at 91 (emphasis in original).
68. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 613 (Colo. 1999).
69. *Simon, supra* note 38 at 240.
70. *Id*.
71. *See, e.g., Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1261-62 (Colo. 1998).
72. *FC&S Bulletins, supra* note 5 at Public Liability, A.3-1–A.3-2.
73. *Id.* at Public Liability, A.2-7.
74. *Id.* at Public Liability, A.2-10–A.2-11.
75. *Id.* at Public Liability, A.2-3.
76. *Id.* at Public Liability, A.3-5.
77. *See In re Endeavor Marine, Inc*., No. Civ.A. 98-0779, 2000 WL 192994, *3-4 (E.D.La. Feb. 16, 2000) (noting policy does not define the date of "execution" or use the term "execute" in any provision other than in the exclusion, and that this was not a case where the insured was trying to enter "into an insured contract retroactive to a time far in advance of the initial coverage date."); *Motor Vehicle Cas. Co. v. GSF Energy, Inc*., 549 N.E.2d 884 (Ill.App.Ct. 1989) (exclusion did not apply although claim was based on injury that occurred before execution of written contract between insured and indemnitee, where there was a pre-existing oral agreement, and written contract merely memorialized terms of oral contract). Difficulties arise if a contract, executed before the effective policy date, is later modified. Generally,

a contract modification relates back in time to the date of the original contract, at least insofar as what law controls the contract's construction. *See Fellers-Schoonmaker Homes, Inc. v. Five Star Homes & Real Estate, Inc.*, 405 P.2d 677 (Colo. 1965) (original contract terms still followed if not inconsistent with modified terms; intent to discharge original contract not presumed); *Colowyo. Coal Co. v. City of Colo. Springs*, 879 P.2d 438 (Colo.App. 1994) (following modification, law at time original contract entered governs unless original contract expressly abrogated).

78. *FC&S Bulletins, supra* note 5 at Public Liability, A.3-5. Some variations of this policy form add the following language to the exceptions to the contractual liability exclusion:

> Solely for purposes of liability assumed in an "insured contract," reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage" provided: (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and (b) Such attorney fees and litigation expenses are for the defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

Id. at A.3-5–A.3-6. *See also* Malecki and Flitner, *supra* note 1 at 21.

79. *FC&S Bulletins, supra* note 5 at Public Liability, A.2-4–A.2-5. Subsections (2) and (3) to the definition of "insured contract" generally restore the contractual liability exclusion's application under circumstances where a professional liability or errors and omissions policy otherwise might provide coverage. *Cf. Durbrow v. Mike Check Builders, Inc.*, 442 F.Supp.2d 676 (E.D.Wis. 2006) (professional services exclusion did not bar coverage for water damage allegedly caused by faulty workmanship absent allegation that claimed damages stemmed from insured preparing or approving of maps, surveys, designs, or similar work). For an often-cited discussion of the purpose underlying the "professional services" exclusion, *see Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870 (Neb. 1968) (act or service at issue must use special learning, something more than mere proficiency). Insureds may be able to delete this "errors and omissions" exclusion for an additional premium and obtain limited coverage for "design-build" damages.

80. *See, e.g., Fisher v. Am. Family Mut. Ins. Co.*, 579 N.W.2d 599, 603 (N.D. 1998) (quoting with approval 2 Long, *The Law of Liability Insurance* § 10.05[2] (Matthew Bender, 1998)); *American Girl, supra* note 10 at 79-81. *See also Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 726 (5th Cir. 1999); *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, 845 F.Supp. 428, 442 (W.D.Mich. 1993). *See also Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008, 1011 (Alaska 1982) (explaining that assumption of liability in a contract "refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract."); *cf. Gibson & Assocs., Inc. v. Home Ins. Co.*, 966 F.Supp. 468, 474 (N.D.Tex. 1997) (contractual liability coverage provisions are specifically designed to provide coverage for indemnification actions, even though policy may offer no coverage for breach of contractual duty).

81. *See* Turner, *Insurance Coverage of Construction Disputes* § 10:1 (West, 2d ed., 2006) (noting that certain "guarantee" agreements may qualify as agreements under which a policyholder may contractually "assume" the liability of a third party. *See id.* at § 10:7.

82. *See Simon, supra* note 38 at 240.

83. *See Cal-Farm Ins. Co. v. TAC Exterminators*, 218 Cal.Rptr. 407 (Cal.App. 1985).

84. *See Gibson & Assocs., supra* note 80 at 474.

85. *See Steamboat Dev. Corp. v. Bacjac Indus., Inc.*, 701 P.2d 127 (Colo.App. 1985); *Richmond v. Grabowski*, 781 P.2d 192, 194 (Colo. App. 1989) (discussion of liability resulting from a promise to purchase insurance on behalf of another or add another as an additional insured under one's existing liability policy).

86. *Vandenberg, supra* note 2; *Hotel des Artistes, supra* note 10.

87. *See* Dreschler, *supra* note 6.

88. *See Hoang v. Monterra Homes LLC*, 129 P.3d 1028 (Colo.App. 2005) (impliedly upholding coverage for all underlying claims, including breach of implied warranties, but limiting coverage based on earth movement exclusion), *cert. granted on other grounds*, No. 05SC389, 2006 WL 1586645 (Colo. 2006); *cf. Haugan v. Home Indem. Co.*, 197 N.W.2d 18, 23 (S.D. 1972) (interpreting pre-1986 ISO form, holding "Breach of an implied warranty is not a contractual assumption of liability."). *See also Dalvit v. Larsen Homes, Ltd. v. Md. Cas. Co.*, No. 01-CV-5333 (Denver Dist. Ct. 2005) (builder's breach of implied warranty was both an "accident" and "occurrence," triggering coverage).

89. *See Great American Ins. Co. v. Woodside Homes Corp.* 448 F.Supp.2d 1275, 1285-86 (D.Utah 2006).

90. *See Hottenstein, supra* note 12.

91. *See Hiigel, supra* note 8 (manufacturer's attempt to disclaim implied warranties provided under Uniform Commercial Code must be brought to consumer's attention and agreed to by consumer); *Cherokee Inv. Co. v. Voiles*, 443 P.2d 727 (Colo. 1968) (refusing to enforce implied warranty disclaimer accompanying sale of goods). As to new homes, the Colorado Supreme Court has, to date, specifically declined to determine whether a builder-vendor of a new home may disclaim Colorado's implied warranties. *See Sloat v. Matheny*, 625 P.2d 1031, 1034 (Colo. 1981). Other jurisdictions have held attempted disclaimers of implied warranties void as against public policy. *See, e.g., Melody Homes Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987).

92. *See, e.g., American Girl, supra* note 10 at 76-77; *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (Kan. 2006); *J.S.U.B., Inc. v. U.S. Fire Ins. Co.*, 906 So.2d 303 (Fla.App. 2005).

93. *FC&S Bulletins, supra* note 5 at Public Liability, A.2-13.

94. *Id.* at Public Liability, A.3-16.

95. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294 (Colo. 2003).

96. *Id.* at 307, *quoting Pub. Serv. Co. v. Wallis & Co.*, 986 P.2d 924, 933 (Colo. 1999).

97. *See Cosmopolitan Homes, supra* note 63 at 1045.

98. *Id.*

99. *See Vanderbeek v. Vernon Corp.*, 50 P.3d 866 (Colo. 2002).

100. *Decker v. Browning-Ferris Indus., Inc.,* 931 P.2d 436, 446 (Colo. 1997); *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 682 (Colo. 1994).

101. *See generally* Sandgrund and Sullan, *supra* note 57 at §§ 14.4.3.g and 14.9.2.

102. *See generally Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (examining limits on exculpatory clauses).

103. *See Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001) (CRS § 13-80-101, statute of limitations for contract actions, rather than CRS § 13-80-104, contractors' statute of limitations, applies to claim for breach of express warranty to repair or replace defective work).

104. *See generally* Sandgrund and Sullan, *supra* note 57 at § 14.9.3-.4.

105. An open question is whether coverage restored by the exception "trumps" other policy exclusions. *Compare Simon, supra* note 38 (exception restores coverage notwithstanding other exclusions to the contrary) *with Hoang, supra* note 88 (exclusion's exception restoring coverage did not trump separate exclusion denying coverage).

106. *See generally* Drechsler, *supra* note 6; Richmond and Black, "Expanding Liability Coverage: Insured Contracts and Additional Insureds," 44 *Drake L.Rev.* 781 (1996); Turner, *supra* note 81 at § 10.1 (most construction contracts provide that one party will assume the liability of another).

107. *American Girl, supra* note 10 at 80-81. ■