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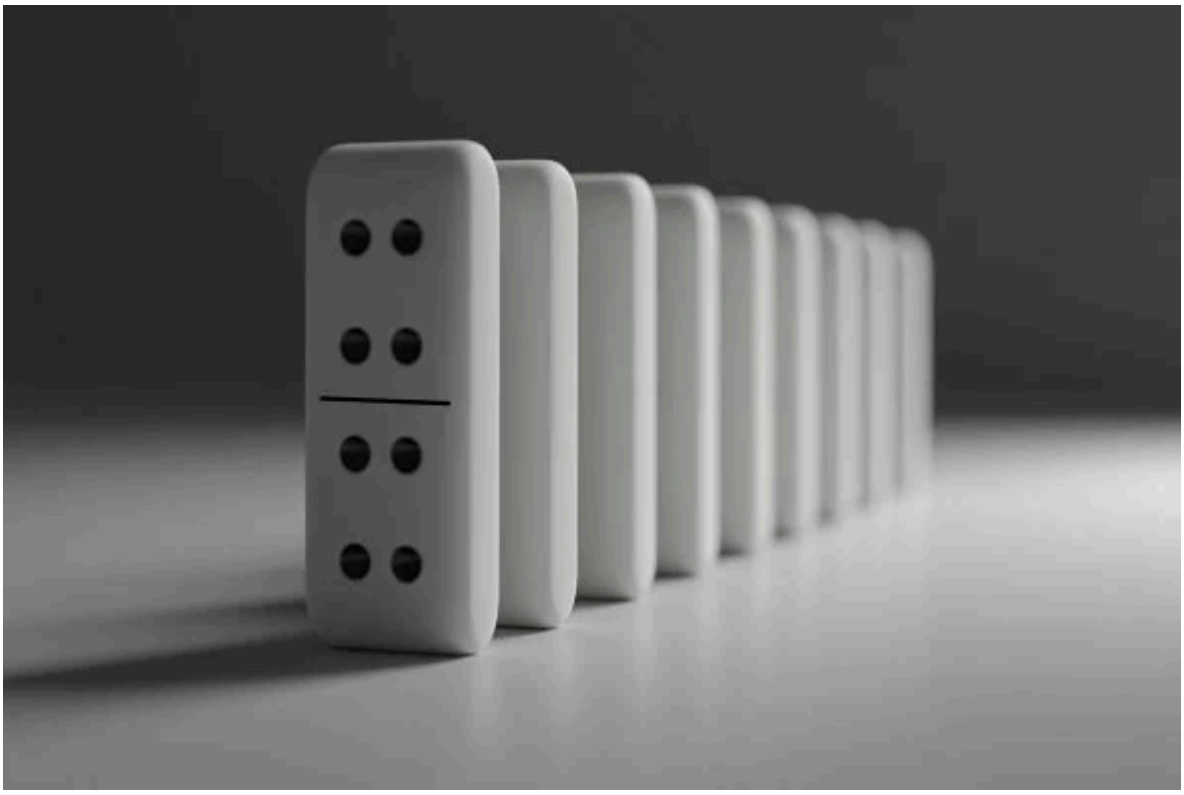
When and If the Next Domino Will Fall

February 28, 2025 | Patrick Wielinski



> Don't wanna discuss it
>
> Think it's time for a change
>
> You may get disgusted
>
> Start thinking that I'm strange …
>
> There's no need for argument
>
> There's no argument at all …
>
> Oh oh Domino….
>
> —Van Morrison, "Domino"

Domino toppling involves standing up dominoes in a sequence known as a domino run and then knocking down the first one in line to strike the next, which knocks that one down to strike the next, and so on, creating a chain reaction referred to as a domino effect. The analogy to falling dominoes is frequently applied in everyday parlance, and a domino effect is a cumulative effect produced when one event initiates a succession of similar events. This article likens the decades' long raft of litigation over the concept of "occurrence" as applied to property damage arising out of construction defects to a domino effect moving inexorably to increased coverage for construction insureds.

Van Morrison's "Domino" was released in 1970, as coverage for property damage under the commercial general liability (CGL) policy was evolving. Though the song certainly had nothing to do with insurance, it remains vibrant today and is a staple of the classic rock genre. It serves as a soundtrack for the overriding issue that is the subject of this article—whether the remaining holdout states (i.e., the dominoes that remain standing) will eventually fall.

This article examines the decades-long raft of litigation over the concept of "occurrence" as applied to property damage arising out of construction defects. The trend appears to be moving inexorably to increased coverage for construction insureds. For a map of these states and their current status, see "Defective Work as an Occurrence—State Court Holdings."

The 1980s: Not Enough Dominoes To Topple

Throughout the 1980s and up to the dawn of the twenty-first century, there was little in the way of developments relating to insurance coverage for property damage arising out of defective work or faulty construction. By and large, any developments were negative in terms of additional commercial general liability (CGL) coverage for contractors and owners. Revisions of the CGL forms in 1966 and 1973 ushered in exclusions for property damage arising out of the named insured's work or product, but the availability of the broad form property damage (BFPD) endorsement to the standard 1973 policy modified those exclusions to preserve coverage for property damage occurring to nondefective work during operations and to work performed on behalf of the named insured by subcontractors. These expansions of coverage have been retained in the current editions of the CGL form that were promulgated in 1986.

Unfortunately, the CGL policy changes were largely ignored by insurers (and many insureds) and the courts. Rather, courts tended to depart from the terms of the policies themselves in favor of vague coverage platitudes such as a breach of contract is always intentional, not accidental, and, thus, could not be an occurrence, or that damage to an insured's work is always expected. [1]

The poster child for this view is *Weedo v. Stone-E-Brick, Inc.,* 81 N.J. 233, 405 A.2d 788 (1979). The court recognized that construction defects do not constitute an occurrence and are covered only when the damage claimed is for the cost of correcting damage done to property other than the insured's own work, even though the *Weedo* case based its business risk analysis on the 1973 policy exclusions without consideration of the effect of the BFPD exclusion on expanding coverage for the construction industry. The *Weedo* court bootstrapped its reasoning with a citation of Roger C. Henderson, "Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know," *Nebraska Law Review*, 1971. That article also failed to consider the existence of the BFPD exclusion, concluding that CGL

coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not what the damaged person bargained for.

The *Weedo* reasoning was eventually cited in nearly 200 other cases and continued to stand strong as virtually "untopplable" (pardon the grammatical license) and unsupported by more reasoned interpretations of the CGL policy according to its actual terms. Another frequently cited example of the application of *Weedo* (and the Henderson law review article) in support of a denial of coverage to a contractor is *Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.,* 52 F. Supp. 2d 569 (E.D.N.C. 1999), in which the insured general contractor sought coverage from its CGL insurers for damages to a building caused by a leaky roof installed by a subcontractor. The policies before the court were on the 1973 form with a BFPD exclusion, but the court concluded that, because the damages were based solely on the costs of repairing the insured's allegedly faulty workmanship, there was no "occurrence" within the meaning of the policies.

A similar case is *Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.,* 396 N.W.2d 229 (Minn. 1986). The court applied a business risk rationale largely borrowed from *Weedo*/Henderson to deny coverage to a general contractor for property damage caused by its subcontractor's use of a defective mortar additive in brick masonry, observing that the replacement of the 1973 work performed exclusion by the BFPD endorsement work performed exclusion constituted only a slight difference in wording.

2000–2020: Many Dominoes Topple

In accord with the structure of the policy form, CGL insurance coverage for most defective construction claims historically turned on the applicability of exclusions relating to damage to the insured's own work. Due to the coverage enhancements introduced with the BFPD exclusion to the policy in the late 1960s and the subsequent incorporation of those enhancements into the policy itself in 1986, the insurance industry found itself paying claims that it may not have underwritten.

These claims ran the gamut of residential condominium defects, subdivision-wide construction and single-family homes, and commercial and industrial projects. Often, claims also involved alleged construction defects occurring years after completion but before the expiration of the applicable statute of repose, thus, triggering coverage under the completed operations hazard.

As a result, insurers pivoted toward interpreting defective construction insurance claims strictly according to the insuring agreement of the policy, contributing greatly to the explosion of construction defect coverage litigation. Many courts accepted a novel interpretation of the CGL insurance policy based on the definition of "occurrence" to deny claims involving defective work that had previously been covered under the more traditional policy approach of applying the property damage exclusions, ignoring the coverage preserved for defective work claims under those exclusions. By focusing on the definition of "occurrence" and, at the same time, diverting attention away from the coverage preserved under the property damage exclusions, these arguments and the cases that adopted them departed from the language of the CGL policy itself.

But there was a "Domino-like" "time for a change" (to borrow from Van Morrison), and eventually, the presence of the limited property damage exclusions in the policies weakened the "no occurrence/no

property damage" argument. Applying the standard rules of contract interpretation, courts held that the insertion of exclusions such as exclusion l., the your work exclusion, exclusion j.(5) the operations exclusion, and exclusion j.(6), the incorrect work exclusion, indicated that the property damage claims exclusions were necessary because defective work claims, even many involving defective work by insureds, survived muster under the CGL insuring agreement. In other words, the existence of an occurrence and property damage was upheld. Other courts simply refused to accept that all property damage arising out of defective work flowed from an uninsured breach of contract, was expected or intended, and was not an occurrence. There was a sea change shift in the interpretation and handling of these claims.

As a result, "dominoes" in many states began to fall. Many states recognized that defective work can give rise to an occurrence, even where the property damage may be to the insured's own work. These cases/laws are listed below in loosely chronological order.

- *Fejes v. Alaska Ins. Co.,* 984 P.2d 519 (Alaska 1999) (1973 policy form)
- *Wanzek Constr., Inc. v. Employers Ins. of Wausau,* 679 N.W.2d 322 (Minn. 2004)
- *Broadmoor Anderson v. National Union Fire Ins. Co.,* 912 So. 2d 400 (La. App. 2d Cir. 2005), *cert. den.,* 925 So. 2d 1239 (La. 2006*)*
- *Lee Bldrs., Inc. v. Farm Bureau Mut. Ins. Co.,* 137 P.3d 486 (Kan. 2006)
- *Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 242 S.W.3d 1 (Tex. 2007)
- *Fine Paints of Europe, Inc. v. Acadia Ins. Co.,* 2009 WL 819466, 2009 U.S. Dist. LEXIS 24188 (D. Vt. Mar. 24, 2009)
- *Sheehan Constr. Co., Inc. v. Continental Cas. Co.,* 935 N.E.2d 160 (Ind. 2010)
- *Architex Ass'n, Inc. v. Scottsdale Ins. Co.,* 27 So. 3d 1148 (Miss. 2010)
- Ark. Stat. § 23–79–155 (2011)
- *Boothbay Harbor Shipyard, LLC v. North Am. Specialty Ins. Co.,* 2012 WL 3779207, 2012 U.S. Dist. LEXIS 123525 (D. Me. Aug. 30, 2012)
- *Big-D Constr. Corp. v. Take It for Granite Too,* 917 F. Supp. 2d 1096 (D. Nev. 2013)
- *State ex rel. Nationwide Mut. Ins. Co. v. Wilson,* 778 S.E.2d 677 (W. Va. 2015)
- *Employers Mut. Cas. Co. v. Fisher Bldrs., Inc.,* 371 P.3d 375 (Mont. 2016)
- *Owners Ins. Co. v. Tibke Constr., Inc.,* 901 N.W.2d 80 (S.D. 2017)
- *Travelers Prop. Cas. Co. of Am. v. Northwest Pipe Co.,* 2017 WL 2687652, 2017 U.S. Dist. LEXIS 96643 (W.D. Wash. June 22, 2017
- *Skanska USA Bldg., Inc. v. M.A.P. Mech. Contrs., Inc.,* 505 Mich. 368, 952 N.W.2d 402 (2020)

Many other states recognized that defective work could give rise to an occurrence but in slightly more limited circumstances, which is where the property damage is to other than the defective work itself, even if it's the insured's own work. Those toppled dominoes include the following, in loosely chronological order:

- *American Family Mut. Ins. Co. v. American Girl, Inc.,* 673 N.W.2d 65, 78 (Wis. 2004)
- *United States Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871 (Fla. 2007)

- *Lennar Corp. v. Auto-Owners Ins. Co.,* 214 Ariz. 255, 151 P.3d 538 (Ct. App. 2007)
- *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.,* 216 S.W.3d 302 (Tenn. 2007)
- *Auto Owners Ins. Co., Inc. v. Newman,* 684 S.E.2d 541 (S.C. 2009)
- *Furey Roofing & Constr. Co., Inc. v. Employers Mut. Cas. Ins. Co.,* 2010 WL 422253, 2010 R.I. Super. LEXIS 24 (Super. Ct. Feb. 1, 2010)
- *Greystone Constr., Inc. v. National Fire & Marine Ins. Co.,* 661 F.3d 1272 (10th Cir. 2011), *but see* C.R.S.A. § 13–20–808 (2010)
- *Crossmann Cmtys. of NC, Inc. v. Harleysville Mut. Ins. Co.,* 395 S.C. 40, 717 S.E.2d 589 (2011)
- *Capstone Bldg. Corp. v. American Motorists Ins. Co.,* 67 A.3d 961 (Conn. 2013)
- *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.,* 746 S.E.2d 587 (Ga. 2013)
- *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Alliance Roofing & Sheet Metal, Inc.,* 2013 WL 1120587, 2013 U.S. Dist. LEXIS 38567 (D. Md. Mar. 14, 2013)
- *Regional Steel Corp. v. Liberty Surplus Ins. Corp.,* 226 Cal. App. 4th 1377, 173 Cal. Rptr. 3d 91 (2014)
- *Owners Ins. Co. v. Jim Carr Homebuilder, LLC,* 157 So. 3d 148 (Ala. 2014)
- *Pulte Homes of NM, Inc. v. Indiana Lumbermens Ins. Co.,* 367 P.3d 869 (N.M. Ct. App. 2015)
- *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC,* 143 A.3d 273 (N.J. 2016)
- *National Surety Corp. v. Westlake Investments, LLC,* 880 N.W.2d 724 (Iowa 2016)
- *Fountaincourt Homeowners' Ass'n v. Fountaincourt Dev., LLC,* 360 Or. 341, 380 P.3d 916 (2016)

Illinois: The Much-Anticipated Toppled Domino

The most recently toppled domino to be added to the states that have recognized property damage arising out of defective work, even to the defective work of the named insured, is an occurrence, which was eagerly awaited for over 20 years. On November 23, 2023, the Illinois Supreme Court did not disappoint in toppling one of the last major cases blocking coverage in *Acuity v. M/I Homes of Chicago, LLC,* 2023 IL 129087, 234 N.E.3d 97 (2023). The case involved CGL coverage for construction defects resulting in water damage to a townhome project.

In that context, the Illinois Supreme Court responded to the request of the intermediate appellate court to clarify the law as to the existence of property damage and occurrence in Illinois. The court acknowledged that M/I Homes, the insured, was supported by an amici curiae brief sponsored by AGC of America, National Association of Home Builders, American Subcontractors Association, and their local chapters in Illinois.

For decades, courts in Illinois had interpreted the definitions of "property damage" and "occurrence" in the standard CGL policy to deny coverage for property damage arising out of defective construction as to the entire construction project itself. Those courts found coverage only in the unlikely event of damage to other real property and, perhaps, to the personal property of project owners. In reality, this amounted to little, if any, coverage for Illinois insureds; Illinois had lagged behind numerous other jurisdictions in upholding coverage for unexpected and unintended property damage arising out of faulty workmanship by the insured. The Illinois Supreme Court noted that such a narrow view of coverage is unsupported by the policy language, and it joined the majority of jurisdictions in holding that unexpected and unintended

physical injury to tangible property arising out of defective work amounts to an occurrence of property damage under a CGL policy.

The court further opined that once an occurrence of property damage is found, resort must be had to the property damage exclusions within the policy to determine ultimate coverage, including exclusion l., the your work exclusion including the subcontractor exception; exclusion j.(5), the operations exclusion, and exclusion j.(6), the incorrect work exclusion, including their particular part limitations; and exclusion m., the impaired property or property that has not been physically injured exclusion. In doing so, the court rejected the notion that property damage arising out of defective workmanship amounts to an uninsurable "business risk," the cost of which is to be borne by the insured contractor itself. [2]

Aligning itself with the majority of jurisdictions, the court concluded that uninsured business risks are to be sorted out through the application of the property damage exclusions. In that regard, it remanded the case to the trial court to determine issues relating to the applicability of those exclusions to the facts before it.

While *Acuity Homes v. M/I Homes* was pending before the Illinois Supreme Court, the Northern District of Illinois entered judgment on the pleadings in favor of Acuity, the insurer, in a declaratory judgment action brought against it by Cornice & Rose (C&R), the insured architectural firm, seeking a defense as to property damage alleged against C&R by an owner. *Cornice & Rose Int'l v. Acuity,* 631 F. Supp. 3d 551 (N.D. Ill. 2022). The district court upheld Acuity's denial of coverage based on the Illinois law in effect at that time, finding the pleadings alleged that no third-party property was damaged beyond the work of the insured and that Acuity was entitled to judgment on the pleadings that it owed no duty to defend C&R.

C&R appealed, relying on the change in Illinois wrought by *Acuity v. M/I Homes*. *Cornice & Rose Int'l, LLC v. Acuity*, No. 23-1152, 2024 WL 4880102, 2024 U.S. App. LEXIS 29925 (7th Cir. Nov. 25, 2024). In response to C&R's appeal, Acuity sought to cut some of its losses from *Acuity v. M/I Homes* by requesting the court determine that *Acuity v. M/I Homes* was, in fact, an outlier case that fell outside the presumption of a retrospective application of a supreme court opinion because it changed the law. The Seventh Circuit flatly rejected that argument, stating that "rather than changing the law, *[M/I] Homes* reiterated the longstanding principle that contracts are to be interpreted as written and that at most, it clarified Illinois law and abrogated decisions that interpreted insurance policies based on their generic purpose instead of their text." Therefore, the court panel found that *M/I Homes* did not change the law but rather reaffirmed the principle that contracts must be enforced as written, abrogating prior decisions that prioritized policy intent over text. [3]

Massachusetts: The Untoppled Dominoes Persist

Acuity v. M/I Homes invalidated the previously restrictive policy interpretation of Illinois, emphasizing that unexpected property damage from negligent work—even within the insured's scope of work—constitutes an occurrence. This shift expands potential coverage for construction insureds, provided the property damage exclusions within the policy do not apply.

At the same time, vestiges of restrictive approaches to occurrence/property damage exist and continue to be upheld in a number, though relatively limited, of states. In each of the following cases, the dominoes

appeared to line up to topple, but they remained standing as blockades to legitimate coverage in those outlier states, including Massachusetts.

In *Lessard v. Havens & Sons Inc.,* 104 N.E. 3d 744 (Mass. Ct. App. 2024), the insured home builder sought coverage from its CGL insurer for a judgment in excess of $250,000 in damages for construction defects in a home it constructed. Damages included structural as well as defective installation of other elements of the roof and siding. The insurer intervened and sought a declaration that it did not have a duty to indemnify the insured under the policy, and the court agreed, holding that CGL policies provide coverage for tort liability for physical damage to others and not for the contractual liability of the insured for economic loss and that replacement or repair of faulty goods and work is a business expense to be borne by the insured contractor in order to satisfy its customers.

The court rejected the argument that the damages were, at least in part, for the cost of repairing property damage that the construction defects caused, not the costs of repairing or removing the construction defects themselves in that the structural defects caused cracks in the walls and defects in the roof deck and siding, and defects in the roof and siding caused water damage. However, neither the insured nor the homeowners identified any sums to repair the cracks or the water damage.

Massachusetts remains one of a relatively small number of jurisdictions that, contrary to the definition of "property damage" in the CGL policy, limit coverage to only third-party property and deny coverage for damage to the work of the insured, often leading to anomalous results and confusion. For example, in *Admiral Ins. Co. v. Tocci Bldg. Corp.,* 120 F.4th 933 (1st Cir. 2024), Tocci, the insured contractor, entered into a contract to serve as construction manager on a residential project. The owner alleged items of deficient work and supervision on the part of Tocci, including the failure to properly install the building envelope due to the deficient installation of the primary weather-resistant barrier and the deficient installation and sealing of the windows in all five buildings, as well as numerous other items of faulty workmanship. Admiral, Tocci's CGL insurer, denied coverage, prompting dueling coverage lawsuits in Massachusetts and New Jersey courts.

The Massachusetts district court, following Massachusetts law, held that construction defects within the insured's scope of work do not qualify as an occurrence under a CGL policy. While the court acknowledged contrary authority, such as *Cypress Point Condo Assn. v. Adria Towers LLC,* 226 N.J. 403, 143 A.3d 273 (2016), holding that subcontracted defective work could be an occurrence, it declined to follow this reasoning. Instead, the court predicted Massachusetts would adopt a narrower view, consistent with earlier precedents like *Weedo* and Henderson's article. Both of these outmoded authorities have since been discredited as to the 1986 CGL forms by many cases, including *Cypress Point*.

On appeal, the First Circuit Court of Appeals affirmed, but not by addressing whether faulty work could constitute an occurrence. Instead, the court sidestepped the rules of insurance policy interpretation by first determining whether the insuring agreement and its definitions (occurrence and property damage) were satisfied and skipped straight to the exclusions. It applied exclusion j.(6), stating that the insurance did not apply to "that particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it." Unfortunately, the court undertook an extremely broad reading of "that particular part" as a reference to the entirety of the project where Tocci was the contract manager

contractor charged with supervising and managing the project as a whole, refusing to apply other case law that limited the scope of "that particular part" to only the defective portions of the work.

In footnote 4, addressing whether the application of exclusions rendered a reading of the property damage/occurrence definitions to deny coverage for Tocci's work as meaningless surplusage, the court appeared to accept Admiral's position that the exclusions were added (albeit improbably) as a backstop for use in jurisdictions that had found there was coverage for this type of claim. In other words, it would only be surplusage in jurisdictions that, unlike Massachusetts, had concluded such damage is not property damage or does not arise from an occurrence. [4]

While Illinois has joined jurisdictions favoring coverage for unintended construction defects, Massachusetts remains aligned with the lingering minority view that faulty workmanship is a business risk outside of CGL coverage. These contrasting rulings highlight the persistent state-by-state divergence over whether defective construction qualifies as "property damage" caused by an "occurrence," sometimes creating a patchwork landscape for contractors and insurers operating across multiple states. This was the scenario before the court in *Admiral v. Tocci*, where the laws of New Jersey and Massachusetts differed significantly as to the scope of coverage for property damage arising out of defective work.

New York: The Dominoes Do Not Topple Uphill

Just as water will not flow uphill, likewise, neither will dominoes topple in that direction. Additionally, dominoes cannot stand so as to topple downhill. That circumstance resembles the state of New York law on insurance coverage for property damage related to construction defects.

New York courts have historically followed the overly restrictive view that faulty construction claims are not covered under a CGL policy unless they cause damage to property that is outside the scope of the insured's construction project. *George A. Fuller Co. v. U.S. Fid. & Guar. Co.,* 200 A.D.2d 255, 613 N.Y.S.2d 152 (N.Y. App. Div. 1st Dep't. 1994); *J.Z.G. Resources, Inc. v. King,* 987 F.2d 98 (2d Cir. 1993). These courts borrowed from the infamous and discredited New Jersey case, *Weedo*, which has since been overturned by the New Jersey Supreme Court in *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, LLC,* 143 A.3d 273 (N.J. 2016), because *Weedo* interpreted 1966 CGL policy forms inapplicable to 1986 CGL policy forms. [5]

In the face of the questionable viability of these dated authorities, the Tenth Circuit Court of Appeals undertook an extensive review of New York law in *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.,* 882 F.3d 952 (10th Cir. 2018). Before the court were the claims of the insured, Black and Veatch, for CGL coverage for damage to several jet bubble reactors caused by deficiencies in internal components constructed by Black Veatch's subcontractor. New York law applied per a choice-of-law provision in the policy, apparently enforceable under Kansas law, where the lawsuit was filed.

Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 (collectively "Aspen") relied on dated authorities, including *George A. Fuller*, *J.Z.G. Res., Inc. v. King*, and the tired Henderson law review article discussed above, to argue that the property damage to the bubble jet reactors did not arise out of an occurrence. The Tenth Circuit rejected these authorities as either interpreting out-of-date CGL policies or not involving subcontractor work. The court stated that to determine that there was no occurrence would render the subcontractor exception to the your work and several other exclusions "surplusage," further rendering them

meaningless in violation of New York contract interpretation rules. Therefore, the accidental harm to the reactors constituted an occurrence.

The court noted that its interpretation of occurrence was supported by the changes that Insurance Services Office, Inc., has made to the standard CGL policy form since 1986, namely adding the subcontractor exception to the your work exclusion, and by the fact that the overwhelming trend among state supreme courts has been to recognize these types of damages as occurrences, as set out earlier in this article. At the same time, the New York Court of Appeals, the highest court in that state, had yet to rule on these issues, and the Tenth Circuit predicted that, when faced with them, the court would adopt the comprehensive treatment of *Black & Veatch*, forsaking the now outmoded limitations on the occurrence/property damage issues under prior New York law. [6]

Unfortunately, there is no level surface on which dominoes in New York can topple, apparently until the issue of coverage for property damage arising out of defective workmanship comes before the New York Court of Appeals. Perhaps the most recent judicial foray in this regard is *Burlington Ins. Co. v. PCGNY Corp.,* 2024 WL 4451303 (S.D.N.Y. Feb. 24, 2024); *report and recommendation adopted sub nom.,* 2024 WL 4212645 (S.D.N.Y. Sep. 16, 2024). There, the subrogee of the insured owner sought recovery against the contractor that had defectively removed and repaired roofs on an apartment complex, who in turn sought recovery against the roofing subcontractor. Complex insurance coverage claims and denials among numerous insurers followed as to the duty to defend.

The court adopted the report and recommendation of the magistrate that heard the numerous cross-motions among the parties. The court rejected the argument of the insured contractors that it should follow *Black & Veatch* and uphold coverage, observing that no New York case law has followed *Black & Veatch* and that one lower appellate court had expressly refused to do so in favor of the *George A. Fuller* line of cases, citing *RD Rice Const., Inc. v. RLI Ins. Co.,* 2020 NY Slip Op 31328(U) (Sup. Ct. May 07, 2020).

Despite the restrictive case law and based on the overwhelming trend throughout most jurisdictions, it is extremely likely that soon New York will join that broadening trend seen in *Black & Veatch.* As Van Morrison noted, "there's no argument at all," and another important domino may fall.

Pennsylvania: The Dominoes Are Glued to the Floor?

Of all the jurisdictions that restrict coverage for construction defect-related property damage, Pennsylvania is the most notorious, leading the way in its narrow interpretation of occurrence. The seminal case there is *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 589 Pa. 317, 908 A.2d 888 (2006). In that case, Kvaerner agreed to build a brick oven battery according to a contract with Bethlehem Steel. The brick and masonry on the oven failed by shifting and cracking. As a result, Bethlehem filed a lawsuit against Kvaerner for breach of contract.

The Pennsylvania Supreme Court applied a strict four-corners rule, holding that it could not look beyond the Bethlehem complaint and the policy in order to determine coverage. Strictly applying the breach of contract allegations, the court held that the definition of "accident" required to establish an "occurrence" under a CGL policy could not be satisfied by claims based on faulty workmanship. It observed that such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or

its common judicial construction in that context. In the view of the court, to hold otherwise would be to convert the policy into a performance bond. The court concluded that, since the underlying suit alleged only property damage from poor workmanship to the work product itself, there was no occurrence.

Kvaerner has been followed consistently by the state and federal courts of Pennsylvania in literally hundreds of cases. The following cases provide a few examples of *Kvaerner's* application.

- In *Erie Ins. Exch. v. Wilton,* 273 A.3d 1038 (Pa. Super. 2022), the insured roofer's faulty workmanship caused water leaks and resulting interior damage to the home where work was done. The court held that the faulty installation of the roof lacked the necessary fortuity to constitute an "occurrence."
- On the other hand, the court in *Pennsylvania Mfrs. Indem. Co. v. Pottstown Indus. Complex LP,* 215 A.3d 1010 (Pa. Super. 2019), held that a commercial tenant's allegations that the insured's negligent roof maintenance and repairs, which resulted in flooding that damaged more than $700,000 of the tenant's inventory, alleged an occurrence under the CGL policy. The court distinguished the facts before it from *Kvaerner* on the basis that the tenant alleged damage to other property (the tenant's inventory stored on the premises) caused by a distinct event—flooding—and sought damages for the destruction of that other property, not for the cost of repairing or replacing the defective item supplied by the insured—the inadequate roof.

Nevertheless, the Pennsylvania courts continue to adhere to an aggressive application of *Kvaerner* in denying coverage in construction defect coverage cases. For example, in *Knoblich v. Erie Ins. Exch.,* 326 A.3d 409 (Pa. Super. Ct. 2024), the insured heating, ventilation, and air conditioning contractor installed a defective geothermal heating and cooling system that failed to maintain constant temperatures in rooms in a house. The insured and the owner sought coverage under the insured's CGL policy for the costs of removal and replacement of the majority of the duct work and to complete the system installation. The court held that, pursuant to governing Pennsylvania law in *Kvaerner*, faulty workmanship did not constitute an occurrence and the failure to complete the installation of the geothermal system in a workmanlike manner in accordance with the manufacturer's specifications amounted to a breach of its contract with the homeowners. Therefore, it was not an accident (i.e., unexpected and fortuitous), so there was no triggering an occurrence under the policy as to the insurer's duty to defend or indemnify.

A similar recent case is *Country Pools & Spas, Inc. v. Erie Ins Co.,* 315 A.3d 110 (Pa. Super. 2024), app. den., 323 A.3d 1268 (Pa. 2024), in which the court reversed a summary judgment in favor of a pool contractor that constructed a retaining wall in connection with a pool that violated local zoning. The court relied on *Kvaerner* to hold that the insured's conduct did not involve an accident that occurs unexpectedly, as well as case law applying *Kvaerner* to deny coverage for negligent representations. *See Erie Ins. Exch. v. Maier,* 963 A.2d 907, 910 (Pa. Super. 2008).

The long line of cases in which the courts of Pennsylvania have declined to uphold unexpected and unintended property damage arising out of the insured's work to be an occurrence has continued to buck the national trend. So far, there does not appear to be any serious indication when one of the last dominoes will fall in favor of the construction industry. Nevertheless, it would seem to be inevitable.

Delaware: The Dominoes Are Wavering Toward Coverage?

In *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Zonko Bldrs., Inc.,* No. 21-437-MAK, 2021 WL 4061564, 2021 U.S. Dist. LEXIS 168855 (D. Del. Sep. 7, 2021), the court considered an insurer's declaratory judgment action arising from a lawsuit against its general contractor insured in which the underlying plaintiffs asserted claims against the insured for a myriad of construction defects. The policy included a manuscript endorsement expressly modifying coverage to deem property damage resulting from work performed by subcontractors as an "occurrence" under the policy.

The court noted that Delaware courts have held that defective workmanship is not an "occurrence" under CGL policies like the one before the court—likely based, at least in part, on the reasoning of *Brosnahan Bldrs., Inc. v. Harleysville Mut. Ins. Co.,* 137 F. Supp. 2d 517 (D. Del. 2001), that an occurrence required an accidental or unexpected event outside the control of human agency. However, the court found that an occurrence had been pled based on the terms of the manuscripted definition of occurrence because of the allegations that the work had been performed by subcontractors.

The policy also contained a subcontractor exception to the your work exclusion. The court agreed that the subcontractor exception would be rendered meaningless if the policy excluded faulty subcontractor work from the definition of "occurrence." While the subcontractor exception provision was added as a manuscripted endorsement, the court's discussion indicates some movement away from Delaware state court opinions refusing to recognize that faulty workmanship can give rise to an occurrence under the proper circumstances.

Any Conclusion To Be Had?

The move away from overly restrictive approaches such as the third-party property damage requirement and toward the application of the actual terms of the CGL policy itself to preserve coverage remains the natural progression in most states. Despite what some lower courts have held to be the prevailing law in New York, settled principles of policy interpretation as applied in *Black & Veatch v. Aspen* will likely carry the day as they have in states such as Florida, New Jersey, Texas, and, most recently, Illinois, where restrictions on occurrence/property damage as to coverage for defective workmanship had previously held sway. This anomaly is hopefully and sensibly fading, so that standard definitions, terms, and conditions in effect throughout the entire construction industry should be interpreted and applied in a similar manner among the 50 states and to construction claims that bear the same elements of damage. After all, "there's no need for argument" over interpreting standard policy provisions culminating in a complete domino effect.

Footnotes

[1] This truncated description is necessarily from 50,000 feet. For considerably more detailed analysis, see Patrick J. Wielinski, *Insurance for Defective Construction*, Sixth Edition, IRMI, 2023.

[2] It should be noted that, despite the expansion of coverage under *Acuity v. M/I Homes*, traditional principles survive as to the basic elements of property damage. *St. Paul Guardian Ins. Co. v. Walsh Constr. Co.,* 99 F.4th 1035 (7th Cir. 2024). Walsh was the general contractor for a portion of O'Hare International Airport. Walsh retained a subcontractor to manufacture the steel and curtain wall, which contained defective welds in steel columns. Those defects led the City of Chicago to question the structural integrity of the canopy system. The city and Walsh entered into a settlement where Walsh agreed to repair the columns at its own expense. Walsh then turned to its insurer for coverage. The Seventh

Circuit recognized the change in Illinois law under *Acuity v. M/I Homes* but agreed with the insurer that there was no coverage because there was no property damage (i.e., physical injury to tangible property) to the work that Walsh performed. The court rejected Walsh's argument that the defective welds increased the *potential* for the canopy to collapse, but at the same time, it offered no evidence that this "structural instability" had manifested itself in any physical way.

[3] Acuity filed a petition for a rehearing, arguing that the court, rather than granting judgment on the pleadings in favor of C&R, should have remanded the case to determine whether certain "business risk" exclusions applied because the court affirmed the existence of an occurrence of property damage within the terms of the policy. The court summarily denied the petition without opinion.

[4] In *Endurance Am. Ins. Co. v. John Moriarty & Assocs., Inc.,* No. 1:23-CV-12550-JEK, 2024 WL 3849670 (D. Mass. Aug. 16, 2024), the court faced venue and choice-of-law issues as to Florida versus Massachusetts law. In choosing to apply Massachusetts law and denying the motion to transfer the venue, the court noted the difference between restrictive Massachusetts law as opposed to the law of Florida as to coverage for faulty workmanship.

[5] For a similar case applying outmoded analysis of earlier policy forms, *see Aquatectonics, Inc. v. Hartford Ins. Co.,* 2012 WL 1020313 (E.D.N.Y. Mar. 26, 2012).

[6] Such a result would benefit the construction industry beyond the state of New York because numerous liability policies issued to contractors, particularly on manuscripted or London policy forms, include a New York choice-of-law clause. The insertion of such a clause favors insurers out to deny property damage claims arising out of defective construction. Standard CGL policies seldom contain such clauses.