

MEALEY'S™ LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2016 Update

by
Thomas F. Segalla,
Ellen H. Greiper,
Matthew S. Lerner,
Marvin N. Romero
and
Michael Rubin

Goldberg Segalla
New York, New York

**A commentary article
reprinted from the
June 2016 issue of
Mealey's Litigation Report:
Construction Defects Insurance**



Commentary

Construction Defect Claims: A 2016 Update

By
Thomas F. Segalla,
Ellen H. Greiper,
Matthew S. Lerner,
Marvin N. Romero
and
Michael Rubin

[Editor's Note: Thomas F. Segalla, Ellen H. Greiper, Matthew S. Lerner and Michael Rubin are partners and Marvin N. Romero is an associate in the Construction, General Liability, and Global Insurance Services Practice Groups of the law firm Goldberg Segalla LLP. The firm has 19 offices in New York, Florida, Illinois, Missouri, Connecticut, Maryland, Pennsylvania, North Carolina, New Jersey, and the United Kingdom. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis, Mealey's. Copyright © 2016 by Thomas F. Segalla, Ellen H. Greiper, Matthew S. Lerner, Michael Rubin and Marvin N. Romero.]

The laws governing Commercial General Liability insurance coverage are constantly evolving. Numerous Court decisions over this past year have yielded a broad array of judicial interpretations of existing laws, frequently resulting in disparate treatment of similar laws across state lines. For example, an Iowa Court recently upheld the frequently-ligated subcontractor exception, in direct contravention of a prior, binding decision rejecting the exemption. The Iowa Supreme Court granted a further review, and oral argument on the issue was held on March 8, 2016. Similarly, dueling District Courts in Illinois issued conflicting decisions as to whether or not “defective workmanship” constitutes an “occurrence” such that insurance obligations would be triggered. Interestingly, these two decisions were issued less than

three months apart, and it is very likely that the issue will be settled by the Illinois Appellate Courts.

There have been numerous other decisions of interest which are addressed herein, such as: an Ohio Court's holding of that fire damage, although provided for in the insured's policy, was not covered due to the insured's failure to cooperate in the fire investigation; a Vermont Court illustrating the seemingly trivial distinction between the phrases “collapse” and “risk of loss involving collapse”; a Minnesota Court holding that the status of limitations for a construction defect claim can begin to accrue prior to project completion if the defect's discovery is made while construction is ongoing; and a Montana Court's ruling that a failure to treat logs with insecticide, which ultimately led to a beetle infestation, constituted a volitional act and a business decision as opposed to an “occurrence” that would have otherwise triggered coverage.

This article will not only highlight various decisions from across the country over these past twelve months that will have a significant impact on the construction industry; it will also help litigants navigate through constantly evolving judicial interpretations which require similarly evolving legal analyses within the industry and by those involved in construction defect disputes. We encourage and welcome your responses by way of telephone and/or e-mail.

Coverage

Arizona

Property Exclusions

Desert Ridge Resort LLC v. Occidental Fire & Casualty Co., 2015 U.S. Dist. LEXIS 148899 USDC 10/7/2015.

Plaintiff and defendant filed motions for summary judgment in this declaratory judgment action. In the underlying suit, the plaintiff sued its general contractor and subcontractors in connection with alleged construction defects that resulted in significant water damage to plaintiff's resort. A *Damron* consent judgment was agreed to in the amount of \$12 million against the general contractor, and the contractor assigned all of its rights and claims against its insurer. Plaintiff commenced a declaratory judgment as assignee of the contractor's rights under the policy.

Defendant insurer argued that the policies did not provide coverage because the damage occurred before the policies came into effect, some of the damages were excluded by the "Your Work" exclusion, and certain damages were excluded by the "mold" exclusion. The plaintiff countered that the insurer was precluded from raising those grounds for denying coverage because they were not identified in its denial letters.

The Court noted that the insurer could raise the previously unidentified grounds for contesting coverage in *Damron* agreements. The Court also rejected plaintiff's theory that the insurer had waived the right to assert its "Your Work" and "Preexisting Damage" exclusions, as it found no evidence that the insurer knew of the facts necessary to deny coverage based on those provisions and therefore could not knowingly waive its rights. Moreover, its disclaimer letters expressly reserved the right to raise additional coverage defenses. The Court held that the preexisting damage clause precluded coverage in this case. That provision stated that the insurance applied to bodily injury or property damage only if it was caused by an occurrence within the coverage territory and first occurs during the policy period. The Court held that since the provision relied upon by the carrier to disclaim coverage was not an exclusion, it was the plaintiff's burden to establish coverage under

the policy and plaintiff failed to establish that the damage began when the policy was in effect.

Practice Point: The Court's decision provides a good analysis of the distinctions between a *Damron* agreement and a *Morris* agreement and the possibility that an insurer can be precluded from raising a previously unidentified ground for disclaiming coverage.

California

No Coverage Where Claimed Defect Stemmed from Faulty Workmanship

Am. Home Assur. Co. v. SMG Stone Co., 2015 U.S. Dist. LEXIS 75910 (N.D. Cal. June 11, 2015)

This was a declaratory judgment action commenced by two insurers relating to the construction of a 54-story hotel and luxury condominium high-rise. The owner/developer had retained a contractor, which, in turn, retained two subcontractors to install certain stone floor tiles. After the subcontractors commenced their work, the owner discovered fractures in some floor tiles that were subsequently removed and replaced. The remediation process also required the removal and replacement of portions of drywall and concrete sub-floor. The subcontractors tendered claims for defense and indemnity to the two insurers in connection with certain related litigation and arbitration, prompting the insurers' request for a declaration that the insurance policies at issue did not cover the floor tile fracture claims and plaintiffs had neither a duty to defend nor a duty to indemnify defendants.

In granting summary judgment in favor of the insurers, the Court initially noted that one of the insurance policies at issue covered "property damage" caused by an "occurrence" subject to a number of specific exclusions. The Court found the fracturing of the stone floor tiles caused by the subcontractors' defective installation of those tiles was the result of an occurrence. Drawing upon the definition of occurrence under California law, the Court noted there was no evidence that the subcontractors "knew" that their tile installation work was defective before the tiles fractured.

The Court, however, found that there was no "property damage" as defined under the policy, and, in so holding, remarked that the incorporation of a defective

component or product into a larger structure does not constitute property damage, unless and until the defective component causes physical injury to tangible property in at least some *other* part of the system. Among other things, in order for defendants to have prevailed, they needed to show that the damage to the subfloor and drywall constituted physical injury to tangible property *independent* of their defective work. The undisputed facts, however, established that the damage to the subfloor and drywall resulted from the remediation of the defective floor tile work – and remediation work does not constitute property damage under California law.

Also, inasmuch as no one had actually lived in the constructed property yet, the Court rejected defendants' argument that the fractured tiles caused loss of use of the residences and marketing office. The mere delay in the completion of the project and sale of the residences did not constitute loss of use. The Court concluded that because the insurers had no coverage obligation, they similarly had no duty to defend.

Practice Point: There was no basis for coverage because the underlying defect stemmed from faulty workmanship and there were no damages independent of the faulty workmanship.

Connecticut

Though Engaging in Reckless Conduct, the Insured Manufacturer Did Not Expect or Intend its Product to Cause Harm

Harleysville Worcester Ins. Co. v. Paramount Concrete, 2015 U.S. Dist. LEXIS 104869 (D. Conn., August 17, 2015)

This insurance coverage action stemmed from damage to multiple swimming pools that were constructed with a defectively produced concrete known as "shotcrete." The plaintiff insurer brought a declaratory judgment action against the manufacturer/supplier of the shotcrete, a pool builder, and the manufacturer's excess liability insurer seeking a declaration that it had no duty to indemnify the manufacturer in connection with underlying litigation brought by the pool company.

In the underlying litigation, the pool company asserted products liability claims against the

manufacturer after approximately nineteen pools built by the pool company developed significant detrimental cracks. After trial, the jury returned a verdict in favor of the pool company awarding compensatory damages in the amount of \$2.7 million. The jury also found that the pool company was entitled to punitive damages because the manufacturer acted "with a reckless disregard for the safety of product users, consumers and others who were injured by the product." Shortly after the verdict, the insurer filed this declaratory judgment action seeking a declaration that the manufacturer's insurance policy did not provide coverage for the damages awarded. After the filing of dispositive motions, the Court granted summary judgment (almost entirely) in favor of the manufacturer and pool company. On the discrete issue, however, of whether the manufacturer might be excluded from coverage because it "expected or intended" its shotcrete to fail, the Court conducted a bench trial.

The Court concluded – after conducting the bench trial – that the insurer established *at most* that the manufacturer lacked an effective quality control system, its management lacked experience with concrete, and its batchman did not feel adequately trained. Although this pointed to severe deficiencies in the manufacturer's operations and were enough for the jury to find that it acted "recklessly," the insurer did not prove that the relevant individuals at the manufacturer actually knew, much less intended, that the shotcrete was so defective it could cause harm. Without that knowledge, the manufacturer could not be held to have "expected" the nineteen pools to crack and, as a result, the insurer failed to meet its burden of establishing expected or intended injury. The insurer, therefore, was obligated to indemnify the manufacturer for the damages caused by its shotcrete.

In holding as it did, the Court noted, "[I]t is frankly inconceivable that the [principals of the manufacturer] would have expected or intended [their] product to harm the pools, but sold the product nonetheless. [The pool company] was their largest customer and the owners of [the pool company] were a family." Furthermore, in analyzing the expected or intended injury exclusion, the Court noted that it was not enough that the harm might have been foreseeable to "a reasonable concrete

manufacturer in the manufacturer's position," nor was it sufficient that a jury found that the manufacturer acted with reckless disregard for the safety of others.

Practice Point: In order for the "expected" or "intended" injury exclusion to apply, an insured must have actually known or intended as the exclusion expressly states.

Illinois

Defective Workmanship Does Not Constitute an Occurrence

Acuity v. Lenny Szarek, Inc., 2015 U.S. District LEXIS 116778 (USDC ND Ill. 9/2/2015).

After defendant subcontractor had been sued by two condominium associations stemming from two construction projects, Mulberry Grove and Cary Woods, its insurer sought a declaration that it was not required to defend and indemnify either defendant in the underlying actions. Both complaints essentially alleged that the defendant's improper construction resulted in water infiltration that caused damage to the condominium. The *Mulberry Grove* action also claimed that there had been damage to personal property within the affected units.

The Court noted that the duty to defend arises when a complaint makes allegations that "fall within or potentially within the coverage provisions of the policy." In Illinois, commercial general liability policies do not cover costs associated with repairing or replacing defective work or products that are purely economic losses. The claim by the plaintiffs in the *Mulberry Grove* action for damage to personal property did not change the Court's analysis. The Court noted that the condominium associations were not the owners of the property allegedly damaged and the complaint did not seek damages for personal property and could not do so. As a result, the Court found that the complaints failed to make any viable claim for an occurrence and therefore, the insurer had no duty to defend or indemnify the defendants.

Practice Point: The Court notes that under Illinois law, allegations of defects in the construction of a building are not "property damage" and caused by an "occurrence."

Illinois

Insurer May Have a Duty to Defend Based on a Liberal Interpretation of the Pleadings

West Bend Mut. Ins. Co. v. Pulte Home Corp., 2015 Ill. App. Unpub. LEXIS 1039 (App. Court of Illinois, First District, Sixth Division, May 15, 2015)

In this case, the insurer filed a declaratory judgment action claiming that it had no duty to defend or indemnify a real estate developer (which had developed and constructed a residential condominium development) or the developer's subcontractor (which had installed certain exterior siding). In the underlying action, the development's homeowners association ("HOA") filed a complaint against the developer and the siding manufacturer, alleging that the siding and "exterior envelope" of the units and common areas were defective. The developer impleaded the siding subcontractor, after which both the developer and subcontractor tendered the defense to the insurer.

In support of its motion for judgment on the pleadings, the insurer argued that the underlying complaints did not allege any damage to any person or property other than the exterior of the buildings and, as such, the underlying complaints did not contain allegations of "property damage" caused by an "occurrence" as required by the policy language. The insurer further argued that the underlying allegations against the siding subcontractor were barred by various policy exclusions. The trial court, however, denied the insurer's motion and the Appellate Court affirmed.

In affirming the denial of the insurer's motion, the Appellate Court initially remarked that "an insurer has a duty to defend even if only a single theory of recovery alleged in an underlying complaint potentially falls within the coverage of the policy." It was apparent from the face of the underlying complaints that the allegations did not solely allege damage to the buildings, *but also* "other (albeit unspecified) damage resulting therefrom." For example, the HOA's amended complaint alleged that the HOA and unit owners would be required to make repairs and/or replacement of the common area and building exterior envelopes "*and resultant damage.*" (emphasis added). Also, the amended complaint sought to recover "such *other damage* resulting from the defective materials and above defective conditions determined at trial." (emphasis included).

Reading the underlying allegations liberally, in favor of the developer and its subcontractor – as the Court pointed out that it “must” – the Court concluded that the allegations of the amended complaint regarding damages to “other property” were “at worst vague and ambiguous.” But, the allegations provided a sufficient basis by which to deny the insurer’s motion. As the Court remarked, “vague, ambiguous allegations against an insured should be resolved in favor of finding a duty to defend.”

Practice Point: In denying an insurer’s motion for judgment on the pleadings, the Court read the pleadings liberally – in favor of the insured – in order to find that the insurer may have a duty to defend.

Illinois

Exceptions Existed to Policy’s Faulty Workmanship Exclusion

Moda Furniture, LLC v. Chi. Title Land Trust Co., 2015 IL App (1st) 140501, 35 N.E.3d 1139 (Appellate Court of Illinois, First District, First Division, June 29, 2015)

In this matter, the insurer appealed the decision of the trial court holding that a business owner/seller of rugs (“insured”) was entitled to coverage for the destruction of approximately 20,000 of its rugs. The underlying facts were that the insured had leased a facility owned by the landlord, and the landlord retained a roofer to replace the roof. During this work, the roofer allegedly failed to protect the insured’s inventory and, as a result, gravel and other dirt fell from the ceiling on the rugs and antique carpets. The insured in turn submitted a \$450,000 claim to the insurer, which the insurer denied.

On appeal, the Court considered two issues: (1) whether the damage alleged by the insured implicated an exclusion for loss or damage caused by or resulting from “faulty, inadequate or defective” workmanship, repair, or construction; and, if so, (2) whether the “resulting loss” exception to the exclusion applied so as to provide coverage for the insured’s damage to its inventory. With respect to the first issue, the Court concluded (with little difficulty in summary fashion) that the allegations regarding the nature of the roofer’s work did in fact implicate the exclusion at issue. The

more pressing issue, however, was the second issue – *i.e.*, whether the exception to the exclusion applied – to which the Court dedicated significantly more time in addressing and conducted a multi-jurisdictional analysis.

The Court ultimately concluded that in view of the policy’s broad definition of “covered cause of loss,” there were at least two possible ways in which a “covered cause of loss” and “resulting loss” were sufficiently alleged so as to implicate the exception to the faulty workmanship exclusion. First, the Court noted that the exception applied because the roofer’s faulty workmanship (the “excluded cause of loss”) caused physical damage to the insured’s property (the “covered cause of loss”) which led to the insured’s economic injury (the “resulting loss or damage caused by that covered cause of loss”). Moreover, another approach supporting the application of the resulting loss exception would be to view the dirt and debris that fell on the inventory as the “covered cause of loss.” Accordingly, the roofer’s faulty workmanship (the “excluded cause of loss”) caused falling dirt and roof debris within the premises (the “covered cause of loss”) resulting in the damage to the inventory (the “resulting loss or damage caused by that covered cause of loss”).

Practice Point: The insured’s alleged “covered cause of loss” and “resulting loss” warranted coverage under the exception to the policy’s faulty workmanship exclusion.

Illinois

Insured’s Faulty Workmanship Considered an Occurrence

Westfield Ins. Co. v. National Decorating Serv., 2015 US Dist. LEXIS 159140 (USDC ND 11/25/2015).

A subcontractor’s insurer commenced a declaratory judgment action seeking a determination that it was not required to defend its named insured and additional insureds in a lawsuit alleging property damage. In the underlying action, plaintiffs sued the subcontractor alleging that the subcontractor’s work was defective and that the faulty work caused damage to other parts of the project that were beyond the subcontractor’s scope of work on the project. There was no dispute that the cost to repair and replace the subcontractor’s faulty work was not covered. The

dispute centered on whether the damage caused to other parts of the project were covered.

The Court noted that under Illinois law, in order for a construction defect to qualify as an occurrence, it must damage something other than the project itself or the building itself. The Court also noted that the determining factor when evaluating if there is "property damage" resulting from an "occurrence" "is an examination of the scope of the named insured's work." The Court held that damage "beyond the scope of the named insured's work at a building is property damage resulting from an occurrence." As the complaint in the underlying action claimed damages to parts of the building that were beyond the subcontractor's work, they were covered damages under the insurance policy. As a result, the Court granted defendant's motion for summary judgment and held that the insurance carrier was required to defend its insureds.

Practice Point: The Court's decision is in contrast to *Acuity v. Lenny Szarek, Inc.*, which held that a contractor's damage to a building or project stemming from defective construction is not a covered event. The Court specifically noted its disagreement with *Acuity*. We anticipate that the different interpretations by the two District Courts will ultimately make its way to the Illinois Court of Appeals.

Iowa

Construction Defect Covered by a Commercial General Liability Policy

National Surety Corp., v. West Lake Investments, LLC, 2015 Iowa App. LEXIS 982 (Ct. App., Oct. 28, 2015).

An excess carrier commenced a declaratory judgment action seeking a ruling that it had no duty to indemnify its insured for a consent judgment obtained against its insured for a subcontractor's construction defects. Following a jury trial in which the jury confirmed the consent judgment (minus amounts satisfied from other sources), the insurer appealed the award. The insurer argued that the damages were not an "occurrence." The Court found that water damage and mold arising out of construction defects constituted an "occurrence" under the excess policy. The Court further found that the jury's decision that

the property damage occurred during the policy period was supported by the evidence.

Practice Point: The Court's decision was in contrast to a prior decision from the same Court in *Continental W. Ins. Co. v. Jerry's Homes Inc.*, 2006 Iowa App. LEXIS 122 (Iowa Ct. App. 2006) which found in favor of an insurance company on claims against a general contractor for defective work of a subcontractor. In light of the inconsistent decisions, the Iowa Supreme Court granted a further review of this decision. Oral argument was scheduled for March 8, 2016. The Supreme Court's decision will undoubtedly have a significant impact on the insurance industry.

Maryland

Possible for Tenant to Have Had an Insurable Interest in Entire Building

476 K, LLC v. Erie Ins. Exch., 2105 Md. Cir. Ct. LEXIS 4 (Circuit Court of Maryland, Montgomery County, May 7, 2015)

Plaintiff, a commercial tenant, brought a declaratory judgment action seeking coverage under a \$5.5 million commercial property insurance policy. Plaintiff alleged that part of the property had abruptly collapsed (as a result of defective construction methods), resulting in severe damage and leaving the remainder of the property – not just plaintiff's leased space – unsafe for occupancy. The defendant insurer filed a motion to dismiss the complaint, arguing that the plaintiff was precluded from recovering more than its limited insurable interest in the building. In support of the motion, the defendant pointed out that plaintiff's lease with the landlord required the plaintiff to obtain coverage for certain systems ("machinery insurance") and that this is what the insurer was insuring when plaintiff purchased a \$5.5 million policy. The defendant further argued that the lease required the landlord (not the plaintiff) to obtain the property insurance on the building and that plaintiff could not have obtained similar coverage because that was not its obligation under the lease.

The Court denied the defendant's motion to dismiss the complaint. In doing so, the Court provided further context of the lease provisions. Under the lease, the

landlord was required to maintain property insurance on the building, and, in connection with that obligation, obtained a \$1.1 million policy. Under an amendment to the lease, plaintiff was required to reimburse the landlord for the landlord's insurance costs. Plaintiff claimed that it was concerned whether the \$1.1 million policy provided sufficient coverage to protect its interests, so it obtained the \$5.5 million policy from defendant, which insured the property against, among other things, "abrupt collapse . . ."

The Court concluded that a jury could find that in obtaining the \$5.5 million policy with defendant, plaintiff was seeking to insure the *entire* building. Furthermore, although the lease obligated the plaintiff to obtain machinery insurance, the lease did not prohibit plaintiff from obtaining insurance covering more than the machinery. In the Court's view, a jury could also find that the lease amendment requiring plaintiff to reimburse the landlord for 100% of its insurance costs also gave plaintiff an insurance interest in the building. In fact, this provision essentially made plaintiff responsible for all insurance covering the property.

Practice Point: In addressing whether the plaintiff tenant had an insurable interest in the entire building, the Court emphasized that a provision in the tenant's lease required the tenant to reimburse the landlord for 100% of the landlord's insurance costs and, furthermore, in obtaining a \$5.5 million policy, a jury could find that the tenant was seeking to insure the entire building.

**Montana
Insured's Duty to Settle Depended on Whether It Had a Reasonable Basis for Contesting Coverage**

Northland Cas. Co. v. Mulroy, 2015 U.S. Dist. LEXIS 94631 (U.S.D.C. for the District of Montana, Misoula Division, July 21, 2015)

This underlying construction defect claim related to a beetle-infested log home. The defendant property owner hired the defendant contractor to construct a home on the owner's property. The contractor purchased the logs to be used but did not chemically treat the logs with insecticide. A few years after the contractor completed the project, the owner began noticing insect bore holes and track marks in the logs.

The owner subsequently brought the infestation issue to the contractor's attention and made a claim against the contractor and the contractor's insurer, which had insured the contractor under an occurrence-based CGL policy. The insurer denied coverage and the owner subsequently filed a complaint against the contractor. The contractor's insurer accepted defense of the claims under a reservation of rights.

After nearly nineteen months of litigation in the underlying case, the insurer filed a declaratory judgment action, after which the parties attended a settlement conference and the parties failed to resolve the case. Subsequently, with the declaratory judgment action pending, and without notifying the insurer, the parties in the underlying action settled the case in which the contractor admitted liability, agreed to hold a hearing to decide the amount of damages, and assigned any rights relating to insurance. The hearing contemplated in the settlement agreement took place and the state court judge issued findings of fact and conclusions of law, ultimately concluding that the contractor (and the contractor's owner) were liable and awarding damages.

Subsequently, the parties in the declaratory judgment action filed cross-motions for partial summary judgment on the issue of coverage. Also, the defendants – the owner, contractor, and an individual owner of the contractor – filed a motion for partial summary judgment on the defendant insurer's duty to defend.

Defendants argued that the insurer breached its duty to defend not by denying a defense in the underlying action, but "by failing to consider the interests of its insured and attempt settlement of the underlying action for an amount well within the policy limits, despite the opportunity to do so." Defendants further argued that because the insurer breached the duty to defend by breaching the purported duty to settle, the insurer was liable for the amount of the consent judgment that had been determined by the state court judge.

The Court initially noted that whether the insurer was liable for failing to settle within the policy limits depended on whether it had a reasonable basis in law or fact for contesting coverage under the CGL policy. The Court concluded that the insurer did not breach its duty to defend or its duty to settle. Notably, the insurer properly expressed its reservations concerning coverage in a reservation of rights letter that pre-dated the

homeowner's suit. Further, the insurer's basis for contesting coverage was more than reasonable – and entirely correct. As a result, it did not have any obligation to settle the case. On these bases, the Court denied defendants' motion for partial summary judgment as to the duty to defend.

Regarding coverage, the insurer argued that there was no coverage under the CGL policy for the contractor's defective work because the damage did not arise from an occurrence. The Court agreed that there was no coverage, remarking that an intentional business decision on the part of an insured generally does not constitute an "occurrence" and the facts established in the underlying case did not trigger coverage. The decision not to treat the logs could not reasonably be characterized as an "occurrence" under the policy, but instead was a volitional act and business choice on the part of the contractor.

Practice Point: The insurer did not have a duty to settle the underlying construction defect claim because it had a reasonable ground for contesting coverage and, in fact, the Court concluded that there was no coverage because there was no occurrence.

New Mexico

Your Work Exclusion Applicable to Damage to Contractor's Property But Not Damage to Other Property
Pulte Homes of New Mexico, Inc. v. IND. Lumbermans Ins. Co., 2015 NM App. LEXIS 134 (Ct. App. 12/17/2015).

The New Mexico Court of Appeals addressed the "Your Work" exclusion under a CGL policy. Plaintiff had been contracted to build homes and was later sued for numerous construction defects. Plaintiff commenced a third-party action against the subcontractor's insurance carrier under which plaintiff was an additional insured. Following an arbitration award in favor of the homeowners, finding that the windows and doors did not operate properly and had to be replaced, plaintiff tendered its defense to its insurer in May 2009. The carrier disclaimed coverage and plaintiff commenced a third-party action against the insured. In March 2012, the plaintiffs in the underlying lawsuits filed a fifth amended complaint which added additional allegations that the defective windows

caused additional damage including cracks in the stucco surrounding the windows and doors. Plaintiff tendered its defense to the insurer a second time following the fifth amended complaint and the carrier again disclaimed coverage.

The Court examined whether either of the two defense tenders triggered a duty to defend. The Court found that the conditions reported in the May 2009 tender constituted "property damage." In doing so, the Court found property damage had occurred because the arbitration award found that the windows and glass doors had deteriorated and needed to be replaced. The Court also found that the property damage was the result of an occurrence. The Court held that the definition of "occurrence" did not specifically exclude faulty workmanship of the alleged property damage and therefore could be an occurrence.

However, the Court found that the May 2009 tender was subject to the "Your Work" exclusion. The Court held that the May 2009 tender was with respect to allegations of property damaged only to the subcontractor's work itself, the windows and sliding glass doors and not other property. As a result, the exclusion applied and coverage was precluded. However, the March 2012 tender contained allegations of damage to other property, including the stucco around the windows and glass doors. As a result, the "Your Work" exclusion did not preclude coverage. Thus, the March 2012 tender triggered the carrier's duty to defend plaintiff as of the date of that tender.

Practice Point: In analyzing whether the "Your Work" exclusion applies, the Court examined the allegations in May 2009 and March 2012. The only difference between the two allegations was that one alleged damage to property other than the subcontractor's property. This difference was sufficient to provide coverage for one of the claims.

New Jersey

Faulty Workmanship May Have Caused Consequential Damages to Other Parts of Building
Cypress Point Condominium Ass'n., Inc. v. Adria Towers, LLC, 441 N.J. Supp. 369, 118 A.3d 1080 (App. Div. July 9, 2015).

The plaintiff condo association brought claims against two insurers and various subcontractors seeking coverage under the developer's CGL insurance policies for consequential damages caused by the subcontractors' defective work. Specifically, the subcontractors allegedly failed to properly install the roof, flashings, gutters and leaders, brick and facade, windows, doors, and sealants (the "faulty workmanship"). According to the condo association, the faulty workmanship *also* caused consequential damages to the common areas and unit owners' property, including damage to steel supports, exterior and interior sheathing and sheetrock, insulation and other interior areas of the building. The trial court determined that there was no "property damage" or "occurrence" as required by the policy to trigger coverage and granted summary judgment dismissing the claims against the insurers.

On appeal, the sole question was whether consequential damages to the common areas of the condo complex and to the unit owners' property (caused by the subcontractors' defective work) constituted "property damage" and an "occurrence" under the policy. The condo association raised two principle arguments; (1) that under a plain reading of the language in the policy, the consequential damages constituted "property damage" and an "occurrence;" and (2) that the trial level judge had erroneously placed substantial reliance on the holdings of two prior cases.

The Appellate Division held that the consequential damages clearly constituted "property damage" ("physical injury to tangible property") inasmuch as the faulty workmanship damaged the common areas and unit owners' property. The Court also found the existence of an "occurrence" under the policy because the consequential damages amounted to an unexpected and unintended continuous or repeated exposure to substantially the same general harmful conditions. The Court also held that the trial court erroneously applied the holdings of two other cases which the Court found were distinguishable because: (1) they involved only replacement costs flowing from a business risk rather than consequential damages caused by defective work; and (2) they interpreted different language from the policy language at issue in the appeal. Accordingly, the Appellate Division reversed and remanded the case with instructions to consider the insurers' alternate contentions that plaintiff's claims were otherwise excluded under the policy.

Practice Point: The faulty workmanship at issue likely caused consequential damages since the complained of damages related to other areas of the condo association.

Nevada

Dispute Between Co-Insurers Regarding Defense and Indemnity Obligations for Underlying Construction Defect Cases

Assurance Co. of Am v. Ironshore Specialty Ins. Co., 2015 U.S. Dist. LEXIS 98990 (U.S.D.C. for the District of Nevada, July 29, 2015)

This case involved a dispute between co-insurers over coverage for sixteen separate underlying construction defect cases. In each of the underlying sixteen cases, the insureds had CGL policies with three insurers (the plaintiffs) and another insurer (the defendant) and, in each of the cases, they were defended and indemnified by the three plaintiff insurers only. Furthermore, in each case, the defendant issued a denial letter stating that the insureds' work had been completed prior to the onset of the policy and, therefore, coverage was not triggered. Plaintiffs alleged the claims were wrongly denied by defendant inasmuch as defendant had a duty to defend and indemnify.

First, the Court found plaintiffs' claims for declaratory relief to be inappropriate. In so holding, the Court noted that plaintiffs had settled each of the underlying actions on behalf of the insureds and, inasmuch as the case now involved only past conduct which could be fully remedied by plaintiffs' claims for equitable indemnity and contribution, declaratory relief would be inappropriate.

Second, defendant argued – and the Court agreed – that summary judgment dismissing plaintiffs' claims for equitable indemnity was warranted because Nevada does not recognize such a cause of action between co-insurers.

Third, defendant argued that plaintiffs' separate claim for contribution should be dismissed as well. In addressing this claim, the Court initially addressed whether the defendant had a duty to defend in the underlying sixteen actions. Defendant argued that it correctly applied a "continuous or progressive injury or damage exclusion" because the work that caused the alleged

property damage occurred before the beginning of the policy period in each of the underlying cases and was not alleged to have been sudden and accidental. The Court, however, disagreed. With respect to eight of the sixteen cases, the allegations of property damage were vague as to their temporal implications and could have included sudden and accidental damage. Therefore, there was a duty to defend. In the remaining eight cases, the Court similarly found that defendant had a duty to defend. Indeed, the Court could not preclude the possibility that the alleged defects first arose during the coverage period and were sudden and accidental.

Finally, the Court considered whether defendant had a duty to indemnify. Defendant's main argument was that even if it had a duty to defend in the underlying actions, plaintiffs had failed to meet their burden in demonstrating that defendant had a duty to indemnify. The Court rejected this argument, however, pointing out that defendant's view of the "burden of proof" was incorrectly reversed. As the Court explained, in cases in which a non-participating co-insurer (such as defendant) is found to have had a duty to defend in an already settled action (such as here, with respect to the sixteen different cases), the insurer attempting to disclaim coverage (defendant) bears the burden of proving the applicability of any policy exclusions. Defendant failed to carry this burden since it had presented no evidence demonstrating that the sixteen underlying cases fell within its policy exclusions. As a result, defendant's motion for summary judgment to dismiss the contribution claims was denied.

Practice Point: In this declaratory judgment and contribution action by three insurers against another insurer, the Court considered not only claims for declaratory judgment, but also claims for equitable indemnity and contribution.

**New York
Issue of Fact Regarding Whether Faulty Design and Workmanship Exclusion Applied**

Binghamton-Johnson City Joint Sewage Bd. v. Am. Alternative Ins. Corp., 2015 U.S. Dist. LEXIS 62551 (N.D.N.Y. May 13, 2015)

The plaintiffs (a joint sewage board and two municipalities) asserted claims for a declaratory judgment and

breach of contract in an attempt to recover \$3.5 million in costs from the defendant insurer resulting from a structural wall collapse at a sewage treatment plant. Plaintiffs argued they were covered under an "all risk" insurance policy and that the insurer incorrectly denied coverage based upon the "faulty design and workmanship exclusion" to the policy. Plaintiffs further argued that the insurer was estopped from denying coverage under the policy because the insurer paid a portion of the cost of replacing certain lost media and acknowledged that the "resulting loss exception" to the faulty design and workmanship exclusion applied to the lost media. Plaintiffs and the defendant insurer both moved for summary judgment and both motions were denied.

In denying the plaintiffs' motion, the Court held that plaintiffs incorrectly interpreted the resulting loss exception in a way that impermissibly rendered the exception greater than the exclusion itself. Also, in arguing that the "collapse" of the wall was a covered cause of loss, plaintiffs ignored that the collapse of the wall was the direct result of design and workmanship defects, and not some independent cause. In effect, plaintiffs were attempting to treat the inevitable collapse of a wall due to gravity as something other than the result of the faulty design and workmanship of the wall. Contrary to plaintiffs' interpretation under the resulting loss exception, the only instances in which the faulty design and workmanship exclusion would be negated, and the loss or damage covered, would be something like fire, wind, snow, and/or external collision by, or contact with, trees or other objects.

The Court also rejected the argument that the insurer was estopped from asserting a valid exclusion to coverage. In so holding, the Court noted that in order for coverage by estoppel to occur, an insured must establish that the carrier's conduct resulted in the imposition of coverage where it otherwise did not exist and that the insured was prejudiced by the carrier's subsequent denial of coverage. Here, plaintiffs failed to establish that defendant's conduct (in paying for filter media and debris removal) resulted in coverage (for the wall) because the payment for the filter media and debris removal arose from separate portions of the policy that specifically provided for payment for business property and debris removal which were independent of any obligations or exclusions relating to the structure.

In denying the defendant insurer's motion for summary judgment (which argued that the faulty design and workmanship exclusion to property coverage applied), the Court held that the defendant had not sufficiently demonstrated through expert testimony that the design and/or construction was defective and an approximate cause of the wall collapse. The Court's denial of the insurer's motion appeared to be solely based on the certain omissions in the insurer's expert's affidavit.

Practice Point: The Court denied plaintiffs' and defendant's motions for summary judgment where there were issues of fact regarding whether the "faulty design and workmanship exclusion" applied.

Ohio

Economic Losses and Policy Exclusions

Park-Ohio Holdings Corp. v. Liberty Mut. Fire Ins. Co., 2015 US Dist. LEXIS 147602 (USDC ND OH. 10/30/2015).

Plaintiffs entered into a contract with a cradle manufacturer to supply cap screws. In supplying the cap screws, plaintiffs incorporated washers they had purchased from a third-party that were unknowingly defective. The manufacturer had to replace the washers and approximately 7000 cradles sustaining damages of over \$14 million in replacement costs. One of the defective washers also caused a fire in one of its customer's locations. The manufacturer ultimately sued the plaintiffs and reached a settlement of over \$2 million. Plaintiffs then commenced a declaratory judgment action against their insurer and excess insurer for indemnity of the settlement amount. Defendants denied coverage on their respective policies and filed motions for summary judgment on the basis that the alleged damages were not the result of an occurrence or certain policy exclusions precluded coverage.

The Court noted that the claims of defective washers that needed to be replaced were economic damages that are not typically covered in a CGL policy. The Court further noted that the claims sounded in breach of contract and warranty and did not constitute an "occurrence." The Court also held that the contractual liability exclusion applied. Coverage was also found to be precluded through the "Your Product" exclusion as the defective washers were the plaintiff's product. The

Court noted that the "Impaired Property" exclusion was not applicable as the physical cracking of the defective washers was sudden and accidental therefore making the impaired property exclusion inapplicable. The Court further found that defendants could also justify denying coverage under the "Recall" exclusion.

The Court addressed the fire damage coverage separate as it involved a different type of damage claim. The Court found that the fire damage claim was the type of consequential harm that would likely be covered under a CGL policy. However, plaintiffs failed to establish that the washers were the actual cause of the fire and thus were not entitled to coverage. The Court also noted that defendants would have been able to disclaim for lack of cooperation as the plaintiffs did not provide information requested by the defendants regarding the fire over the course of several months.

Practice Point: In making a coverage analysis, it is always important to make a distinction between the types of damages claimed. This action involved claims for economic losses as well as for fire damages which likely would have been covered had it not been for the insured's failure to cooperate in the investigation of the fire.

Vermont

The Definition of the Term "Collapse" Did Not Apply

Equinox on the Battenkill Mgmt. Ass'n v. Phila. Indem. Ins. Co., 2015 VT 98 (Supreme Court of Vermont August 7, 2015)

The Court considered whether its definition of the term "collapse" from a prior case was applicable with respect to its interpretation of similar policy language at issue in the present case. In this declaratory judgment action, the plaintiff management association sought a declaration that it was entitled to coverage for the failure of certain balconies at the complex it managed. Specifically, the association argued that the damage to the balconies qualified under the policy's collapse coverage. The insurer, however, denied coverage arguing that the damage did not fall within the definition of "collapse" as that term had been defined previously by the Court.

In the prior case, the Court defined "collapse" as damage such as "falling in, loss of shape, [or] reduction

to flattened form or rubble of the building or any part thereof." Although the Court accepted the prior definition, it held that the term "collapse" (and its definition) did not apply to the instant matter. In so holding, the Court noted that the present insurance policy language in dispute more broadly provided coverage for "loss caused by or resulting from risks of direct physical loss involving collapse of buildings or any part of buildings." The Court emphasized that the single word "collapse" and the phrase "risk of loss involving collapse" cannot mean the same thing.

Practice Point: Although a prior Court decision defined the term "collapse," that definition did not apply to the policy language in dispute because the policy language related to the "risk of loss involving collapse," not solely "collapse."

West Virginia

The Duty to Defend v. Duty to Indemnify

State Exrel. Nationwide Mut. Ins. Co. v. Wilson, 2015 W.Va. LEXIS 963; 778 SE 2d 677 Ct. App. W.Va. 10/7/2015.

Nationwide Mutual Insurance Company sought a writ of prohibition to stop enforcements of an order of the Circuit Court that denied its request for a declaratory judgment and found that it was required to defend and indemnify its insured for any damages recovered against the insured in an underlying lawsuit. The underlying lawsuit stemmed from a construction contract that required Nationwide's insured to build a new residential home for homeowners. The homeowners subsequently filed a lawsuit against Nationwide's insured for causes of action including breach of contract, defective workmanship, and defamation.

Nationwide argued that most of the claims asserted by the plaintiffs in the underlying action were not covered under the CGL policy and those claims that did trigger coverage were subject to policy exclusions. Initially, the Court noted that the CGL policy provided coverage for "property damage and bodily injury liability" caused by an "occurrence" and covered against "personal and advertising injury." The Court noted that of the nine counts asserted by the plaintiffs, only one count which alleged defective workmanship triggered coverage under the policy. As an insurer's duty to defend is broader than its

duty to indemnify, the Court held that once any claim triggered coverage, Nationwide would have been responsible to provide a defense to its insured for all claims.

As defective workmanship causing property damage is an "occurrence," the Court held that only those damages caused by the insured's defective workmanship were caused by an "occurrence," thus, triggering coverage. The Court also held that the claim alleging defamation also triggered coverage under Coverage B of the CGL policy.

Although the allegations triggered coverage under the CGL policy, the Court found that the two counts that triggered coverage were excluded. The Court found that the "Your Work" exclusion precluded coverage as the plaintiff's complaints in the underlying action sought damages for the defective workmanship of the insured only and not of its subcontractors. Additionally, the defamation claim was excluded as the allegations in the complaint were that the defamation was done with intent, which the policy specifically excluded. As a result, the Court held that Nationwide had no duty to provide coverage, defense or indemnification to its insured.

Practice Point: The Court's decision notes that when conducting a coverage analysis, it is not enough to determine whether coverage is triggered. The Court must also assess whether any of the policy exclusions apply.

Wisconsin

Home Owners Not Entitled to Collapse Coverage Because Collapse Did Not Occur During Construction
Oboikovitz v. Am. Family Mut. Ins. Co., 2015 Wisc. App. LEXIS 403, 364 Wis. 2d 527 (Court of Appeals of Wisconsin, District Three, June 2, 2015)

The Court considered whether the dismissal of the insured homeowners' bad faith claim against their home insurer was proper. The construction of the insureds' home was completed in 2003, after which the home suffered numerous damages from 2003 through 2011, including cracks in the foundation, walls, flooring, and exterior cement pad. The insurance policy in dispute provided "collapse coverage" covering the "risk of direct physical loss to covered property

involving collapse of a building or any part of a building caused by . . . use of defective materials or methods in construction . . . *if the collapse occurs during the course of the construction . . .*” (emphasis added). The policy further provided that “collapse” did not include “settling, cracking, shrinking, bulging or expansion.”

The defendant argued that even assuming that a collapse did occur, the collapse did not occur during the construction of the home and, as such, there was no basis for coverage under the policy. The Court agreed, holding that although the homeowners’ problems with their home related back to the initial construction, the policy required not only that the causal events occur during construction, but also that the house actually collapse during the construction. Here, the only evidence of any damage existing during the time of construction was a “thin crack” in the concrete driveway pad and a patched crack that was later discovered under the basement bedroom carpet. The Court remarked that a single crack in the basement floor was “woefully inadequate” to establish that there was a collapse during construction.

Practice Point: Plaintiff homeowners were not entitled to collapse coverage for their home because the policy specifically limited the coverage to a collapse occurring during the construction of their home and, although the subsequent collapse related to the initial construction, this is not when the actual collapse occurred.

Sixth Circuit

Coverage Extension May Warrant Coverage for Partial Collapse of Church Ceiling

Joy Tabernacle – The New Testament Church v. State Farm Fire & Cas. Co., 616 Fed. Appx. 802, 2015 U.S. App. LEXIS 10707 (3d. Cir. June 22, 2015)

The ceiling of a church constructed in 1927 partially collapsed 85 years later in 2012. The plaintiff Church had purchased the property in 2009, and obtained insurance covering “accidental direct physical loss” to the premises. Although losses caused by collapse were generally excluded, the Church’s policy included a coverage extension for “collapse” covering loss resulting from “decay that is hidden from view.” After the insurer denied the Church’s claim, the

Church brought suit and the District Court granted the insurer’s motion for partial summary judgment.

On appeal to the Sixth Circuit, the Church argued that “decay” should be defined broadly to include “gradual and progressive decline,” while the insurer argued that the Court should affirm the district court’s restricted definition of “decay” to “organic rot.” To assist, the Court turned to dictionaries to determine the plain meaning of “decay.” The definitions included both “organic rot” and a broader reference to a general decline or degeneration over time. The Court concluded that the Church had likely carried its burden of proving coverage under the collapse extension of the policy. In so concluding, the Court found that the deterioration of the church roof structure was analogous to the facts of two earlier cases – in those matters, wood and mortar in two older buildings had weakened over time due to age and the extended exposure to humidity and weather. The earlier cases suggested that the deterioration and degradation of the wooden roof structure and walls over a long period of time may qualify as “decay” that was “hidden” and that such decay may be what “caused in part” the ceiling collapse. As a result, such loss could be covered under the policy, even though defective material or methods in construction might have also contributed to the collapse. Accordingly, the Court held that summary judgment in favor of the insurer was inappropriate.

The Court also considered the applicability of the policy’s general exclusions for: i) cracking; and ii) defective design or construction. The Court concluded that under the specific terms of the collapse extension, defective materials or methods of construction could not preclude coverage where an enumerated cause of loss was the other cause of collapse. Moreover, to find that a general exclusion for cracking could preclude coverage where collapse actually occurred would render the entire collapse extension nugatory, as the collapse of a structure often involves the cracking of beams and walls.

Practice Point: Applying a broad definition of the word “decay,” the Court held that an issue of fact existed regarding the

insured's potential coverage under a coverage extension providing coverage for "decay that is hidden from view."

Liability

Florida

A Shift in Cases Involving Multiple Perils to an Efficient Proximate Cause Analysis

Peek v. Am. Integrity Ins. Co., 2015 Fla. App. LEXIS 14147 (Fla. 2d DCA 9/25/2015).

Plaintiffs commenced an action against its insurance carrier for breach of contract when it denied their claim for losses to their home caused by Chinese drywall used in construction of the plaintiffs' home. The defendant was awarded a directed verdict at trial and the plaintiffs appealed. The discovery and trial in the underlying action were conducted under the theory that the plaintiffs needed to prove their loss pursuant to the "concurrent cause" rule of *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. 3d DCA 1988). Under the concurrent cause rule, when multiple perils cause a loss and at least one of the perils fall within the policy coverage, the loss is a covered event even if it is not the prime or efficient cause. Upon close of evidence, the defendant moved for a directed verdict and the Court reserved decision. The following day, the Court of Appeals, Florida Second District, rendered a decision in *American Home Ins. Co. v. Sebo*, 141 So. 3d 195 (Fla. 2d DCA 2013) where the Court disagreed with *Wallach's* rule and held that in a multiple peril coverage analysis, an efficient proximate cause theory should determine whether the damage is covered. As a result, the peril that was the most substantial or responsible factor must be the covered peril. Based on the court's decision in *Sebo*, defendants herein renewed their motion for a directed verdict. Plaintiffs argued that they had satisfied even the ruling in *Sebo*. The Trial Court disagreed and granted defendants a directed verdict.

On appeal, the Court agreed with the Trial Court's finding and found that plaintiffs did not satisfy their burden under *Sebo* as the evidence established that the Chinese drywall, which was excluded under the policy, was the responsible factor for the loss. The Court also rejected plaintiff's alternate theory that the loss should still be covered under the "ensuing loss" provision of the policy. The Court held that the plaintiffs' losses were

directly related to the defective Chinese drywall and therefore stemmed from an excluded risk.

Practice Point: Interesting, the plaintiffs in this action did not request a mistrial or make a request to reopen the case in light of the Court's decision in *Sebo* as it was undisputed that the parties had conducted discovery and trial under the concurrent cause doctrine under *Wallach*.

Florida

Settlement Agreements and Covenants Not To Enter Judgment

Bradfield v. Mid-Continent Cas. Co., 2015 U.S. Dist. Lexis 152297 (USDC M.D. Fl., 11/10/2015).

In an underlying case for defective construction, the defendants' insurer denied coverage. Plaintiffs and defendants entered into a *Coblentz* agreement whereby the parties agreed to a consent judgment and defendants assigned plaintiffs their right against their insurer in exchange for plaintiffs' releasing the contractors from any personal liability. Plaintiffs commenced this action to recover the consent judgment against the insurer and insurer moved for summary judgment.

The Court noted that under Florida law, the party seeking to enforce a *Coblentz* agreement must show: (1) coverage; (2) a wrongful refusal to defend; and (3) that the settlement was reasonable and made in good faith. The Court held that one of the insureds listed in the *Coblentz* agreement was not an additional insured under the policy. The Court further held that the damages claimed were either not covered or excluded from the policy and that the *Coblentz* agreement was not reasonable and/or was the result of fraud.

Practice Point: The Court found that the *Coblentz* agreement was unreasonable and/or the result of collusion by examining the questionable circumstances surrounding the agreement. Those factors included the fact that the agreement did not distinguish between covered and noncovered damages, the language of the agreement

itself, and the fact that defendants in the underlying action made no effort to dispute or minimize the amount of the Consent Judgment.

Minnesota

Statute of Limitations for Defective Construction Claim.

328 Barry Avenue LLC v. Noland Props. Group LLC, 271 NW 2d 745 (11/25/2015).

The parties disputed whether Minnesota's two-year Statute of Limitations for claims of defective construction can begin to run before substantial completion of construction. There was also a dispute as to when the injury was discovered to trigger the running of the Statute of Limitations.

Plaintiff retained the defendant to serve as a general contractor during construction of a building. While construction was still ongoing in October 2009, a water leak was observed by a window. Silicone sealant was applied after this discovery. Although a further leak was observed two weeks later, there was no other evidence of leaks between November 2009 through August 2010. In August 2010, water leaks were observed around the same window and subsequent inspections revealed further water damage to the building.

The Court determined that the plain language of Minnesota Statute of Limitations does not require the substantial completion of construction and therefore a claim for defective construction can accrue before construction is complete. The Court, however, found issues of fact as to whether the injury was discovered in the fall of 2009 or in August 2010. The Court noted the lack of any water leaks between the fall in 2009 and August 2010 created an issue of fact as to whether it was the same leakage issue. As a result the Court denied defendant's motion to dismiss plaintiff's complaint.

Practice Point: The Court's decision makes it clear that the discovery of a defect during the construction phase may trigger the owner's obligation to investigate the entire property or risk violating the statute of limitations.

Missouri

Permissive Joinder and Severance

Sparks Constructors, Inc. v. Hartzell Harwoods, Inc., 2015 U.S. Dist. LEXIS 153682 (USDC ED MI., ND 11/13/2015).

Plaintiff commenced an action against a property owner and its insurance carrier alleging that they were responsible for costs and incurred by the plaintiff to repair a roof collapse that occurred during construction of a building. The defendant insurer filed a motion to be dismissed from the action or alternatively to sever the case for a separate trial. In examining the Federal Rules of Civil Procedure Rule 20 for permissive joinder, the Court found that the requisites for permissive joinder have been met and thus there was no need to dismiss the insurer or sever the action for separate trial. The Court noted that the defendants claimed that it would be prejudice by single trial as the jury would hear evidence that the property owner was covered by an insurance policy, the Court rejected the argument. The Court noted that both defendants had an interest in determination of coverage under the policy. Further, to the extent that the evidence of insurance could be deemed inadmissible, the defendant could request a limiting jury instruction at the appropriate time. As a result, the Court denied defendant's motion for severance.

Practice Point: In analyzing the permissive joinder rules, the Court noted that one of the requirements to sustain permissive joinder is that a common question of law or fact, to all the parties involved in the action.

Pennsylvania

Settlement Agreement with Architect Also Released Subcontractor

Jadic v. Bertolet Constr. Corp., 2015 PA Super. Unpub. LEXIS 41809 (Super. Ct. PA 11/16/2015).

Homeowners appealed a decision that granted summary judgment to defendant subcontractor based on a settlement the homeowners had reached with their architect. The plaintiffs had retained an architect to provide design plans to remodel their home. At the recommendation of the architect, plaintiff's hired defendant subcontractor to build the garage's foundation and pour concrete for the garage, level the

backyard and construct a retaining wall. The plaintiff subsequently sued the subcontractor for defective construction. During discovery, the subcontractor learned that the plaintiffs had been sued by the architect for unpaid services and plaintiffs had reached a settlement with the architect. As part of the settlement, plaintiffs' executed a general release. The subcontractor filed a motion for summary judgment arguing that the settlement agreement had released the subcontractor from any claims.

The Court noted that the general release provided that plaintiffs released all entities involved in the project and therefore upheld the Trial Court's dismissal of the plaintiff's lawsuit.

Practice Point: The Court noted that it did not matter that the subcontractor was not a party to the lawsuit or that the plaintiffs did not intend to release it as part of its settlement with the architect. Rather, the Court focused on the broad language in the release that specifically stated that it released any other person related to the project.

Oregon

Covenant Judgments Does Not Release the Insurer.

Brownstone Homes Condo Assn. v. Brownstone Forest Heights LLC, 358 Ore. 223 (11/19/2015).

Condominium homeowners association sued its contractor for negligence. The contractor's insurer refused to defend. The homeowners association and contractor subsequently entered into a stipulated judgment against the contractor, a covenant not to execute on that judgment, and an assignment of the contractor's claim against its insurer to the homeowners association. The homeowners association commenced a garnishment action against the insurer which then obtained a dismissal of the action on the ground that under *Stubblefield v. St. Paul Fire & Marine*, 267 Ore. 397 (1973), the covenant not to execute had released the contractor and therefore the insurer from its obligation to pay.

Under *Stubblefield*, a plaintiff had to obtain a judgment against the insured prior to executing a covenant not to execute. Failure to do so would result in the insurer also being discharged from its obligation to pay. The Oregon Supreme Court overruled its prior decision in *Stubblefield* and held that a covenant not to execute is not a release and therefore the plaintiffs maintained a right against the insurer.

Practice Point: The Court's overruling of *Stubblefield* puts Oregon with the majority of jurisdictions which hold that a covenant judgment is not a release of further liability but rather a contractual promise not to sue the defendant on the judgment. ■

MEALEY'S LITIGATION REPORT: CONSTRUCTION DEFECTS INSURANCE

edited by Shawn Rice

The Report is produced monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

ISSN 1550-2910