MEALEY'S® LITIGATION REPORT

Construction Defects Insurance

Construction Defect Claims: A 2018 Update Part I

by
Thomas F. Segalla,
Michael T. Glascott,
Ashlyn M. Capote
and
Brandon D. Zeller

Goldberg Segalla
Greensboro, N.C

A commentary article reprinted from the March 2019 issue of Mealey's Litigation Report: Construction Defects Insurance

LexisNexis®

Commentary

Construction Defect Claims: A 2018 Update Part I

By
Thomas F. Segalla,
Michael T. Glascott,
Ashlyn M. Capote
and
Brandon D. Zeller

[Editor's Note: Thomas F. Segalla and Michael T. Glascott are partners, and Ashlyn M. Capote and Brandon D. Zeller are associates with the law firm Goldberg Segalla. Thomas Segalla, Michael T. Glascott and Ashlyn M. Capote are located in the Buffalo, N.Y. office and Brandon D. Zeller is located in the Greensboro, N.C. office. Any commentary or opinions do not reflect the opinions of Goldberg Segalla LLP or LexisNexis®, Mealey Publications™. *Responses are welcome.]*

Introduction

Courts' analyses in insurance coverage cases arising out of construction defect claims typically vary based on the specific damages at issue in the underlying construction defect cases. For example, a Nebraska court decided that if there is an allegation of property damage to something other than the insured's work product, then an "occurrence" may be alleged to trigger coverage in the first instance. However, a Kentucky court determined that there was no "occurrence" alleged for a lawsuit involving damage to an entire home even though the insured had only been responsible for the basement and foundation work. Meanwhile, an Illinois court held that there was no occurrence alleged for an underlying construction defect claim where the insured was alleged to have acted intentionally, and a Hawaii court concluded that underlying construction defect claims could trigger coverage where the policy contained a modified definition of "occurrence."

One thing that these cases have in common is that they tend to be extremely fact-specific, and although there is no "one size fits all" rule to determine how courts will decide these issues, there are some key characteristics that can inform the construction industry. This article is the first of two parts, and examines the key cases involving coverage disputes arising out of construction defects nationwide in 2018.

Hawaii

Gemini Ins. Co. v. ConstRX Ltd., No. CV 14-00355 DKW-RLP, 2018 U.S. Dist. LEXIS 163453, 2018 WL 4567699 (D. Haw. Sept. 24, 2018).

The insured was hired to perform construction repairs at condominium buildings and apartment units. A dispute developed between the insured and the owner over the quality of the insured's work and the owner's payments for the work, and the matter was referred to arbitration. The insured sought defense and indemnity from its liability insurer, which denied coverage based on, *inter alia*, lack of occurrence and various business risk exclusions.

Notably, the policy contained an endorsement revising the definition of "occurrence" to provide that faulty workmanship did not constitute an "occurrence" unless the faulty workmanship caused property damage to property other than the insured's work. The court therefore determined that because the arbitration dispute involved alleged damage to property other than the insured's work, then an occurrence was alleged. The

court contrasted this with Hawaii case law, which determines that no occurrence is alleged in construction defect cases because that case law interprets the usual ISO definition of occurrence.

The court rejected the insurer's assertion that the Damage to Property, Damage to Your Work, and Damage to Impaired Property or Property Not Physically Injured Exclusions applied for the same reason — because the owner's allegations included claims that more than just the insured's work product was damaged.

Practice Point: In Hawaii, a carrier will owe a duty to defend if there is a remote possibility that there may be coverage.

Washington

Diamond Constr., LLC v. Atl. Cas. Ins. Co., No. C17-1408-JCC, 2018 U.S. Dist. LEXIS 136335, 2018 WL 3831287 (W.D. Wash. Aug. 13, 2018), *reconsideration denied*, No. C17-1408-JCC, 2018 WL 4095092 (W.D. Wash. Aug. 28, 2018).

The insured contracted to replace a roof on condominiums. Despite actions taken to secure the roofing material during the middle of the project due to a rainstorm, there was a leak that caused damage to several units inside the building. The insured discovered multiple small tears and penetrations in the base sheet that may have been caused by his crew moving equipment or supplies on the roof before leaving the day before. The owner sued the insured for the water damages, and the insured's CGL carrier denied coverage.

The insured sued its carrier, and the carrier ultimately moved for summary judgment based on the policy's Rain Cover Exclusion, Heat Application Exclusion, and Damage to Property Exclusion under j(5). The court granted the carrier's motion with respect to j(5), determining that the damage arose directly from the insured's ongoing operations in installing the roof.

Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr., Inc., No. 2:17-CV-00341-SMJ, 2018 U.S. Dist. LEXIS 199658, 2018 WL 6173426 (E.D. Wash. Nov. 26, 2018), *reconsideration denied*, No. 2:17-CV-00341-SMJ, 2018 U.S. Dist. LEXIS 208332, 2018 WL 6492956 (E.D. Wash. Dec. 10, 2018).

The insured was the general contractor for the construction of a residence but relied on subcontractors to perform all of the work. The homeowners sued the insured asserting that it had failed to finish constructing the home. The insured's CGL carrier agreed to defend the insured under a reservation of rights and commenced a declaratory judgment action. The court held that the carrier had a duty to defend the insured, but the carrier renewed its motion for summary judgment on the indemnity issue after judgment was entered against the insured in the underlying action.

The carrier's policy contained an Independent Contractors Limitation of Coverage Endorsement that required the insured to obtain, *inter alia*, contractual indemnification from subcontractors and additional insured coverage under the subcontractors' policies. The carrier argued that it had no duty to indemnify the insured because the insured had failed to comply with the conditions in the endorsement. Because there was no dispute that the insured had failed to comply with the conditions and that the carrier was prejudiced as a result, the carrier had no duty to indemnify.

Florida

S.-Owners Ins. Co. v. MAC Contractors of Fla., LLC, No. 2:18-CV-21-FTM-99CM, 2018 U.S. Dist. LEXIS 103659, 2018 WL 3067928 (M.D. Fla. June 21, 2018), *reconsideration denied*, No. 2:18-CV-21-FTM-29CM, 2018 U.S. Dist. LEXIS 134072, 2018 WL 3768986 (M.D. Fla. Aug. 9, 2018).

The insured was hired to be the general contractor for a home. A dispute arose between the owner and the insured, and ultimately the owner sued for breach of contract alleging construction defects. The amended complaint against the insured alleged that it had refused to complete its contract and subsequently abandoned it. The insured's carrier initially agreed to defend it, but then withdrew the defense and filed the coverage action.

The crux of the carrier's argument in its motion for summary judgment was that the lawsuit against the insured was excluded from coverage based on the Damage to Your Work Exclusion, which applied to "property damage" to the insured's work arising out of it or any part of it and included in the "products-completed operations hazard." The court's analysis of whether the exclusion applied centered around whether the damages fell within the products-completed operations hazard. The carrier argued that it did because the

underlying action clearly alleged that the insured had abandoned the project. The insured asserted that the provision was ambiguous. The court disagreed and determined that the carrier had no obligation to defend or indemnify the insured based on the exclusion.

Practice Point: Under Florida law, exclusions are to be construed narrowly but they are deemed presumptively valid if they are specific and clear.

Auto-Owners Ins. Co. v. Envtl. House Wrap, Inc., No. 3:17-CV-817-J-34PDB, 2018 U.S. Dist. LEXIS 111437, 2018 WL 3244008 (M.D. Fla. May 14, 2018), *report and recommendation adopted*, No. 3:17-CV-817-J-34PDB, 2018 U.S. Dist. LEXIS 111157, 2018 WL 3241259 (M.D. Fla. July 3, 2018).

The underlying dispute involved claims against a homeowners association, the general contractor, and the insured subcontractor. The carrier filed a coverage action against each of them seeking a determination that it owed no coverage under the policy it issued. Only the general contractor appeared, so the carrier moved for default against the subcontractor and the homeowners association. The court noted that, in order to avoid inconsistent judgments, the court would not enter a default judgment against a defendant in a declaratory judgment action if another defendant in the action had appeared. Therefore, the motion was denied without prejudice to renew when the action was ripe for a final adjudication against all of the defendants.

Practice Point: It is always important to review all applicable court rules, as here the court expressed annoyance at counsel for failing to attach a memorandum of law in support of its motion as required by the local rules.

Owners Ins. Co. v. Bobby T., Inc., No. 8:16-CV-3428-T-27AAS, 2018 U.S. Dist. LEXIS 51901, 2018 WL 1524400 (M.D. Fla. Mar. 28, 2018).

The insured was hired to repair and remediate moisture intrusion problems on the exterior of some condominiums. The condo association sued the insured alleging that the property had suffered damages as a result of construction defects associated with the work. The insured's carrier agreed to defend the insured subject to a reservation of rights, but then filed a coverage action seeking a determination that the complaint against the insured fell wholly within the policy's Damage to Your Work Exclusion. The court denied the carrier's motion because it determined that it was unclear from the underlying complaint whether the action only alleged damages to the insured's work, and pointed specifically to an allegation in the complaint that there was water intrusion that had extended to areas outside where the insured had performed work. Therefore, because it was possible that the complaint against the insured alleged damage to property other than the insured's work, the carrier had an obligation to defend the insured.

Practice Point: If some of the allegations fall within the scope of coverage and some fall outside the scope of the coverage, then the carrier must defend the entire action.

Mid-Continent Cas. Co. v. JWN Constr., Inc., No. 9:17-CV-80286, 2018 U.S. Dist. LEXIS 20529, 2018 WL 783102 (S.D. Fla. Feb. 8, 2018), *appeal dismissed*, No. 18-11278-AA, 2018 WL 3238589 (11th Cir. June 28, 2018).

The underlying plaintiff wanted to hire a particular contractor to construct a residential home, but the contractor was not an approved builder by his lender. Therefore, the underlying plaintiff hired the insured to act as a general contractor, and the insured then hired the underlying plaintiff's preferred contractor to actually perform the work.

When the underlying plaintiff sued the insured for faulty work, the insured's carrier filed the coverage action seeking a determination that it did not owe any duty to defend or indemnify the insured because coverage was excluded by the policy's Damage to Your Work Exclusion. The insured argued that the exclusion did not apply because it had not actually performed any of the work and a subcontractor had performed portions. The court disagreed and determined that the fact that the insured had entered into a contract to be responsible for all of the work at the property was dispositive, and noted that the exclusion for defective work did not include an exception for a subcontractor's work.

Practice Point: The judge spent a portion of the decision iterating its rules regarding summary judgment motions, and criticized the insured for failing to comply with the judge's instructions.

S. Owners Ins. Co. v. Gallo Bldg. Servs., Inc., No. 815CV01440EAKAAS, 2018 U.S. Dist. LEXIS 212961, 2018 WL 6619987 (M.D. Fla. Dec. 18, 2018).

The insured was a subcontractor hired to perform certain work on a construction project. The carrier had issued commercial and umbrella policies to the insured covering various policy periods. When the project developer sued several subcontractors, including the insured, for defective work, the carrier filed a coverage action seeking a determination that it had no duty to defend or indemnify the insured because the action against the insured failed to allege any property damage, and because even if it did, coverage was barred by the Damage to Your Work Exclusion and the Stucco Exclusion.

The court first determined that the underlying complaint alleged property damage because it alleged damage to property other than the insured's work product. Specifically, the complaint against the insured contained allegations that there was damage to other building components, damage to other property, and property damage to the work of other contractors. The court rejected the carrier's assertion that the Damage to Your Work Exclusion operated to bar coverage for the same reason, and rejected the carrier's position that the underlying complaint must allege damage to property other than the project. The court pointed out that the exclusion was limited to barring coverage for the insured's own work and that the insured was only a subcontractor with a limited scope of work. Finally, the court rejected the carrier's argument that the Stucco Exclusion applied because it was unclear whether the allegations against the insured related to the installation of stucco or EIFS.

Practice Point: There is case law in Florida standing for the proposition that "bald assertions and buzzwords" should not trigger coverage, but it is does not apply where the allegations against the insured specify items of damage.

Watermark Constr., L.P. v. S.-Owners Ins. Co., No. 617CV1814ORL40TBS, 2018 U.S. Dist. LEXIS 40831, 2018 WL 1305913 (M.D. Fla. Mar. 13, 2018).

The plaintiff in this coverage dispute was an apartment developer that brought suit against one of its subcontractors and the subcontractor's carrier. The developer sought a determination that the carrier was obligated to provide it with additional insured coverage. The carrier argued that coverage was barred by the policy's Stucco Exclusion and Fungi or Bacteria Exclusion.

The developer sought a determination that the Stucco Exclusion did not apply and brought another claim for reformation of the policy. The developer pointed to the fact that the policy declarations included a portion of the premium related to stucco work and argued that it relied on that when it entered into a contract with the insured. The developer also argued that the parties to the policy intended that stucco work be covered and the policy be reformed to reflect that.

Initially, the court denied the carrier's motion to dismiss the reformation cause of action. The developer had moved to dismiss the carrier's counterclaims, or in the alternative to stay the counterclaim, regarding the carrier's indemnification obligation until the underlying action was decided. The court agreed that the duty to indemnify claim should be stayed. The court also refused to grant the developer's motion for default against the subcontractor insured because doing so could result in inconsistent coverage determinations to the developer and the insured.

Practice Point: To state a claim for reformation under Florida law, the complaint must allege that a contract fails to express the agreement of the parties due to either mutual mistake or a unilateral mistake coupled with the inequitable conduct of the other party.

Nat'l Builders Ins. Co. v. RQ Bldg. Prod., Inc., No. 17-61474-CIV, 2018 U.S. Dist. LEXIS 172705, 2018 WL 4846410 (S.D. Fla. Oct. 5, 2018).

This decision was an order from the district court judge adopting the magistrate judge's report and recommendation, and overruling the objections that were made in response to the same. The decision is brief, although the magistrate's report and recommendation is available through PACER and other websites where federal court filings are accessible. The bulk of information outlining the facts in this case come from the September 7, 2018 report and recommendation from the magistrate.

The insured was hired to design and install windows and doors for a property that was being constructed. The owners alleged that after they took possession of

the property, they began to suffer bodily injuries as a result of chronic water intrusion through the windows due to defective installation. The owners alleged that they moved into the property two days before the policy lapsed. The carrier argued in this coverage action that it owed no duty to defend the insured because there were no allegations of damage suffered during construction or during the two days that the owners lived on the property while the policy was still effective.

The court determined that the carrier had an obligation to defend the insured in an underlying construction defect case because the complaint against the insured alleged that the conditions in the home were latent and existed at the time the owners moved into the premises.

Practice Point: Florida follows the trigger-in-fact test regarding when an occurrence happens, i.e., that the occurrence happens when the physical injury to property happens, and not when the defective work is performed.

Amerisure Ins. Co. v. Auchter Co., No. 3:16-CV-407-J-39JRK, 2018 U.S. Dist. LEXIS 154949, 2018 WL 4293149 (M.D. Fla. Mar. 27, 2018).

The insured was hired to construct a 13-story office building. During construction, the insured experienced financial problems, and at one point, its construction contract surety took over the project. The owner eventually brought a lawsuit against both the insured, its surety, and various subcontractors on the project. The carrier defended the insured subject to a reservation of rights. The owner's underlying action culminated in a 28-day trial and 87-page final judgment.

The insured's surety also sued the insured to recover for contractual indemnification in connection with the bonds insuring and guaranteeing the insured.

The carrier filed this coverage action seeking a determination that it had no duty to indemnify the insured or the surety in connection with the owner's underlying action as well as in connection with the lawsuit filed by the surety against the insured.

The major issue was whether the underlying judgments were for the repair and replacement of the window system, which was the insured's particular work, and whether the carrier should be responsible for the $5,000,000 portion of the judgment related to replacement of the entire window system. The court ultimately concluded that because the judgment in the owner's underlying action established that the defective work caused property damage to otherwise non-defective property, and that the property damage would continue without a replacement of the entire window system, then the carrier was obligated to indemnify the insured for the entire cost of the replacement for the window system.

Practice Point: The court noted that under *Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240 (11th Cir. 2015), "it is the fact of damage to otherwise non-defective property and the cause of that damage which compels a finding that coverage exists."

Mt. Hawley Ins. Co. v. Maitland Ctr., LLC, No. 18-CV-80452, 2018 U.S. Dist. LEXIS 126460, 2018 WL 3634579 (S.D. Fla. July 30, 2018).

The carrier filed a coverage action against various entities seeking a determination regarding its coverage obligations to the entities. The defendants in the action filed a motion to dismiss or in the alternative to stay the coverage action, arguing that there could be no actual case or controversy until the underlying action was resolved. Defendants did acknowledge that the carrier's claim regarding the duty to defend was ripe, so the decision was limited to whether the cause of action seeking a determination vis a vis the duty to indemnify should be dismissed or stayed. The court concluded that if the carrier was successful in demonstrating that it had no duty to defend the entities, then it would follow that there was no duty to indemnify. Therefore, the court determined that it would not decide the duty to indemnify issue until either a final disposition in the underlying action or there was a ruling on the duty to defend.

Practice Point: In Florida, the duty to indemnify cannot be determined until the underlying action is resolved unless the carrier can demonstrate that the allegations in the complaint could never trigger the duty to indemnify.

Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 880 F.3d 1300 (11th Cir. 2018).

This case was a result of a prior 2016 decision from the Eleventh Circuit that certified a question to the Florida Supreme Court. This brief decision acknowledges that the Florida Supreme Court determined that the notice and repair process set forth in Chapter 558 of the Florida Statutes constituted a "suit" within the meaning of the commercial general liability policies issued to the insured. Specifically, the Florida Supreme Court had acknowledged that it was an alternative dispute resolution proceedings. Therefore, the Eleventh Circuit reversed the grant of summary judgment to the carrier and remanded the case to the district court.

Practice Point: In Florida, Chapter 558 of the Florida Statutes allows an alternative dispute resolution mechanism in certain construction defect matters.

Travelers Indem. Co. of Connecticut v. Richard McKenzie & Sons, Inc., 326 F. Supp. 3d 1332 (M.D. Fla. 2018).

The insured had been hired by the owner of a citrus grove in order to manage operation of the citrus grove and maximize profit. Eventually the owner sued the insured alleging breach of an oral contract and breach of fiduciary duty. The owner had also pressed the State Attorney to pursue a criminal action against the insured, which then charged the insured with a scheme to defraud and with grand theft. With respect to the civil action, the insured entered into a consent judgment for nearly $3,000,000 with the agreement that the owner would agree not to execute against the insured and would instead pursue collection against the insured's CGL carrier.

In the coverage action, the court determined that both the Expected or Intended Injury Exclusion and the Damage to Property Exclusion barred coverage. The court also determined that even if there were coverage, the amount of the consent judgment was unreasonable and that collusion and bad faith between the insured and the owner tainted the settlement. Critical to the court's decision was the fact that the owner agreed to recommend to the State Attorney a lenient decision in the criminal action in exchange for the consent judgment.

Practice Point: The owner's prior statements to the State Attorney and prior complaints were fatal to its attempt to amend the complaint to add a cause of action for negligence.

Texas

Colony Ins. Co. v. Rentech Boiler Sys., Inc., No. 1:16-CV-00159-BL, 2018 U.S. Dist. LEXIS 46780, 2018 WL 1442740 (N.D. Tex. Mar. 1, 2018), *report and recommendation adopted*, No. 1:16-CV-159-C, 2018 U.S. Dist. LEXIS 45906, 2018 WL 1418185 (N.D. Tex. Mar. 21, 2018).

A public utility hired the insured to construct a generator, and then sued the insured for alleged design flaws. The utility sued the insured in North Carolina, and the insured's carrier, which had issued both CGL and E&O policies to the insured, denied any obligation to defend or indemnify the insured and brought this coverage action.

Regarding the CGL policies, the carrier argued that the insuring agreement was not triggered in the first instance and that even if it were, Exclusion k, which bars coverage for property damage to the insured's product, and Exclusion m, which applies to damage to impaired property or property not physically injured, applied to exclude coverage. The court determined that the exclusions operated in tandem to result in the conclusion that coverage was excluded.

Regarding the E&O policy, the court concluded that coverage was excluded by the policy's provision that stated that the policy did not cover repair, replacement, withdrawal of the generator, or any failure to delay performing professional services.

Greystone Multi-Family Builders, Inc. v. Gemini Ins. Co., No. CV H-17-921, 2018 WL 1579477 (S.D. Tex. Mar. 30, 2018).

The insured was hired to act as a general contractor on a construction project. After disputes arose, the insured sued the owner, and the owner counterclaimed against the insured for various breaches of the contract. The insured's CGL carrier denied any obligation to defend or indemnify the insured, and this coverage action followed. The carrier filed a motion for summary judgment arguing that the owner's claims against the insured did not allege any occurrence and that various exclusions applied.

Initially the court rejected the carrier's argument that no occurrence was alleged because the owner had alleged various actions that were not necessarily the

natural result of the insured's mismanagement. The court also determined that some of the alleged damages, such as damage to structural elements or the project, fell within the definition of "property damage."

The court also analyzed whether coverage was excluded under the policy's Damage to Property Exclusion under subsections j(5) and j(6), The Fungus or Spore Exclusion, and the Damaged to Impaired Property under subsection (m). The district court judge agreed with the magistrate judge's decision and overruled the insured's objections as they related to the exclusions determining that the carrier had not demonstrated that the exclusions applied.

Mt. Hawley Ins. Co. v. Slay Eng'g, Texas Multi-Chem, & Huser Constr. Co., Inc., 335 F. Supp. 3d 874 (W.D. Tex. 2018).

The insured was the general contractor hired by a city to construct a municipal sports complex. The insured hired various subcontractors for the project, including one that would build the pool and another that would perform earthwork, grading, and storm drainage work. The city filed a lawsuit against the insured alleging breach of contract and negligence associated with the pool and site drainage. The insured's CGL carrier denied coverage based on various policy exclusions and filed this declaratory judgment action seeking a determination that it did not owe coverage.

Initially, the court determined that the Breach of Contract Exclusion did not vitiate coverage because, although the claims against the insured related to the insured's contract for the work, the carrier was arguing that the exclusion was too broad and that the exclusion should not apply to all work related to the project regardless of who performed it. The court also rejected the carrier's argument that the Breach of Contract Exclusion rendered the Subcontractor Exception to the Your Work Exclusion irrelevant, and pointed out that the Subcontractor Exception indicated that the policy was intended to cover damage arising from a subcontractor's work.

Illinois

Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp., No. 17-CV-3513, 2018 U.S. Dist. LEXIS 135871, 2018 WL 3819109 (N.D. Ill. Aug. 10, 2018).

The insured was hired to sell a particular brand of lumber to contractors for a specific building project. After the lumber was incorporated into the project, it was discovered that the wrong type of lumber had been delivered, and the building owners demanded that it be removed and replaced. The contractor brought suit against the insured alleging various causes of action associated with the transaction.

The insured's carrier declined to defend the insured because it argued that the underlying lawsuit failed to allege any "property damage" caused by an "occurrence" and based on the policy's business risk exclusions. Ultimately, the court determined that the lawsuit did allege "property damage" because the lawsuit alleged damages to property other than the lumber, including other building materials that were damaged as a result of the removal of the lumber.

However, the court determined that there was no occurrence alleged because the lawsuit alleged that the insured knowingly supplied the wrong lumber and concealed that it did so, which did not constitute an accident. The court never reached the issue of whether any business risk exclusions applied to bar coverage.

Practice Point: Just because a complaint alleges a negligence cause of action does not necessarily mean that an occurrence is alleged.

Westfield Ins. Co. v. Maxim Constr. Corp., Inc., No. 15 C 9358, 2018 U.S. Dist. LEXIS 59400, 2018 WL 1695371 (N.D. Ill. Apr. 6, 2018).

The insured was hired to install a water treatment system for a city. When the installation failed, various lawsuits resulted, including one brought by the city against the insured and the manufacturer of the water treatment system. The carrier denied coverage based on lack of occurrence and various business risk exclusions including exclusion n, which excludes coverage for loss or expense resulting from loss of use, repair, or replacement of work because of a defect or deficiency in that work.

The court determined that the provision might limit the carrier's obligation to indemnify the insured but that it did not defeat the duty to defend. The court cited at length to a Seventh Circuit opinion involving the same carrier and policy, and what it said was

effectively the same issue to support its decision that the carrier did have an obligation to defend the insured.

Practice Point: In Illinois, a carrier is not required to demonstrate that it was prejudiced as a result of an insured's late notice.

Kentucky

Martin/Elias Properties, LLC v. Acuity, 544 S.W.3d 639 (Ky. 2018).

The insured was hired to perform various tasks associated with renovation of a basement as part of a complete renovation of a home. The insured's work caused the entire home to become unstable and nearly collapse. The insured's CGL carrier denied coverage was triggered for any claims against the insured because it did not result from any occurrence. The trial court had concluded that the damage to the basement was not an occurrence, but that the damage to the rest of the home was because it was unexpected. The appellate court reversed and concluded there was no coverage, and the Supreme Court agreed.

The court determined that in analyzing whether an event constitutes an occurrence, a court must determine whether the insured intended the event to occur and whether the event was a chance event beyond the control of the insured. The court determined that there was no coverage for the insured because the insured had both intent and full control when performing its work, so the resulting damage was not a fortuitous event.

Practice Point: In Kentucky, an occurrence or accident means "something that does not result from a plan, design, or intent on the part of the insured."

Utah

Big-D Constr. Midwest, LLC v. Zurich Am. Ins. Co., No. 2:16-CV-00952-BSJ, 2018 U.S. Dist. LEXIS 137179, 2018 WL 3849923 (D. Utah Aug. 13, 2018).

The insured was a general contractor on a project, and it hired a subcontractor to install a specific type of lumber, but at some point it was discovered that improper lumber had been installed. In order to replace the nonconforming lumber, various non-defective components of the project had to also be removed and replaced, including framing components, mechanical equipment, and windows. The insured acknowledged that the cost of replacing the lumber was not covered under its CGL and excess policies, but asserted that the carriers should provide coverage for replacement of the non-defective portions of the work.

The insured sued both its CGL and excess carriers, and the focus of the dispute was the scope of coverage under the insuring agreement, the Your Work Exclusions, the Recall Exclusion, the Impaired Property Exclusion, and the Contractor's Endorsement Exclusion. Ultimately the court determined that the Recall Exclusion, which applied to damages claimed for, *inter alia*, the replacement of the insured's work if such work is withdrawn because of a known defect, applied to bar coverage for all of the damages alleged against the insured.

Louisiana

Gibbs Constr., L.L.C. v. Nat'l Rice Mill, L.L.C., 238 So. 3d 1033 (La. App. 2018), *writ denied*, 241 So. 3d 1012 (La. 2018).

The insured was a masonry subcontractor that had completed work on an apartment building, and the underlying dispute involved water intrusion damages with respect to tropical storms in 2011 and 2012. Two primary carriers and an excess carrier were involved in the coverage dispute. The general contractor filed suit against the project owner for failure to issue payment, and then the owner filed a counterclaim against the general contractor as well as a third-party lawsuit against the insured subcontractor's carriers. The insured's excess carrier moved for summary judgment seeking a determination that the damages constituted two separate occurrences, in order to trigger two years of policy limits from the underlying carrier before the excess carrier's limits were implicated. The lower court had granted the motion, but the appellate court reversed on a technicality because the excess carrier had improperly attempted to attach much of its evidence to its reply papers rather than its original moving papers.

The excess carrier and an unrelated primary carrier had also moved for summary judgment on the basis that the damages sought from the insured were not "property damage" and were just economic damages. The owner argued that it suffered delay damages, loss of income, and rent concessions, which were "because of" "property damage." Specifically, the owner asserted that because of the insured's defective masonry and

waterproofing work, the interior of multiple apartments had been damaged. The court agreed and determined that the insuring agreement of the policies was triggered. However, the appellate court noted that it could not make any definitive determination regarding coverage because the lower court had determined that there was no "property damage," and then never reached the issue of whether any exclusions applied. Therefore, the case was remanded back to the lower court to determine whether the impaired property exclusion applied.

Practice Point: The standard for summary judgment in Louisiana is governed by LA C.C.P. Art 996, which provides that the court may consider only the documents filed in support of the motion.

Houston Specialty Ins. Co. v. Ascension Insulation & Supply, Inc., No. 17-CV-1010, 2018 U.S. Dist. LEXIS 134996, 2018 WL 4031778 (W.D. La. Aug. 7, 2018), *report and recommendation adopted*, No. 17-CV-1010, 2018 U.S. Dist. LEXIS 143316, 2018 WL 4008988 (W.D. La. Aug. 22, 2018), *on reconsideration in part*, No. CV 17-CV-1010, 2018 U.S. Dist. LEXIS 189303, 2018 WL 5796104 (W.D. La. Nov. 5, 2018).

The insured was a subcontractor hired to install insulation as part of renovations to a home. The underlying dispute alleged both bodily injury and property damage as a result of water intrusion into the home sometime after the renovation project was concluded. The insured's carrier agreed to defend the insured but filed the coverage action on the basis that the alleged damages occurred outside the coverage period and were subject to various policy exclusions.

The court debated whether the issue of when the property damage occurred was subject to either the manifestation theory or continuous exposure theory. The court noted that the Louisiana Supreme Court had not specifically weighed in on the issue but that the bulk of authority adopts the manifestation theory. However, the court determined that it need not specifically determine that issue since the carrier was obligated to defend the bodily injury claims and therefore the entire action.

The court rejected the carrier's assertion that the Fungi or Bacteria Exclusion applied because the underlying complaint against the insured did not contain any mention of mold damages. The court also rejected the carrier's assertion that the Damage to Your Product and Damage to Your Work Exclusions applied because the complaint against the insured alleged damages to property other than the insured's specific work. Finally, the court also rejected the carrier's argument that the Contractual Liability Exclusion applied because no entity was seeking to hold the insured responsible for its contractual liability.

Practice Point: A contractual liability exclusion does not bar coverage for breach of contract claims against the insured and instead applies to situations where a third party seeks to hold the insured responsible for its liability.

Starr Surplus Lines Ins. Co. v. Banner Prop. Mgmt. Co., No. CV 18-5635, 2018 U.S. Dist. LEXIS 207808, 2018 WL 6448840 (E.D. La. Dec. 10, 2018).

The insured was hired to construct a new home but was sued by the homeowner for negligence, breach of contract, and statutory claims associated with the build. The carrier filed the coverage action seeking a determination that it had no obligation to defend or indemnify the insured because the Damage to Property, Damage to Your Product, and Damage to Your Work Exclusions applied. The insured asserted that the exclusions only barred coverage for damages to the insured's specific work product and that because the complaint alleged damages to property outside of the insured's work, the carrier could not demonstrate that coverage was unambiguously excluded for all of the damages alleged against the insured. The court agreed and denied the carrier's summary judgment motion.

Practice Point: In determining whether there is a duty to defend, the courts evaluate the complaint against the insured and the policy but not any extraneous evidence.

Forrest as Tr. for Jack Thrash Forrest III Tr. v. Ville St. John Owners Ass'n, Inc., 259 So.3d 1063 (La. App. 2018).

The coverage dispute arose out of a fire at a condominium complex. The insured was the association that managed the complex. The insured had made a first-party claim against its property carrier, which had been paid. However, one of the individual condominium owners filed a lawsuit against the insured association

asserting that it had failed to make repairs to its individual unit. Specifically, the condominium owner alleged, *inter alia*, that the insured association had failed to secure adequate compensation to repair the unit, negligently repaired the unit, and failed to properly repair the unit.

The insured association sought coverage under its management policy for what it called its directors and officers' alleged wrongful acts. The carrier denied coverage based on the policy's exclusion for claims arising out of loss of tangible property, including construction defects. The court determined that the carrier's denial was correct because the exclusion unambiguously applied because the condominium owner would not have suffered any alleged damages but for the property damage caused by the fire.

Practice Point: Claims-made policies do not require any occurrence and instead provide coverage for wrongful acts.

New Jersey

313 Jefferson Trust, LLC v. Mercer Ins. Companies, No. A-2907-15T3, 2018 N.J. Super. Unpub. LEXIS 35, 2018 WL 316972 (N.J. Ct. App. Jan. 8, 2018).

The insured was the general contractor for construction of a building. When the insured sued the owner for breach of contract arising from failure to pay, the owner counterclaimed for various construction defects. The insured's carrier denied any obligation to defend or indemnify its insured, claiming that the complaint alleged alter ego and fraudulent misrepresentation claims, and that it demanded non-covered compensatory and punitive damages. The carrier cited to provisions of its policy in concluding the allegations and demands do not involve "bodily injury" or "property damage" under the policy. The carrier also asserted that the claim did not arise from an "occurrence," but rather, from intentional actions.

The carrier also argued that the policy's "Business Activities/Business Risk Exclusions" barred coverage. The court acknowledged the exclusion, but pointed out that the subcontractor exception to the exclusion might be applicable. There had been no determination of whether the faulty work had been performed by subcontractors, even though the carrier conceded that at least some of the work was performed by subcontractors. The court remanded the matter to the lower court for a ruling consistent with the court's coverage-related observations, which included the fact that there may not have been an "occurrence." However, rather than grant summary judgment to the carrier on that basis, the court remanded the matter for additional proceedings.

Schnabel Found. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, No. CV PX-16-0895, 2018 U.S. Dist. LEXIS 101529, 2018 WL 2967384 (D. Md. June 12, 2018).

The insured was the general contractor for the construction of an apartment building. One of the subcontractors was an additional insured under the policy. The general contractor's primary policy had been exhausted as a result of unrelated claims made against the insured arising out of the same project, so the coverage dispute centered around the excess policy issued to the insured. The particular underlying disputes related to project delay costs associated with the subcontractor's work. The carrier denied coverage for various disputes, so the subcontractor settled the disputes and then sought to recover from the carrier. The action was decided under New Jersey law.

The court determined that coverage was triggered because the project owner and the general contractor had alleged damages against the subcontractor that arguably resulted from their loss of use of the construction site. The court determined that the damages arose "because of" property damage. However, the court ultimately determined that coverage was barred by the policy's Impaired Property Exclusion because all of the claims against the subcontractor that it had settled arose out of defects in the subcontractor's work.

Practice Point: In New Jersey, courts construe coverage terms in an insurance policy broadly but policy exclusions narrowly.

Minnesota

Westfield Ins. Co. v. Miller Architects & Builders, Inc., No. CV 17-400 (PAM/LIB), 2018 WL 495652 (D. Minn. Jan. 19, 2018).

The insured was a contractor hired to design and build an apartment complex. The owner sought to arbitrate its claims against the insured, and the insured sought

coverage under its CGL policy. The carrier denied any obligation to defend or indemnify the insured. In the coverage action, the insured pointed to five categories of damages alleged by the owner to assert that the carrier had the duty to defend.

Initially, the court rejected the carrier's assertion that the business risk doctrine operated to bar coverage, and instead determined that the specific policy terms governed whether coverage was excluded. The carrier also argued that the arbitration demand did not allege any occurrence because it alleged that subcontractors had intentionally deviated from design specifications, but the court determined that, even if the subcontractors had acted intentionally, it was still accidental from the insured's perspective. Finally, the court determined that the subcontractor exception to the Damage to Your Work Exclusion applied. Therefore, because there was a reasonable chance that the arbitration claims were covered, the carrier had a duty to defend.

Practice Point: In Minnesota, costs to litigate insurance coverage for failure to defend are considered damages that arise from the carrier's breach of contract, so an insured can recover attorneys' fees in declaratory judgment actions.

Missouri

Elec. Power Sys. Int'l, Inc. v. Zurich Am. Ins. Co., 880 F.3d 1007 (8th Cir. 2018).

The insured was hired to relocate a used electrical transformer from Wisconsin to Kentucky. Part of the relocation involved disassembling the transformer, but the insured failed to remove one of the bolts during the disassembly, which damaged the transformer. When a claim was made against the insured, it sought coverage under its CGL policy. The carrier denied coverage based on, *inter alia*, subsections j(4) and j(6) of the Damage to Property Exclusion.

The court concluded that exclusion j(6), which excluded coverage for property damage to "that particular part of any property that must be restored, repaired or replaced because [the insured's] work was incorrectly performed on it" applied to bar coverage. The insured had argued that the exclusion did not apply because "that particular part" that the insured was working on at the time of the damage was one specific part of the transformer and because it was another part of the transformer that was damaged. The court concluded that the insured's interpretation was too narrow. Because coverage was excluded under j(6), the court did not evaluate j(4).

Practice Point: Missouri follows the majority of jurisdictions in that Missouri courts strictly construe exclusions against the carrier.

View Home Owner's Ass'n v. The Burlington Ins. Co., 552 S.W.3d 726 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (May 29, 2018), *transfer denied* (Aug. 21, 2018).

The insured was an owner that sought coverage when a condominium homeowners association alleged that the owner had negligently renovated the building. When the carrier denied coverage, the homeowners association obtained a judgment against the insured and agreed not to execute against the insured and instead pursue the carrier for the judgment.

The court determined that the allegations against the insured did not involve any occurrence. Although there were claims of negligence, the homeowners association alleged a variety of defects associated with the renovations. The court explained that insurance carriers are not sureties of their policyholders' work product and that the purpose of CGL coverage is to protect against fortuitous accidents rather than to shield entities from the results of their defective work product. Therefore, the court determined that the allegations did not arise out of an occurrence. The court also concluded that even if there were an occurrence alleged, the Designated Operations Exclusion would bar coverage because under that exclusion there was no coverage for any completed construction projects.

Practice Point: In Missouri, parties to a dispute may enter into an agreement pursuant to Mo. Ann. Stat. § 537.065 where the claimant seeks the ability to pursue the alleged tortfeasor's insurance carrier.

Depositors Ins. Co. v. NEU Constr. Servs., Inc., 305 F. Supp. 3d 1011 (E.D. Mo. 2018).

The insured was hired to construct a second-story veranda on a home. There were subsequent issues with the waterproof membrane on the veranda, and the insured notified its CGL carrier of the damages that resulted to the home. The carrier denied coverage because it took

the position that the policy did not cover claims for damage attributable to the insured's workmanship.

The insured was subsequently served with an arbitration demand but failed to provide the carrier with notice of the action until nearly a year after the arbitrator made its award against the insured. The carrier then filed this coverage action seeking a determination that it did not owe coverage. Initially, the court determined that there was no occurrence alleged in the arbitration action because the owners had alleged breach of contract against the insured, and because the arbitration award clearly explained that the damages were the result of specific provisions in the contract that the insured had breached.

The court also determined that the insured's failure to provide notice of the arbitration demand was another basis for which there was no coverage. Even though the insured had provided notice of the claim, the policy's requirement that the insured provide notice of a suit was a separate policy condition.

Practice Point: In Missouri, an insured's failure to timely notify a carrier can vitiate the carrier's defense obligation but only if the carrier can demonstrate that it was prejudiced as a result.

Nebraska

Grinnell Mut. Reinsurance Co. v. Fisher, No. A-16-1047, 2018 Neb. App. LEXIS 47, 2018 WL 1304918 (Neb. Ct. App. Mar. 13, 2018).

The insured was sued by a homeowner who claimed that he had stopped working on a house that the insured had agreed to build. The homeowner alleged causes of action for breach of contract, fraudulent misrepresentation, *quantum meruit*, and negligence. The insured's CGL carrier filed this declaratory judgment action seeking a determination that the homeowner's claims were not covered under the CGL policy.

The lower court initially granted the carrier's summary judgment motion by determining that the policy did not cover breach of contract and business risk associated with unworkmanlike conduct. The appellate court reversed finding that the homeowner's complaint included more than just damage to the insured's own work product and therefore constituted an occurrence. For the same reason, the court concluded that the Your Product Exclusion and Your Work Exclusion did not vitiate coverage where the damage was to property of others. The court also determined that the Damage to Property Exclusion might possibly apply, but it was unclear at that stage whether it applied to all of the alleged damages against the insured.

Practice Point: In Nebraska, allegations that the insured's own work product is defective is not an occurrence, but allegations that other property has been damaged may be.

Nevada

AIG Specialty Ins. Co. v. Liberty Mut. Fire Ins. Co., No. 217CV01260APGNJK, 2018 U.S. Dist. LEXIS 38745, 2018 WL 1245488 (D. Nev. Mar. 9, 2018).

This dispute was between a primary CGL carrier and an excess carrier over coverage for their mutual insureds, contractors that had built a hotel. The hotel owner sued the contractors when it was discovered that the hotel's steel frame required replacement. The primary policy had a $2,000,000 per occurrence limit and $4,000,000 aggregate limit. The primary carrier asserted that there was only one occurrence, and therefore its policy was exhausted after payment of $2,000,000.

The excess carrier pointed to the primary carrier's Contractor's Rework Endorsement to argue that it was a separate insuring agreement, and therefore not subject to the $2,000,000 per occurrence limit. Ultimately, the court determined that the primary policy was ambiguous regarding whether the endorsement was subject to the per occurrence limit because it had its own insuring agreement and own exclusions. Therefore, the court granted the excess carrier's summary judgment motion seeking a declaration that the endorsement was not subject to the per occurrence limit.

Practice Point: Under Federal Rule of Civil Procedure 56, a party is entitled to summary judgment where there is no genuine dispute regarding any material fact.

AIG Specialty Ins. Co. v. Liberty Mut. Fire Ins. Co., No. 217CV01260APGNJK, 2018 U.S. Dist. LEXIS 65198, 2018 WL 1863056 (D. Nev. Apr. 18, 2018).

This dispute was part of the same lawsuit as the case of the same name decided a month earlier. The only issue in this particular decision was whether the allegations

against the contractors involved more than one occurrence. The judge had previously decided that the Contractor's Rework Endorsement was subject to a $4,000,000 policy limit. However, the primary carrier asserted that some of the alleged damages did not fall within the Contractor's Rework Endorsement and were therefore subject to the $2,000,000 per occurrence limit.

The primary carrier alleged that there was just one occurrence, but the excess carrier alleged that there were multiple occurrences. The primary carrier asserted that all of the allegations against the insureds were based on one cause: the failure to follow design plans. The excess carrier pointed to the various allegations against the insureds to assert that there were numerous occurrences. Ultimately, the court noted that the specific cause of the injury would need to be determined to ascertain how many occurrences there were, and opined that neither carrier had proven what the proximate cause of the damage was. Therefore, the court denied both carrier's summary judgment motions.

Practice Point: Nevada has adopted the "causal approach" to determine the number of occurrences, which focuses on the cause of the injury rather than the number of the injuries.

New Hampshire

Nautilus Ins. Co. v. Gwinn Design & Build, LLC, No. 18-CV-633-JD, 2018 U.S. Dist. LEXIS 208437, 2018 WL 6519071 (D.N.H. Dec. 11, 2018).

The insured was hired to renovate a home. The homeowner expressed dissatisfaction with the renovation and sued the insured. The insured never answered the complaint against him, and a default judgment was entered. The insured never provided any notice to its CGL carrier. Eventually the homeowner's attorney provided notice of the judgment to the carrier. The carrier hired an attorney to try to get the default judgment against the insured set aside but was unsuccessful.

The carrier then filed this lawsuit against the insured and the homeowner seeking a judgment that it was not obligated to provide coverage for numerous reasons. The carrier then moved for summary judgment specifically related to its claim that it had no obligation to provide coverage because the insured never provided notice of the claims against him. The court granted the carrier's motion because the insured's delay was significant considering a default judgment had been entered against him. The court also noted that the insured had failed to appear in the coverage action and offer any excuse for the delay.

Practice Point: In New Hampshire, late notice precludes coverage where the breach is substantial, and the determining factors are the length of delay, the reasons for the delay, and whether the insured was prejudiced by the delay.

Pennsylvania

First Specialty Ins. Corp. v. Hudson Palmer Homes, Inc., No. 17-5732, 2018 U.S. Dist. LEXIS 194560, 2018 WL 6002318 (E.D. Pa. Nov. 14, 2018).

Ten construction defect lawsuits were filed against an insured in Pennsylvania state courts. The insured's CGL carrier agreed to provide a defense in each of the ten underlying lawsuits subject to a reservation of a rights, and then filed a declaratory judgment action solely as to its duty to indemnify the insured. The insured moved to dismiss the declaratory judgment action, arguing that the action was not ripe, and even if it was ripe, the court should decline to exercise its discretionary declaratory judgment jurisdiction.

The court examined ripeness under the three-part test from the Third Circuit decision in *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990), which analyzes: (1) the adversity of the interest of the parties; (2) the conclusiveness of the judicial judgment; and (3) the practical help, or utility, of that judgment. The insured contended, *inter alia*, that the parties were not yet adverse because they agreed that the carrier had a duty to defend the insured in the underlying actions, and that any potential adversity between the parties would not arise unless or until a judgment was issued against the insured in the underlying action for damages the carrier might contend were not covered. The court agreed with the insured and dismissed the declaratory judgment action.

New York

Colony Ins. Co. v. AIG Specialty Ins. Co., No. 15-CV-3896 (VSB), 2018 U.S. Dist. LEXIS 49580, 2018 WL 1478045 (S.D.N.Y. Mar. 26, 2018).

This case involved a dispute between an insured's CGL carrier and the CGL carrier's professional liability

carrier. The dispute was over coverage for: (1) a 2009 construction defect lawsuit against the insureds; (2) a related 2014 lawsuit against the insureds resulting from settlement of the 2009 action; and (3) a 2014 garnishment action by the construction defect plaintiff and the insureds against the CGL carrier.

The CGL carrier had denied coverage to the insureds for the 2009 and 2014 lawsuits, and then filed this coverage action against its own professional liability carrier. The professional liability carrier denied coverage because it asserted that a claim had first been made against the CGL carrier prior to the inception date of the professional liability policy. The court agreed and included a detailed summary of the correspondence that had been sent to the CGL carrier throughout the 2009 and 2014 lawsuits against the insureds, and specifically, a September 2013 letter to the CGL carrier that outlined causes of action against the CGL carrier for bad faith and equitable garnishment.

Practice Point: The court explained that a notice of occurrence requirement is treated differently than a notice of claim requirement and the latter leaves room for differences of opinion or whether something will likely lead to liability.

Quaco v. Liberty Ins. Underwriters Inc., No. 17-CV-7980 (RJS), 2018 U.S. Dist. LEXIS 162834, 2018 WL 4572249 (S.D.N.Y. Sept. 23, 2018), *judgment entered*, No. 17-CV-7980(RJS), 2018 WL 6528233 (S.D.N.Y. Sept. 28, 2018).

The plaintiff in this lawsuit sought coverage from a carrier as an insured under a claims-made policy that the carrier had issued to a condominium association. The individual had served as both a principal of the sponsor entity that had developed the condominium building and also as a member of its Board. The Board commenced a lawsuit against the sponsor for various construction defects in the buildings, and also sued the individual for violating his fiduciary duties to the Board.

The individual then sought coverage under the policy issued to the Board asserting that he was entitled to coverage as a member of the Board. The carrier denied coverage based on the fact that it was of the position that the individual was sued because he was the principal of the sponsor. The carrier also relied on a construction defect exclusion in the policy.

Ultimately, the court determined that the carrier was required to defend the individual because the complaint against him involved allegations that took place after the sponsor controlled the project, which the court said suggested that some of the claims were against the individual himself unrelated to his role with the sponsor. The court also determined that the construction defect exclusion did not operate to vitiate the duty to defend because several of the allegations had nothing to do with any alleged construction defect.

Practice Point: The court rejected the carrier's argument that *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61 (1991) stands for the proposition that an insurer must have actual knowledge of facts establishing a reasonable possibility of coverage.

Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd, 882 F.3d 952 (10th Cir.), *cert. denied sub nom. Aspen Ins. (UK) Ltd. v. Black & Veatch Corp.*, 139 S. Ct. 151 (2018).

This case was venued in the Tenth Circuit Court of Appeals, but involved analysis of how a New York court would decide the issues. The insured was a global engineering, consulting, and construction company that was hired to construct several jet bubbling reactors to eliminate contaminants from coal-fired power plants. The insured subcontracted the construction of some of the components to another company. At some point, it was discovered that the subcontractor had negligently constructed the parts.

The insured's excess carrier denied coverage, and the insured filed this lawsuit. The district court granted the carrier's motion for summary judgment after determining that the claims against the insured were not caused by an occurrence. The Tenth Circuit indicated that the primary question on appeal was whether the New York Court of Appeals would determine that the property damage at issue was an occurrence under the policy. The court noted that New York state courts had not resolved whether subcontractor damages could constitute an occurrence. In a lengthy opinion, the court analyzed the history of the CGL policy coverage form, opinions from outside New York, and various New York cases. The court concluded that the damages at issue were caused by an occurrence because the insured never intended that the subcontractor would perform faulty work. The court also concluded that determining that the subcontractor's faulty work was

not an occurrence would render the Subcontractor Exception to the Damage to Property Exclusion meaningless.

The court stated that it was predicting that the New York Court of Appeals would decline to follow appellate division decisions that would not support the Tenth Circuit's analysis. One judge filed a dissent stating that it was her belief that the court had overstepped its bounds by limiting the precedential value of the New York appellate division decisions.

Practice Point: The court applied New York law because the carrier's policy contained a provision providing that any dispute regarding the terms of the policy should be construed under New York law.

Oklahoma

Fed. Ins. Co. v. Indeck Power Equip. Co., No. CIV-15-491-D, 2018 U.S. Dist. LEXIS 154257, 2018 WL 4344468 (W.D. Okla. Sept. 11, 2018).

The insured was hired to construct a water treatment system. After the work was completed, at least one segment of the water treatment system failed, and the owner sued the insured alleging negligence in the design and construction of the water treatment system, as well as fraud with respect to repairs to the system. The insured's carrier agreed to defend the insured subject to a reservation of rights, but then filed this declaratory judgment action asserting that coverage was not triggered in the first instance and that various exclusions applied.

The court determined that because there was damage to property other than the insured's work alleged in the underlying action, it did constitute an occurrence, and there was conflicting evidence regarding the scope of the insured's work such that summary judgment to the carrier was not appropriate. For the same reason, the court also determined that the carrier's summary judgment motion based on various business risk exclusions, including the Your Product Exclusion, Your Work Exclusion, and the Impaired Property Exclusion. ■

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