

**Commentary****Construction Defect Coverage In Flux:  
No Hope For Bob The Builder****Three Recent Supreme Court Decisions  
And Three Different Approaches****Has Kvaerner's Foundation Been Cracked?**

By  
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**Introduction: Is A Uniform Blueprint To Construction Defect Unattainable?**

While certainly not scientific, the cover of *Mealey's Insurance* is an excellent source for spotting trends that are developing in insurance coverage. A review from the past couple of years leads to the undeniable conclusion that construction defect claims are a front-runner for the title of fastest growing area. Indeed, the August 31st issue, which landed on my desk while this article was being written, reported on fourteen decisions — seven were listed under the heading "Faulty Work."

As the number of these decisions expand, so too has the disagreement over just what's covered and what's not. Even in the case of seemingly fundamental concepts, experienced policyholder and insurer counsel, not to mention courts, frequently can not reach a consensus. And most confused may be the policyholders themselves. It is not uncommon for even experienced contractors to find the construction defect claims process both eye-opening and jaw-dropping. The words "What do you mean there's no coverage for faulty workmanship — then what did I buy this policy for?" have no doubt been spoken by more than one contractor confronting a lawsuit brought by one of its clients.

As evidence of the variation that exists in this area, consider that three supreme courts recently examined what is an "occurrence" in the context of an underlying construction defect action. The result — three different approaches used to arrive at two different answers. Not long ago the Ninth Circuit, in a decision that was subsequently withdrawn on account of a settlement, did its own math when addressing the "occurrence issue" in the context of a construction defect coverage dispute: "Based on an extensive review of Arizona case law as well as that offered from other jurisdictions, there are, at the very least, four possible interpretations of the term 'occurrence' under a CGL policy." *Southwest Metalsmiths, Inc. v. Lumbermens Mutual Casualty Company*, 2004 U.S. App. LEXIS 5734, \*\*5, *withdrawn by* 2004 U.S. App. LEXIS 6391.<sup>1</sup> With this many approaches being taken by courts, what chance does Bob the Builder have to know what his CGL policy covers?<sup>2</sup>

As often happens in insurance coverage, when a body of case law develops in this manner it plants a seed for continued growth through self-perpetuation. Anytime both sides to a dispute can point to a case or two that they believe support their position, the inevitable result is more litigation.

While the "occurrence issue" is just one of several in the construction defect area, courts' treatment of it can have significant consequences on other issues, in particular, the "your work" exclusion and its all-important "subcontractor exception." This article will examine and attempt to reconcile the three different approaches recently taken by the high courts of Wisconsin, South Carolina and Nebraska addressing coverage for construction defects.

Given the wide disparity in the treatment of the issues by these courts and others, with no end in sight, perhaps the time has come to consider that a uniform blueprint to coverage for construction defects simply may not be a reality. For example, coverage lawyers have come to accept that, notwithstanding the same policy language being considered, courts have not adopted uniform approaches to trigger, allocation and many other issues in the latent injury and damage context. Instead, competing theories were developed by the earliest courts to tackle an issue, setting the stage for subsequent courts to decide which path to follow. Construction defect may be following a similar model.

If that's the case, it would be unfortunate. When it comes to latent claims, such as asbestos and hazardous waste, they were never contemplated under the historic policies that were called upon decades later to respond. That being so, it is not surprising that questions such as trigger and allocation were viewed by courts as particularly vexing, with the result being that different schools of thought developed in response to the issues. But claims for coverage for construction defects and the damage they cause are much different. It is unquestionably contemplated that such claims will be made under commercial general liability policies, especially when the insured has the word "contractor" in its name. Thus, it is unfortunate and unnecessary that so much disparity and confusion is developing in case law over the treatment of such claims, especially those involving relatively similar facts and often-times identical policy language.

**American Family Mutual Insurance Company v. American Girl, Inc., et al.,**  
**673 N.W.2d 65 (Wisc. 2004)**

In early January the Supreme Court of Wisconsin issued its decision in *American Family Mutual Insurance Company v. American Girl, Inc., et al.*, addressing coverage for a poorly constructed building. The facts, by construction defect standards, are relatively straightforward and were summarized by the court as follows: "[A] soil engineering subcontractor [Lawson] gave faulty site-preparation advice to a general contractor [The Renschler Company] in connection with the construction of a warehouse [for American Girl, f/k/a the Pleasant Company]. As a result, there was excessive settlement of the soil after the building was completed, causing the building's foundation to sink. This caused the rest of the structure to buckle and crack. Ultimately, the building was declared unsafe and had to be torn down." *American Girl* at 69-70. Needless to say, litigation — or in this case arbitration — ensued. And the coverage disputes were not far behind.

The *American Girl* court addressed a multitude of issues that often arise in coverage litigation of this sort. For purposes of this discussion, only the "occurrence issue" and "your work" exclusion — and the inter-play between them — will be addressed.

American Family argued that because Pleasant's claim was for breach of contract/breach of warranty, it could not be an "occurrence" under the CGL policies issued to the general contractor — Renschler. It was American Family's position that a CGL policy is not intended to cover contract claims arising out of the insured's defective work or product. The *American Girl* court concluded that American Family got it half right:

We agree that CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law.

*American Girl* at 76.

The *American Girl* court concluded that there is nothing in the CGL policy's basic coverage grant that supports a distinction between tort and contract for purposes of determining the availability of coverage. The court even noted that the New Jersey Supreme Court's landmark decision in *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979) — which is frequently cited by courts nationally in support of their decisions that there is no coverage for breach of contract claims arising out of defective work — "does not hold that losses actionable as breaches of contract cannot be CGL 'occurrences[.]'" *American Girl* at 77.

After rejecting the concept that breach of contract, fundamentally, can never constitute an "occurrence," the court concluded that the underlying claims in fact qualified as an "occurrence," as they were accidental ("clearly not intentional") and not anticipated by the parties. "The damage . . . occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building." *American Girl* at 76. Having reached the conclusion that an "occurrence" existed, the court turned its attention to the policy exclusions — among them, the "your work" exclusion.

The "your work" exclusion at issue provided as follows:

This insurance does not apply to:

1. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The *American Girl* court held that, but for the "subcontractor exception" (the negligent soils engineering work was a cause of the soils settlement and resulting property damage to the building), the "your work" exclusion would operate to preclude coverage. More about the subcontractor exception below.

The *American Girl* rule can be described as follows: Breach of contract qualifies as an "occurrence" causing "property damage," even if to the insured's own work. However, coverage for such property damage is excluded by the "your work" exclusion, but restored if caused by the work of a subcontractor.

***Auto-Owners Insurance Company v. Home Pride Companies, Inc., et al.***  
**684 N.W.2d 571 (Neb. 2004)**

In early August the Supreme Court of Nebraska issued its opinion in *Auto-Owners Insurance Company v. Home Pride Companies, Inc.*, addressing coverage under the following circumstances. Appletree Apartments, Inc. entered into an agreement with J.T. Builders to install new shingles on a number of Appletree's apartment buildings. The work was subcontracted to Home Pride Companies, Inc., which entered into a subcontract with Ron Hansen Construction to install the shingles.

After the work was completed, Appletree noticed problems with the roof and filed suit against Home Pride and others, alleging failure to install the shingles in a workmanlike manner and that such faulty workmanship caused substantial damage to the roof structures and building.

Home Pride sought coverage from Auto-Owners under a CGL policy. Auto-Owners defended Home Pride in the *Appletree* suit under a reservation of rights, but then filed a declaratory judgment action, claiming that the policy did not provide coverage because the faulty workmanship of a subcontractor is not an "occurrence" under a CGL policy. Home Pride argued that coverage was available on the basis of the "subcontractor exception" to the "your work" exclusion. The Supreme Court of Nebraska agreed that coverage was available, but not for that reason.

The *Home Pride* court begins its trip by taking the *American Girl* route, noting that step one in the process is not an assessment of the potential applicability of a policy exclusion, but, rather, a determination whether the underlying action alleges "property damage" caused by an "occurrence." The *Home Pride* court then quickly veers off the *American Girl* course, holding that "faulty workmanship, standing alone, is not covered under a standard CGL policy because it is not a fortuitous event." *Home Pride* at 577. However, despite this conclusion, the court is quick to make an important qualification: "[A]n accident caused by faulty workmanship is a covered occurrence." *Id.* "Stated otherwise, although a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists." *Home Pride* at 578.

Applying this rule, the *Home Pride* court concluded that, because the underlying complaint alleged that in addition to shingles falling off, the faulty workmanship caused the roof structures and building to experience substantial damage, the "occurrence" requirement was satisfied. Having determined that the policy provides an initial grant of coverage, the court continued its analysis by examining the exclusions.

The *Home Pride* court held that the "your work" exclusion did not apply because the damages claimed extended beyond the cost to simply repair and replace the contractors' work, i.e., to reshingle the roofs. In other words, for the same reason why the "occurrence" requirement was satisfied — the roof structures and building experienced substantial damage — the "your work" exclusion was held not to be applicable.<sup>3</sup> Thus, the court held that Auto-Owners had an obligation to defend Home Pride and provide coverage to the extent that it was found liable for the resulting damage to the roof structures and building.

### ***L-J, Inc., et al. v. Bituminous Fire and Marine Ins. Co., 2004 S.C. LEXIS 190***

The Supreme Court of Nebraska's opinion in *Home Pride* was issued on Friday, August 6. Among others, it made frequent reference to the Court of Appeals of South Carolina's decision in *L-J, Inc., et al. v. Bituminous Fire and Marine Ins. Co.*, 567 S.E.2d 489 (S.C. App. 2002). As further evidence of construction defect's state of flux, consider that on Monday, August 9th, before the ink on *Home Pride* had even dried, the Supreme Court of South Carolina reversed the Court of Appeals decision in *L-J*.

In *L-J, Inc., et al. v. Bituminous Fire and Marine Ins. Co.*, the South Carolina Supreme Court addressed coverage for the faulty workmanship of a contractor-insured that had been hired to perform site development work and construct roads for a subdivision. The work was completed in 1990. By 1994, the roads had begun to deteriorate.

The South Carolina Supreme Court noted that, according to the deposition testimony of witnesses, the only "occurrences" were various negligent acts by the insured during road design, preparation and construction that led to the premature deterioration of the roads. Reversing the court of

appeals, the supreme court stated, "We find that all of these contributing factors are examples of faulty workmanship causing damage *to the roadway system only*, which does not fall within the contractual definition of 'occurrence' under Bituminous's CGL policy." *L-J* at \*7 (italics in original). The South Carolina Supreme Court went on to explain that an accident causing bodily injury or property damage to another is the type of insurable loss contemplated by the CGL policy's definition of "occurrence."

Having concluded that there was no "occurrence," the supreme court noted that there was no need to address whether the damage at issue fell under the "subcontractor exception" to the "your work" exclusion. Nonetheless, the court wrote to reverse the court of appeals' determination that an exception to an exclusion can "restore" coverage. "In stating that the exception to the exclusion 'restores' coverage, the court of appeals overlooks existing law, which states that 'an exclusion does not provide coverage but limits coverage.'" *L-J* at \*12-\*13. More about this in the next section.

### ***The 'Occurrence' Requirement And The 'Sub-contractor Exception' To The 'Your Work' Exclusion***

In general, *American Girl*, *Home Pride* and *L-J*, and, for that matter, virtually all construction defect coverage cases, have one thing in common — none provide coverage for damage to the insured's own work. This is the embodiment of Dean Henderson's oft-cited quote: "The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." Henderson, "Insurance Protection for Products Liability and Completed Operations — What Every Lawyer Should Know," 50 *Neb. L. Rev.* 415, 441 (1971).

While *American Girl*, *Home Pride* and *L-J* may reach the same result on the fundamental issue of coverage for damage to an insured's work, they do so for different reasons. *American Girl* concludes that damage to the insured's own work qualifies as an "occurrence," but is subsequently excluded because of the "your work" exclusion. *Home Pride* and *L-J* conclude that damage to the insured's own work is precluded from coverage from the outset, because it is not caused by an "occurrence." Hence, these courts had no need to reach the "your work" exclusion (although the *Home Pride* court did so anyway, in a belt and suspenders fashion).<sup>4</sup>

For one important reason, the difference in these two approaches is enormous: the "subcontractor exception" to the "your work" exclusion. In *American Girl*, the court held that, but for the "subcontractor exception," the "your work" exclusion would operate to preclude coverage. Thus, the *American Girl* court used the "subcontractor exception" to restore coverage for otherwise excluded property damage. However, if *American Girl* had been decided by the *Home Pride* or *L-J* courts, it would appear that coverage would not have been restored by the "subcontractor exception." The *Home Pride* court explained it the clearest:

As an initial matter, we note that *Home Pride* appears to argue that coverage exists because the policy contains a subcontractor exception to the "your work," or "1," exclusion found in section 2. We disagree. The provision *Home Pride* relies on is merely an exception to an exclusion and, therefore, incapable of providing coverage. Stated otherwise, the exception contained within exclusion "1" is irrelevant until two conditions precedent are met: (1) There is an initial grant of coverage and (2) exclusion "1" operates to preclude coverage. *If, and only if, these two conditions are met may the subcontractor exception to the exclusion be applicable.*

*Home Pride* at 575-576 (citations omitted and italics added).

Thus, examining *American Girl* under the rationale of the *Home Pride* or *L-J* courts would likely result in no coverage being restored by the "subcontractor exception." These courts would no doubt conclude that faulty workmanship to the insured's own work does not qualify as an "occurrence," thereby precluding satisfaction of the policy's insuring agreement. Hence, there would be no coverage in the first place to restore.

A dissent in *American Girl* saw the issue in a similar manner as the *Home Pride* and *L-J* courts. Justice Roggensack concluded that the property damage was not caused by an "occurrence," as there was nothing accidental about it. "[I]t was known that if subsoil compaction was not properly done, the completed building would sink and the damage to the building that has occurred would very likely occur. Therefore, the cause of the damage was simply the continuation of prior existing unstable soil conditions." *American Girl* at 89. Likewise, Judge Hearn, dissenting from the Court of Appeals of South Carolina's decision in *L-J*, recognized that exclusions are only relevant if the insuring agreement has first been satisfied: "Although I agree with the majority that exclusion (1) ["your work" exclusion] does not bar coverage here, I would not reach that question because I believe there was no occurrence." *L-J* at 495.

It is generally accepted that a CGL policy does not cover damage to an insured's faulty workmanship. *American Girl*, *Home Pride* and *L-J* demonstrate that it makes a significant difference how this conclusion is reached, given the potential restoration of coverage afforded by the "subcontractor exception" to the "your work" exclusion. The critical question is whether the damage was caused by an "occurrence," which is typically defined as an "accident." That being the case, it is hardly surprising that so much confusion exists among the parties and courts over the extent of coverage available under a CGL policy for construction defects.

The seemingly simple term "accident" has confounded courts long before construction defect coverage claims became so abundant. Writing for the Pennsylvania Supreme Court over forty years ago, Justice Musmanno made the following keen observation about the difficulty of defining the term "accident:"

Everyone knows what an accident is until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court.

*Brenneman v. St. Paul F. & M. Ins. Co.*, 192 A.2d 745, 747 (Pa. 1963). What's more, when it comes to defining an "accident," a case from 1963 is actually quite recent, compared to the many cases from the 1800s on the issue. And these ancient cases frequently seek guidance from even more ancient cases, often times English ones with strange citations that probably very few lawyers practicing in this country today understand. Suffice to say, the question whether something was caused by an "accident" has been keeping judges, including ones in wigs, busy for a very long time.

The *Home Pride* court recognized the difficulty presented by the "accident" issue. After examining numerous decisions from around the country, the court reached the following conclusion: "[A] relatively small number of courts have determined that the damage that occurs as a result of faulty or negligent workmanship constitutes an accident, so long as the insured did not intend for the damage to occur." *Home Pride* at 576. "[A] majority of courts have determined that faulty workmanship, standing alone, is not covered under a CGL policy because, as a matter of policy interpretation [meaning policy language and not public policy], 'the fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship.'" *Home Pride* at 577.

The Supreme Court of South Carolina's recent reversal of the Court of Appeals decision in *L-J* addresses an interesting aspect of the occurrence/accident issue. Moreover, this decision should not go unnoticed by Pennsylvania coverage lawyers. In two very closely watched construction defect coverage cases, the Pennsylvania Supreme Court is currently reviewing the Pennsylvania Superior Court's decisions in *Kvaerner Metals, et al. v. Commercial Union Insurance Company, et al.*, 825 A.2d 641 (Pa. Super. 2003), *appeal granted* 2004 Pa. LEXIS 743 and *Freestone v. New England Log Homes, Inc.*, 819 A.2d 550 (Pa. Super. 2003), *appeal granted* 2004 Pa. LEXIS 742. Just as the Supreme Court of Nebraska did in *Home Pride*, the Pennsylvania Superior Court in *Kvaerner* cited extensively to the now-reversed Court of Appeals of South Carolina's decision in *L-J*. In fact, in doing so, the *Kvaerner* court even went so far as to refer to the *L-J* judge as "legendary."

It is useful to examine the Supreme Court of South Carolina's take on the occurrence/accident issue in conjunction with the Pennsylvania Superior Court's decision in *Kvaerner*. *Kvaerner* involves coverage for damage to a coke battery built by Kvaerner for Bethlehem Steel. Kvaerner argued that the physical damage sustained by the battery after it was placed in service and heated up was an "occurrence," caused, at least in part, by certain torrential rains which resulted in a mortar washout. *Kvaerner* at 647. Reversing the trial court, the Superior Court held that the battery deformities caused by the migration of mortar as a result of unusual, torrential rains clearly constitute an "occurrence" under the policy. *Kvaerner* at 652.

In reaching this conclusion, the Superior Court in *Kvaerner* quoted nearly the entire analysis of the majority opinion in the Court of Appeals of South Carolina's decision in *L-J*, and its conclusion that the repeated exposure of water to the roadway was an accident, and, hence, an "occurrence." However, this conclusion was expressly rejected by the Supreme Court of South Carolina:

We disagree with the court of appeals that the contractual definition of "occurrence" — "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" — includes the road damage caused by continuous exposure to surface water runoff. In our view, the sole cause of the deterioration was the Contractor's faulty workmanship in designing and constructing the road system. That the roads were subject to surface water damage was not an "accident" as the court of appeals held. Rather, the damage was caused by the Contractor's negligently designed drainage system to handle the water runoff and failure to properly compact the road's subgrade.

*L-J* at \*10.

By reversing the Court of Appeals of South Carolina's decision in *L-J*, the Supreme Court of South Carolina has cracked the foundation on which the Pennsylvania Superior Court's decision in *Kvaerner* is based. Having done so, the Pennsylvania Supreme Court should follow the decisions of the majority of courts, holding that faulty workmanship, standing alone, does not constitute an "occurrence." From this decision should flow one that the "subcontractor exception" to the "your work" exclusion can not restore coverage that did not exist in the first place.

### **Conclusion**

The fundamental issue in construction defect coverage disputes under CGL policies is whether an insured's faulty workmanship is an "occurrence." With the occurrence question so closely tied to whether the damage at issue was caused by an "accident," it is not surprising that coverage for construction defects has generated substantial disagreement between insurer and policyholder counsel and courts. The question whether something was caused by an "accident" has been a source of struggle for courts for a very long time. For this reason (not to mention the disagreement that

exists over the myriad issues not discussed herein), perhaps the time has come to consider that, just as in the case with coverage for latent injury and damage, a uniform approach to coverage for construction defects simply may not be in the cards.

The Alabama Supreme Court has offered the following sage description concerning litigation over the pollution exclusion:

Our review and analysis of the entire body of existing precedent reveals that there exists not just a split of authority, but an absolute fragmentation of authority. Cases may be found for and against every issue any litigant has ever raised, and often the cases reaching the same conclusion as to a particular issue do so on the basis of differing, and sometimes inconsistent, rationales.

*Porterfield v. Audubon Indemnity Company*, 856 So.2d 789, 800 (Ala. 2002). At the rate things are going, this same observation may soon be just as appropriate to describe construction defect coverage litigation.<sup>5</sup>

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#### ENDNOTES

1. The *Southwest Metalsmiths* court cited cases that have taken the following four approaches to the "occurrence" issue, and then concluded that since there is more than one possible construction of the provision, it must be construed most strongly against the insurer and in favor of the insured: (1) accidents that include the faulty work of the insured as long as the work causes some collateral damage to tangible property; (2) accidents that include the faulty work of the insured in the form of faulty installation standing alone; (3) accidents that include the faulty work of the subcontractor that are unforeseen; and (4) accidents that do not include faulty workmanship by the subcontractor. *Southwest Metalsmiths, Inc. v. Lumbermens Mutual Casualty Company*, 2004 U.S. App. LEXIS 5734, \*\*5-\*\*6.
2. While construction defect appears to be a relatively new area of coverage law, it may be that it is really just the abundance of cases that is so new. As the Pennsylvania Supreme Court points out, there is nothing new about disputes and confusion over the policy provisions at issue. "In the seventy-one pages summarizing cases on this subject at 8 A.L.R. 4th 563, the insurance carrier has generally had to provide coverage for unanticipated damage to property belonging to a third party but the purchaser of the insurance policy has generally been denied coverage for damage caused by defects in his own workmanship and to his own product. The various rationalizations given for these results are conflicting, sometimes unhelpful and occasionally misleading." *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563, 571 (Pa. 1983) (Hutchinson, J., concurring).
3. The *Home Pride* court's analysis of the "your work" exclusion is somewhat baffling, given that the court cited the language of the "product recall"/sistership exclusion for purposes thereof. In any event, despite this head-scratcher, based on the facts at issue, the court's rationale concerning the non-applicability of the real "your work" exclusion is sound.
4. Albeit in a different context, the Pennsylvania Supreme Court recently provided its own reminder that exclusions under a CGL policy are not potentially applicable until it is first determined that the insuring agreement has been satisfied. See *Minnesota Fire and Casualty Company v. Greenfield*, 2004 Pa. LEXIS 1926, \*17, n. 6 ("Further, what could have been a relatively simple case of contract interpretation has been complicated unnecessarily by the failure of the Insurance Company to advance in an adequate manner an argument that the death of Smith was not an occurrence because it was not an accident. The parties and the Superior Court focused on whether or not Greenfield intended the death of Smith. However, the Superior Court and the Insurance Company have overlooked this key determinant of coverage cited by Mr. Justice Castille.")



5. Speaking of which, as this article was being type-set it came to this writer's attention that on August 31, 2004 the Supreme Court of North Dakota decided *Grinnell Mutual Reinsurance Company v. Lynne, et al.*, 2004 N.D. LEXIS 293. While *Lynne* is a construction defect coverage case, it does not involve the "occurrence" and "your work" exclusion issues that are at the heart of *American Girl*, *Home Pride* and *L-J*. Thus, *Lynne* does not lend itself to a straightforward comparison to these cases. However, *Lynne* does have some interesting things to say about the potential impact of a weather event on the determination of coverage for construction defects. ■