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I. Introduction -- Construction Insurance

There are several types of insurance typically issued in connection with a construction project, each with a separate specific purpose. See Phillip L. Bruner & Patrick J. O'Connor, *Bruner & O'Connor on Construction Law* § 11:1 (2008) and, *Construction Insurance: A Guide for Attorneys and Other Professionals* (Stephen D. Palley et al. eds., American Bar Association) (2011) (These resources provide in-depth analyses of construction insurance). These include comprehensive general liability coverage for owners and contractors, builder's risk coverage for owners, errors and omissions coverage for design professionals and Owner Controlled Insurance Programs, ostensibly for most participants in the construction project. Each of these types will be discussed below.

II. Commercial (or Comprehensive) General Liability Insurance ("CGL")

CGL forms are typically offered in two forms, either "claims-made" or "occurrence." By far, most CGL policies issued to date have been occurrence policies. They provide coverage for bodily injury and property damage caused during the policy period by an occurrence, even if a claim is made against the insured after the expiration of the policy. By contrast, with some exceptions, claims-made CGL policies provide coverage for such claims only if they are made against the insured during the policy period. A discussion of the basic differences between claims made and occurrence policies may be found in *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512 (Fla. 1983).

A. Insuring Agreement And Scope Of Coverage

CGL policies are usually issued using a combination of standard forms which are revised periodically. At first review, these policies can appear to be difficult to understand. Indeed, many of the terms of these forms have been subject to judicial interpretation for years, resulting in numerous opinions across the country that are often difficult to harmonize. At bottom, the insurer promises to pay all sums that the policyholder (usually a contractor) becomes "legally obligated to pay to a third party" because of property damage or personal injury caused by an "occurrence," unless the claim is otherwise excluded by other terms of the policy. The policies also typically provide coverage for the defense of third party claims of liability for covered acts. See Clifford J. Shapiro, *The Good, the Bad, and the Ugly: Three New State Supreme Court Decisions Address Whether an Inadvertent Construction Defect is an "Occurrence" under Commercial General Liability Insurance Policies*, 25 *The Construction Lawyer* 9 (Summer 2005). The Florida Supreme Court, construing a post-1986 CGL policy, held that the defective work of a subcontractor was an "accident" which constituted an "occurrence" under the policy.

As such, there was coverage under the insuring agreement, subject to exclusions contained in the policy or by endorsement. *United Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007).

Typical claims, which may be covered under CGL policies, include a claim by an owner against a general contractor and/or a claim by a general contractor against a subcontractor for the cost of repairing defectively performed work, and/or the damage caused by such defective work. For example, improperly installed windows would be an example of defective work. The water damage that results to the interior of a building from long undetected leaking windows would be damage caused by the defective work. Under such an example, however, depending on the exclusions in the particular policy, the cost of repairing the defective work itself might not be covered under the policy because of typical exclusions of coverage for the cost of repairing the policy holders' own work. *See, e.g., Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84 (D. Md. 1986) (defective workmanship not an occurrence and not covered under CGL policy); *Sawhorse, Inc. v. S. Guar. Ins. Co.*, 269 Ga.App. 493, 604 S.E.2d 541 (2004) (a business risk that was borne by contractor to repair or replace defective work was excluded from CGL policy); *see also Pozzi Window Co. v. Auto-Owners Ins. Co.*, 2007 WL 4440389 (Fla. 2007) (standard post-1986 CGL policy issued to general contractor does not cover the repair or replacement of defective work of its subcontractor), superseded by *Auto-Owners Ins. Co. v. Pozzi Window Co.* 984 So. 2d 1241 (Fla. 2008) (clarifying 2007 decision and holding that damage to windows from subcontractor's defective installation was within the meaning of contractor's CGL policy, if the windows were not defective when purchased); *see also Homes By Deramo, Inc. v. Mid-Continent Cas. Co.* 661 F. Supp. 2d 1281 (M.D. Fla. 2009) (reviewing *Pozzi* and holding that question of coverage could not be determined on motion to dismiss); *Amerisure Mut. Ins. v. Auchter Co.*, 2010 WL 457386 (M.D. Fla. 2010) (reviewing *Pozzi* but finding no coverage for faulty workmanship on roof where no allegations of property damage other than roof were made).

It is often stated that a CGL policy is not intended to insure against the insured's liability for economic losses caused by its failure to complete work as specified in its contract; that is a risk more appropriately assumed solely by the insured contractor. *See LaMarche v. Shelby Mutual Ins. Co.*, 390 So. 2d 325 (Fla. 1980) (construing a pre-1986 standard ISO CGL policy form). However, the so-called business risk exclusions have been viewed in a different light by the Florida Supreme Court's *J.S.U.B.* and the Texas Supreme Court's *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007) decisions. In the *J.S.U.B.* decision, the court distinguished its prior decision in *LaMarche* and held that the post-1986 standard CGL policy issued to a general contractor provided coverage for the consequences of the defective work by a subcontractor. *J.S.U.B.*, at 891. The *Lamar Homes* decision provides a detailed discussion of the CGL policy and the business risk analysis, and reaches the same conclusion as the *J.S.U.B.* court. *Lamar Homes*, 242 S.W.3d 1; *Century Sur. Co. v. Hardscape Const. Specialties Inc.*, 578 F.3d 262 (5th Cir. 2009) (holding that *Lamar Homes* resolved a split in Texas law on insurance of business risks by holding that "allegations of unintended construction defects may constitute an 'accident' or 'occurrence' " under CGL policies). Other courts have declined to follow the direction undertaken in *J.S.U.B.* and *Lamar*. *See, e.g., Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E. 2d 589 (S.C. 2011) (declining to follow *J.S.U.B.* and *Lamar* out of concerns of converting CGL policy to an insurance bond).

B. Duty To Defend vs. Duty To Indemnify

CGL policies create two broad duties owed to the insured by the insurer: (1) a duty to defend; and (2) a duty to indemnify. The duty of the liability insurer to defend its insured is distinct from and broader than its duty to indemnify the insured. *Penn. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co.*, 43 So. 3d 182 (Fla. 4th DCA 2010); *Estate of Tinervin v. Nationwide Mut. Ins. Co.*, 23 So.3d 1232, (Fla. 4th DCA 2009)(citing *Keen v. Florida Sheriffs' Self-Ins. Fund*, 962 So. 2d 1021 (Fla. 4th DCA 2007)); *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307 (8th Cir. 1991); *Pattison v. Employers Reinsurance Corp.*, 900 F.2d 986 (6th Cir. 1990). A liability insurer's duty to defend is controlled by the allegations in the complaint against the insured, even if the allegations may be factually incorrect or without merit. *SM Brickell Ltd. P'ship. v. St. Paul Fire & Marine Ins. Co.*, 786 So. 2d 1204 (Fla. 3d DCA 2001). Furthermore, when only some of the allegations against the insured come within the coverage of the liability policy, the insurer has a duty to defend the entire action, at least until the covered claims are eliminated from the lawsuit. *Executive Builders, Inc. v. Motorists Ins. Companies*, 2001 WL 548391 (S.D.Ind. 2001).; *Am. Hardware Mut. Ins. Co. v. Miami Leasing & Rentals, Inc.*, 362 So. 2d 28 (Fla. 3d DCA 1978); *C.A. Fielland, Inc. v. Fidelity & Cas. Co. of N.Y.*, 297 So. 2d 122 (Fla. 2d DCA 1974).

C. Standard For Construing Insurance Contracts

The interpretation of insurance contracts, such as CGL policies, is governed by generally accepted rules of construction. *J.S.U.B.*, at 877. Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. *Id.*(citing *Tarus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). Further, "in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Id.* (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). Accordingly, "[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari material*." *Id.* (citing *State Farm Fire & Cas. Co. v. CTC Dev. Corp.* 720 So. 2d 1072, 1074-75 (Fla. 1998)) (citations, alteration, and internal quotation marks omitted).

D. Occurrence Within The Policy Period

Only "occurrences" within the "policy period" are covered under a CGL policy. Accordingly, the first step is establishing that there has been an occurrence.

An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful general conditions." *Id.* at SECTION V – DEFINITIONS, § 13. Construing a post-1986 CGL policy, the Florida Supreme Court held that the defective work of a subcontractor was neither expected nor intended by the insured and thus constituted an "accident" and hence, an "occurrence" under the standard post-1986 CGL policy. *See J.S.U.B.*, at 883-89.

The next step is to establish that the “occurrence” occurred within the “policy period.” As the District Court for the Middle District of Florida has explained, there are different methods for determining this:

There are four trigger of coverage theories that are generally accepted: (1) exposure; (2) manifestation; (3) continuous trigger; and (4) injury-in-fact. Under the exposure theory, property damage occurs upon installation of the defective product. Under the manifestation theory, property damage occurs at the time damage manifests itself or is discovered. The continuous trigger approach defines property damage as occurring continuously from time of installation until the time of discovery. And, injury-in-fact (which is also referred to as damage-in-fact), coverage is triggered when the property damage underlying the claim actually occurs. *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002) (citations, alteration, and internal quotation marks omitted).

Florida courts follow the manifestation theory, meaning that the time of occurrence within the meaning of an “occurrence” policy is the time that the injury first manifests itself. *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, 485 F. Supp. 2d 1302 (M.D. Fla. 2006), at 1309-10; *Auto Owners Ins. Co.*, at 1266-67; *Assurance Co. of America v. Lucas Waterproofing Co., Inc.*, 581 F.Supp.2d 1201, 1206 (S.D. Fla. 2008) Therefore, under Florida law, the damage must be discovered while the policy is effective in order for it to be covered.

If it is established that there is an occurrence within the policy period, the final step is to determine whether there is an applicable Exclusion or Exclusionary Endorsement.

E. Coverage Exclusions and Limitations

It is the function of exclusions to restrict and shape the coverage otherwise granted by the insuring agreement. *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). Exclusions do not provide coverage but only limit it. *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325 (Fla. 1980). Furthermore, it has been stated:

Each exclusion is meant to be read with the insuring agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies, there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another. Tinker, *Comprehensive General Liability Insurance — Perspective and Overview*, 25 Fed’n Ins. Coun. Q. 217, 223, cited and quoted in *Weedo*, 405 A.2d at 795 (1975).

Still, it is important to remember that exclusions are interpreted narrowly and that the burden of proving the facts necessary to establish an exclusion is on the insurer. The following is a brief discussion of some of the more prominent exclusions.

1. Expected Or Intended Injury

The typical CGL policy does not apply to:

“‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured. This exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.’”
See ISO CG 00 01 10 01, SECTION 2.a. – Exclusions.

Early versions of the CGL policy form did not contain a parallel exclusion; rather, the concept was included in the definition of “occurrence” in the policy. Moving this requirement from the insuring agreement to an exclusion had the effect of shifting the burden of proof for establishing coverage from the insured to the insurance company. Unless it can be shown that the damage was either expected or intended by the insured, this exclusion cannot be used to deny a claim. *See State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1988) (insured’s mistaken belief that he had received variance to construct house outside setback line was an “accident”).

2. Contractual Liability

This exclusion by its terms applies to liability assumed by the insured under a contract or agreement, not to duties assumed by the insured. It has been explained that the exclusion is not intended to apply to indemnification agreements. Tinker, *Comprehensive General Liability Insurance — Perspective and Overview*, 25 Fed’n Ins. Coun. Q. 217, 265 (1975). In *W. World Ins. Co. v. Travelers Indem. Co.*, 358 So. 2d 602, 604 (Fla. 1st DCA 1978), the court held that the exclusion did not apply to defeat coverage for a surety’s claim against its principal for reimbursement of payments made under a performance bond, stating:

We agree with the lower court’s determination that the assumption of liability by a principal to its surety must be pursuant to an express contract or agreement. While the bond furnished by Travelers is a contract or an agreement, it did not contain any express assumption of liability by the insureds. [Their] liability arose as a matter of law from a theory of indemnification. The general rule is that an exclusion, such as the one here, refers only to contractually created liability, and has no effect upon the general liability of the insured arising by operation of the law.

It is also important to note that the CGL policy covers liability for bodily injury and property damage assumed by the insured under certain indemnity agreements, designated “insured contracts” in the policy, provided the agreements are executed before the occurrence of the bodily injury or property damage. *See generally* 1A Long, *The Law of Insurance Liability*

3. Employer's Liability

An earlier version of the "employee exclusion" contained in an automobile liability policy was held to be clear and unambiguous in its intent to exclude employee claims. *Griffin v. Speidel*, 179 So. 2d 569 (Fla. 1965). In *McRae v. Snelling*, 303 So. 2d 670, 671–672 (Fla. 4th DCA 1974), the court, reviewing the same earlier version of the employee exclusion, added the following important qualification: "[I]n Florida, such clause is not effective to exclude coverage unless the person making the claim is the employee of the insured against whom the claim is asserted." The reason for this limitation is found in the "severability of interests" clause included in most current liability policies, including general liability policies.

In *Fla. Ins. Guar. Assoc. v. Revoredo*, 698 So. 2d 890 (Fla. 3d DCA 1997), the estate of a deceased employee argued that because the employer/insured failed to secure workers' compensation insurance, the deceased never became an employee and thus the "employee exclusion" did not apply. The court construed the workers' compensation and employee exclusions independently. *Id.* The court held that the two exclusions could not be read together to exclude only those employees protected by workers' compensation and, thus, that the employer was liable. *Id.* Other jurisdictions have reached similar conclusions as to the employee and workers' compensation exclusions. See e.g., *Weger v. United Fire & Cas. Co.*, 796 P. 2d 72 (Colo. Ct.App. 1990); *United Fire & Cas. Co. v. Lipps*, 2009 WL 2143766 (E.D. Mo.2009).

4. Pollution

The purpose of the "pollution exclusion" is to exclude coverage for damages arising out of pollution or contamination when such damages appear to be expected or intended on the part of the insured and, thus, are excluded by the definition of "occurrence." However, coverage is afforded for damages caused by pollution or contamination if the discharge, dispersal, release, or escape is sudden and accidental.

Some courts considering the application of this exclusion have construed the exclusionary language very strictly against insurers, liberally interpreting the exception to allow coverage. In *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95 (Ala. 1977), the court found the exclusion ambiguous as to the type of pollution contemplated. In strictly construing the exclusion against the insurer, the court held it was intended to cover only industrial pollution and contamination. Accordingly, the policy covered a real estate developer's liability arising out of sand and dirt washing down from the construction site onto plaintiffs' property. *Id.* In *Allstate Ins. Co. v. Klock Oil Co.*, 426 N.Y.S.2d 603 (App. Div. 1980), the court held that leaking fuel from the negligent installation or maintenance of a gasoline storage tank could be regarded as both a sudden and an accidental discharge, even though the leak went undetected for a substantial period of time. See also, *Farm Family Mut. Ins. Co. v. Bagley*, 409 N.Y.S.2d 294 (App. Div. 1978) (construing the term "dispersal" in the

exception to favor coverage); *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980) (holding that the insurers had a duty to defend their insured in a class action for contamination of the plaintiff's well water resulting from the insured's operation of an industrial waste facility).

Courts have differed sharply over whether the word "sudden" as used in the exclusion is a temporal matter. The Florida Supreme Court held that "sudden" is a temporal matter requiring that the discharge or release of contaminants be abrupt. *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700 (Fla. 1994); *see also Lumbermens Mut. Cas. Co. v. Belleville Indust., Inc.*, 555 N.E.2d 568 (Mass. 1990); *Powers Chemco, Inc. v. Fed. Ins. Co.*, 548 N.E.2d 1301 (N.Y. 1989). Other state high courts have disagreed, holding that "sudden" merely means unexpected. *See Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990).

As a result of extensive litigation over the interpretation of the pollution exclusion and a number of decisions construing the exclusion very narrowly, the insurance industry, in the more recent CGL policies, has substantially rewritten the pollution exclusion in an attempt to almost entirely exclude coverage for pollution liability. Accordingly, the courts have construed these new "absolute pollution exclusions" strictly against the insured. For example, in *Deni Ass. of Fla. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998), the Florida Supreme Court held that an absolute pollution exclusion was unambiguous, ultimately affirming that ammonia spilled from a blueprint machine in an office building and insecticide sprayed on bystanders were "pollutants." The court in *Deni* acknowledged that "the language of this pollution exclusion, sometimes called the absolute pollution exclusion, is in widespread use throughout the country . . . A substantial majority of [these] courts have concluded that the pollution exclusion is clear and unambiguous so as to preclude coverage for all pollution related liability." *Id.* at 1137. In *Deni*, the court declined to adopt the doctrine of reasonable expectations to apply to the interpretation of CGL policies. The *Deni* court explained that there is "no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which premiums are charged." *Id.* at 1140. Instead, the *Deni* court held the pollution exclusion clauses were unambiguous and precluded coverage for the claims at issue. *See also, Auto-Owners Ins. Co. v. City of Tampa Housing Authority*, 231 F.3d 1298 (11th Cir. 2000); *Philadelphia Indem. Ins. Co. v. Yachtsman's Inn Condo Assoc., Inc.*, 595 F. Supp. 2d 1319, 1324 (S.D. Fla. 2009) (a pollution exclusion almost identical to the one in *Deni* was unambiguous, and feces, raw sewage, and battery acid were included in the definition of "pollutants"); *Rock hill Ins. Co. v. Coyote Land Co., Inc.*, 2011 WL 499991 (N.D. Fla. Feb. 4, 2011) (absolute pollution exclusion was clear and unambiguous and excluded coverage for claims related to the emission of hydrogen sulfide); *but see Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926 (Ind. App. 1999) (absolute pollution clause was ambiguous based on prior findings by Indiana Supreme Court that identical language was ambiguous).

5. Aircraft, Auto, Or Watercraft Liability

The intent of this exclusion is to exclude automobile and aircraft hazards which are covered under other policies. Tinker, *Comprehensive General Liability Insurance — Perspective and Overview*, 25 Fed'n Ins. Coun. Q. 217 (1975). A 2001 amendment clarified that the

exclusion applied “even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the ‘occurrence’ which caused the ‘bodily injury’ or ‘property damage’ involved the ownership, maintenance, use or entrustment to others of any aircraft, ‘auto’ or watercraft that is owned or operated by or rented or loaned to any insured.” 1A Long, *The Law of Liability Insurance* §10.05[6][a] (Matthew Bender & Co. 2000); CG 00 02 10 01, ISO Properties, Inc. © 2000. *See also, Alligator Enterprises, Inc. v. Gen. Agents Ins. Co.*, 773 So. 2d 94 (Fla. 5th DCA 2000) (motor vehicle exclusion in CGL policy applied to a collision with an insured’s parked truck even though: (1) the insured was not loading or unloading truck, and (2) the exclusion defined “use” to include operation and loading or unloading); *Hagen v. Aetna Cas. and Sur. Co.*, 675 So. 2d 963 (Fla. 5th DCA 1996) *rev. denied*, 683 So. 2d 483 (Fla. 1996) (exclusion applied when employee was injured by a roll of carpet being pulled from the back of a van with a rope that was attached to both the carpet and the van); *Allstate Ins. Co. v. Safer*, 317 F. Supp.2d 1345 (M.D. Fla. 2004) (exclusion for injury or damage “arising out of the ownership, maintenance, or use of auto” applied to injuries arising from vehicular collision allegedly caused by insured sole proprietor’s negligence in parking box truck that insured owned and that advertised insured’s business on insured’s premises in location that obstructed driver’s view of intersection where collision occurred, even though truck was not physically involved in the accident and was not in use at the time of the accident, and even though view could have been obstructed by object other than vehicle with same results).

When accidents occur during the delivery of products or materials to a construction job site, disputes sometimes arise, often between automobile insurers and general liability insurers, concerning whether the accident occurred during the loading or unloading of an automobile and, therefore, is within the coverage of the automobile liability policy. In *Gen. Accident Fire & Life Assurance Corp. v. Liberty Mut. Ins. Co.*, 260 So. 2d 249 (Fla. 4th DCA 1972), the court discussed at some length the “coming to rest” and “complete operation” tests for determining the completion of unloading. The court concluded that the applicable rule in Florida should be the “complete operation” doctrine, under which unloading does not cease until the goods are “turned over at the place of destination to the party to whom delivery is to be made.” *Id.* at 251.

In *U.S. Fidelity & Guar. Co. v. Helms*, 413 So. 2d 767 (Fla. 3d DCA 1982), a contractor’s CGL carrier contended that its policy did not provide coverage for damage caused by a concrete slab that fell while being lifted, because the slab was still being unloaded. The slab had been transported to the job site and was initially removed from its trailer the day before the accident. *Id.* When the slab did not fit the building, it was reloaded onto the trailer. *Id.* The accident occurred the following day when the slab was again lifted off the trailer. The court concluded that it was unnecessary to decide whether to apply the “coming to rest” or “completed operations” doctrines because unloading had been completed under either test after the slab was transported to the job site and initially removed from the trailer. *Id.* Any further movement was said to be incidental to the construction phase. *Id.*

“Mobile equipment” is defined in the policy separately from “automobile,” and liability arising out of the operation of mobile equipment is covered while liability arising out of the operation of an automobile is not. Therefore, disputes may arise over whether a particular piece of equipment is within the definition of “automobile,” and therefore excluded from CGL

coverage, or whether it is “mobile equipment,” and therefore generally within the CGL coverage. In *Fidelity & Cas. Co. v. Reserve Ins. Co.*, 596 F.2d 914 (9th Cir. 1979), the court analyzed current automobile and CGL policy language in determining that a truck primarily used for welding operations was an automobile rather than mobile equipment when it had four normal tires and a California vehicle license, even though it was also equipped with a welder, air compressor, and hydraulic boom. Liability for a fire that resulted from use of the truck, therefore, was solely within the coverage of the automobile policy. *Id.*

6. Care, Custody, Or Control

This exclusion, which has been a feature of general liability policies for many years, is of considerable importance to contractors. The meaning of “control” has been especially troublesome. In *Michigan Mut. Liab. Co. v. Mattox*, 173 So. 2d 754 (Fla. 1st DCA 1965), the court held that an electrical switchboard, which had been completed by the insured electrical subcontractor and turned over to the general contractor, was not within the care, custody, or control of the subcontractor when its employees subsequently damaged the switchboard. *Id.*

In *Glens Falls Ins. Co. v. Fields*, 181 So. 2d 187 (Fla. 1st DCA 1966), the court considered the application of this exclusion in a contractor’s liability policy when the owner of a silo rented a crane and operator from the contractor to lift the silo and place it on a truck. While the contractor’s employee operated the crane under the direction of the owner, the crane boom collapsed and the silo was destroyed. *Id.* The court held that the care, custody, or control exclusion of the contractor’s liability policy did not exclude coverage for the owner’s claim against the contractor because “proprietary control” of the silo was vested in the owner by reason of its ownership, and “possessory control” was exercised by the owner through its directing of the crane operator. *Id.*

The distinction between proprietary and possessory control was considered again in *Phoenix of Hartford v. Holloway Corp.*, 268 So. 2d 195 (Fla. 4th DCA 1972), a case very factually similar to *Glens Falls Ins. Co.* In *Phoenix of Hartford*, a contractor hired a crane and operator from the insured equipment company. While the crane lifted a heavy reactor head at the construction site, the crane’s boom struck a water tank, damaging both the tank and the reactor head. *Id.* The equipment company’s CGL carrier denied coverage of the contractor’s claim against the equipment company under the care, custody, or control exclusion. *Id.* After noting that cases interpreting this exclusion have traditionally held that “proprietary control,” i.e., the right to control by reason of ownership, is not sufficient to make the exclusion applicable, but that the exclusion does apply to “possessory control,” the court concluded that the proper test for determining the applicability of the exclusion was whether “physical control” was being exercised. *Id.* at 199. The court defined physical control as “control over a material object as distinguished from control of an intellectual nature over a person.” *Id.* Consequently, the court held that the care, custody, or control exclusion applied to bar coverage for damage to the reactor head, but damage to other property over which the insured was not exercising physical control, such as the water tank, would not be excluded. *Id.*

Even when an insured is found to be exercising physical control over property, the extent of the physical control, and therefore the reach of the exclusion, has been disputed. In *Ronalco, Inc. v. Home Ins. Co.*, 606 S.W.2d 160 (Ky. 1980), the court refused to apply the care, custody, or control exclusion to a situation in which the insured, hired to replace the inner lining of a furnace, damaged the outer wall by misfiring a dynamite charge. The court ruled that the property damage merely was incidental to the property on which the work was being performed by the insured. *Id.*

7. Damage To Product Or Work Itself

The underwriting intent in CGL insurance is to cover damage caused by flaws and deficiencies in the insured's products or workmanship. Thus, defective subcontractor work that causes damage to other work under a post-1986 CGL policy is covered under Florida law. See *United Fire Ins. Co. v. J.S.U.B, Inc.*, 979 So. 2d 871 (Fla. 2007). However, the cost of repairing or replacing the defective work (as opposed to the consequences of the defective work) is not covered by a post-1986 CGL policy. *Pozzi Window Co. v. Auto-Owners Ins. Co.*, 2007 WL 4440389 (Fla. 2007) (standard post-1986 CGL policy issued to general contractor does not cover the repair or replacement of defective work of its subcontractor), superseded by *Auto-Owners Ins. Co. v. Pozzi Window Co.* 984 So. 2d 1241 (Fla. 2008) (clarifying 2007 decision and holding that damage to windows from subcontractor's defective installation was within the meaning of contractor's CGL policy, if the windows were not defective when purchased) (aff'd by *Piozzi Window Co. v. Auto Owners, Ins.*, 294 Fed. App. 588 (11th Cir. 2008)); *but see Pa. Nat. Mut. Cas. Ins. Co. v. Parkshore Dev. Corp.*, 2009 WL 1737032 (D.N.J. 2009) (acknowledging *Lamar Homes* and *J.S.U.B.*, but finding them inconsistent with New Jersey law); *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684 (7th Cir. 2008) (also noting *Lamar Homes* and *J.S.U.B.*, but declining to follow).

8. Failure To Perform

In *Willets Point Contracting Corp. v. Hartford Ins. Group*, 429 N.Y.S.2d 230 (App.Div. 1980), *aff'd* 440 N.Y.S.2d 619, a claim brought against a road contractor's CGL policy by the operator of a gas station for lost profits resulting from the road contractor's blocking of the station's ingress and egress was excluded even though the contract between the road contractor and the county required the contractor to maintain the means of ingress and egress to each owner's property. *Id.* In applying the exclusion, the court stated:

An examination of the exclusion reveals a clear and unambiguous desire by the insurer to exclude from the coverage damages arising from the breach of representations or warranties made by the named insured as to the level of performance of its work. The complaint in the action brought by Hempstead is subject to but one interpretation. Hempstead is seeking the benefit of the contractual representations or warranties made by Willets to the County, i.e., that in performing its work it would maintain ingress and egress to abutting property owners. *Id.* at 233. See also,

Minnick's, Inc. v. Reliance Ins. Co., 422 A.2d 1028 (Md. Ct.Spec.App. 1980) (property damage claims arising out of performance failure of heating systems installed by insured were not covered).

See 1A Long, *The Law of Liability Insurance* §10.05[8] (Matthew Bender & Co. 1995) for a discussion of the exclusion in the 1988 CGL form.

9. Recall Of Products, Work Or Impaired Property: "Sistership" Exclusion

This exclusion derives its name from a practice in the aircraft industry in which, after the crash of an airplane, all others of its make and type, i.e., its "sisterships," were withdrawn from service because of a suspected common structural defect. 3 Long, *The Law of Liability Insurance* Appx. B, App-70 (Matthew Bender & Co. 1988).

The sistership exclusion was cited in *Wollard Aircraft Equip., Inc. v. Traficant*, 266 So. 2d 56 (Fla. 3d DCA 1972). The court held that there was no coverage for the cost of repairing, modifying, and redesigning 46 lifts, none of which had malfunctioned, after the collapse of a similar unit during use. However, in *Aetna Cas. & Sur. Co. v. Monsanto Co.*, 487 So. 2d 398 (Fla. 1st DCA 1986), the court made a distinction based on whether the insured's product, which had been incorporated into the product of a third-party manufacturer, could be withdrawn without physical injury to the third party's product. The court held that "[i]f the third party manufacturer's costs were greater than those necessary to replace the insured's defective products, and if the insured's defective product resulted in damage to other parts of the third party manufacturer's final product, the costs are not excludable under [the sistership] provision." *Id.* at 400.

10. Voluntary Payments

A "voluntary payment" provision "requires the insured to obtain the insurer's consent before settling" in instances where the insurer has not wrongfully refused to defend the insured. *Am. Reliance Ins. Co. v. Perez*, 712 So. 2d 1211 (Fla. 3d DACE 1998). This is especially significant in the construction context, as a contractor or subcontractor who agrees to perform repairs may be not be able to seek coverage related to said repairs if it did not first obtain consent from the insurer. For example, in *Roslyn Companies, Inc. v. RAJ Sales of Texas, Inc.*, 412 Fed. App. 252 (11th Cir. 2011), a contractor who repaired damages to the interior of buildings caused by its subcontractor's faulty roofing work was barred from seeking indemnification for the repairs from its insurer because it did not seek the insurer's consent as required by the "voluntary payments" provision contained in the policy before agreeing to perform the repairs.

III. Limiting Endorsements

As stated above, the standard CGL policy provides a broad grant of coverage, which is narrowed by the exclusions immediately following the insuring agreement. This reduced coverage can be further narrowed by limiting endorsements. Following is a discussion of limiting endorsements that insured's in the construction industry must be aware of as these are becoming more prevalent in the current insurance market.

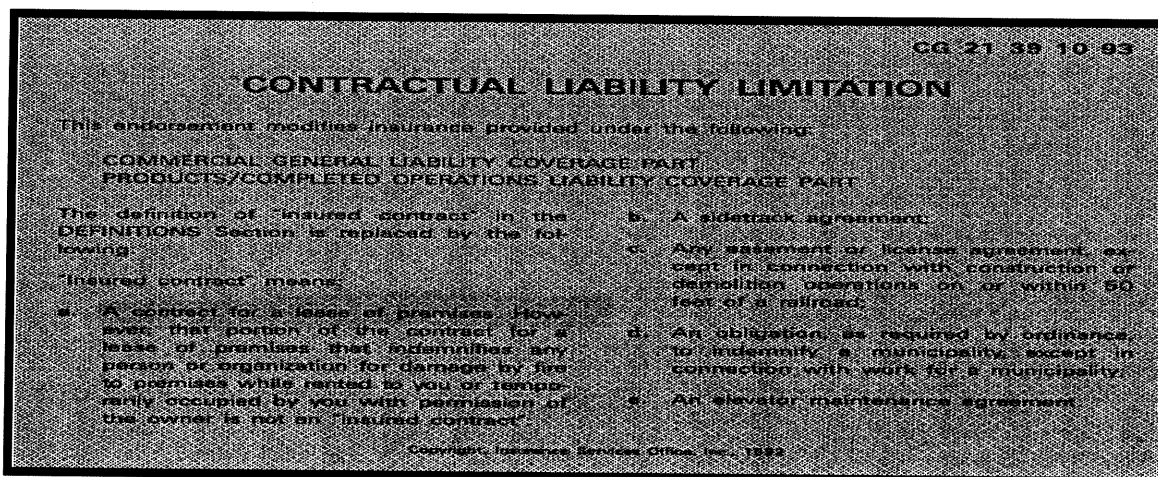
A. Contractual Liability Limitation

One of the most important risk-shifting provisions in a construction contract is the indemnification provision. Typically, an owner will require the general contractor to indemnify it from personal injury and property damages arising out of the project. In some cases, an owner may require the contractor to indemnify the owner even if the owner is wholly at fault – i.e., the owner is 100% negligent.¹ Contractors usually accept this indemnification obligation because it is insured under the standard CGL policy.

In the standard CGL policy, SECTION V – DEFINITIONS, paragraph 9(f) defines an “Insured Contract,” in part, as:

- (f) That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement....

However, the Contractual Liability Limitation endorsement shown below modifies the definition of an “Insured Contract”; thereby deleting paragraph 9(f) and, consequently, removing coverage for indemnification obligations.

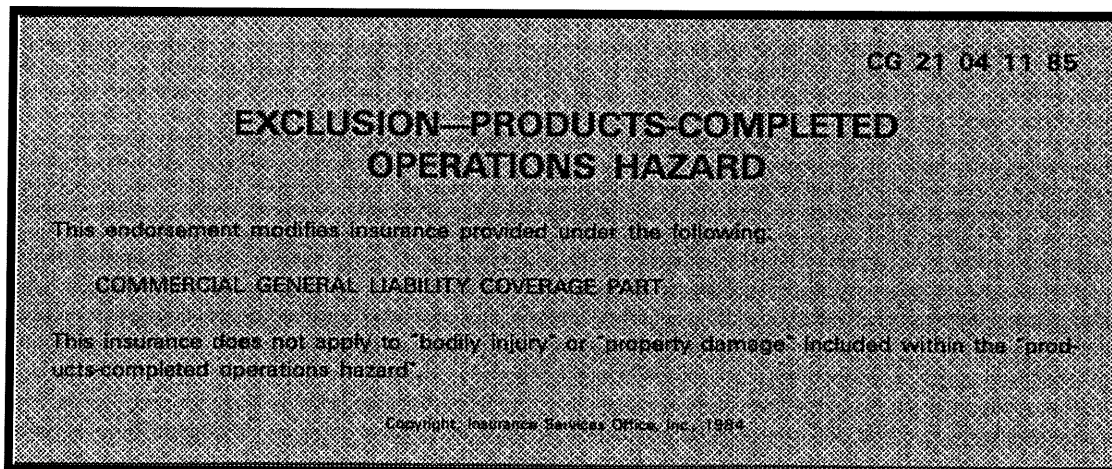


¹ Some states have anti-indemnification statutes, which prohibit broad form indemnification provisions. Florida, however, permits broad form indemnification provisions provided the strictures of section 725.06, Florida Statutes are followed. See Wm. Cary Wright and Clifford J. Shapiro, *Construction Contract Indemnities, the 'Insured Contract,' and Additional Insured Coverage* in CONSTRUCTION INSURANCE: A GUIDE FOR ATTORNEYS AND OTHER PROFESSIONALS 143-182 (Stephen D. Palley et al. eds., 2011), for a more detailed discussion.

This is a subtle yet profound change in coverage. If a contractor or subcontractor has such an endorsement, it has an uninsured indemnification obligation. This should be unacceptable from every party in the construction project. From an owner's perspective, an uninsured indemnification obligation from a general contractor exposes the owner because the indemnification grant is only as solid as the financial wherewithal of the general contractor, as opposed to the financial stability of an insurance company. From a general contractor's perspective, such an endorsement leaves it self-insuring the indemnification obligation, which should be unacceptable.

B. Products-Completed Operations Hazard

A significant benefit of the standard CGL policy is that it covers Products-Completed Operations Hazards. This is especially true for construction defects, since most defects are discovered after completion of the project. Moreover, the statutes of limitations and statutes of repose can extend for many years after project completion. For example, in Florida, a contractor can be sued for construction defects up to ten (10) years after a certificate of occupancy is issued. Without insurance for Products-Completed Operations, the contractor is self-insuring that risk. Below is a copy of the ISO endorsement which excludes Products-Completed Operations.



C. Damage To Work Performed By Subcontractors On Your Behalf

As reflected in the *J.S.U.B.* and *Lamar Homes* decisions above, some states interpret the standard CGL policy issued to a general contractor to provide coverage for the consequences of a subcontractor's defective work.

Exclusion 2.1. – Damage To Your Work – excludes:

"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 by or on your behalf by a subcontractor.

The *J.S.U.B.* and *Lamar Homes* courts analyzed the italicized language and held that the exclusion did not apply to work performed by subcontractors. That is, these courts held there was coverage for the consequences of the defective work by a subcontractor. This is a tremendous benefit for owners and general contractors.

In response to earlier decisions like *J.S.U.B.* and *Lamar Homes*, as shown in the endorsement below, such coverage is removed by deleting the above-quoted italicized language.

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**EXCLUSION – DAMAGE TO WORK PERFORMED BY
SUBCONTRACTORS ON YOUR BEHALF**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion I of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

I. Damage To Your Work

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

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D. Residential Construction Operations Exclusion

Needless to say, if a contractor is involved in residential construction, it is unacceptable to have the following endorsement on its or any of its subcontractors’ policies. Take special note of the definition of “Residential Construction Operations” because it includes “condominiums, cooperatives, rental apartments, interval ownership dwellings, fee simple ownership or any other form.”

ENDORSEMENT No. 11

This endorsement, effective 12:01 AM: [REDACTED]
Forms a part of policy no: [REDACTED]
Issued to: [REDACTED]
By: [REDACTED]

**Commercial Umbrella Liability Policy with CrisisResponse™
Residential Construction Operations Exclusion**

This policy is amended as follows:

Section V. EXCLUSIONS is amended to include the following additional exclusion:

Residential Construction Operations

This insurance does not apply to any liability arising out of **Residential Construction Operations**. This exclusion applies whether or not the **Residential Construction Operations** have been completed or are ongoing.

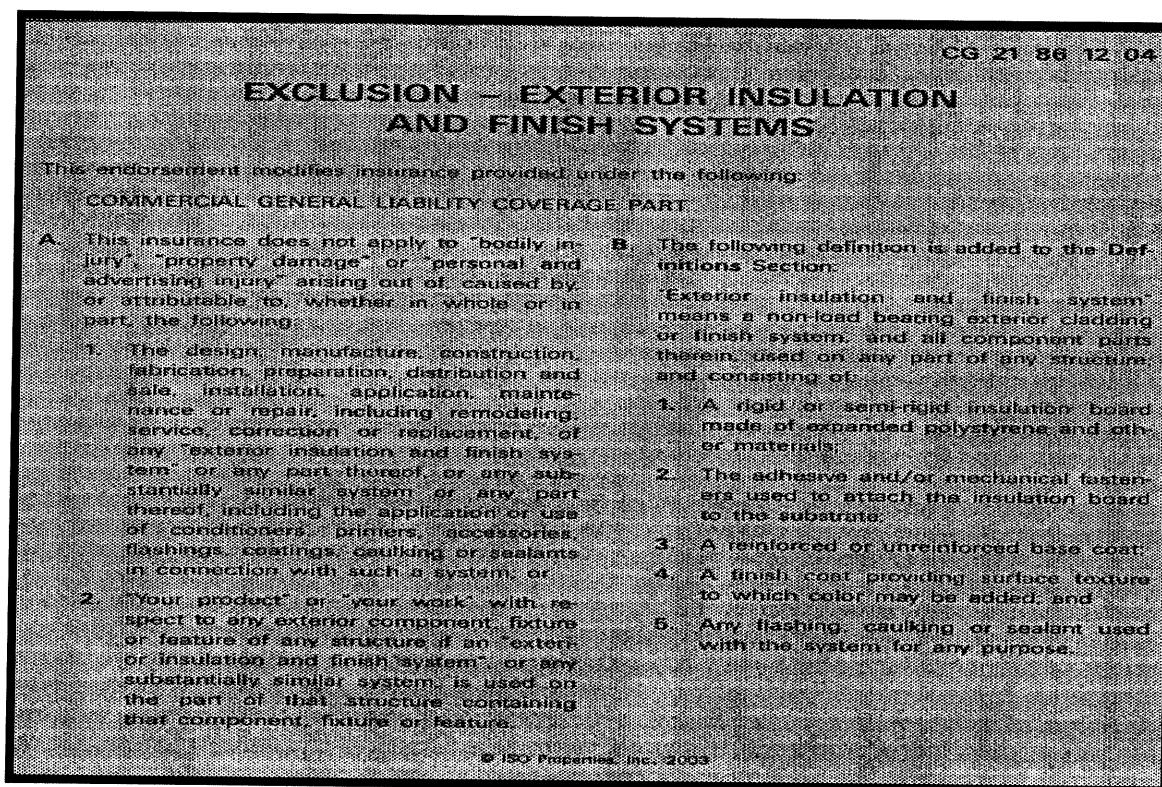
Section VII. DEFINITIONS is amended to include the following additional definition:

Residential Construction Operations means any activity by or on behalf of any Insured, in any capacity, regarding, related to, or in support of, any construction of residential premises including, but not limited to, detached single family houses, attached single family houses or multiple unit residential structures, whether as condominiums, cooperatives, rental apartments, interval ownership dwellings, fee simple ownership or in any other form.

The practice point here is that this endorsement should not be accepted by any party involved in a residential project – particularly a high-rise condominium. Construction defect litigation involving condominiums is common place across the country. As such, if suit is filed against the general contractor or subcontractors, this exclusion would preclude coverage and defense of the suit by the insurer.

E. Exclusion – Exterior Insulation And Finish Systems

Due to the tremendous litigation involving EIFS systems, particularly in the Southern and Gulf Coast states, the insurance industry came out with an endorsement specifically excluding this risk from the standard CGL policy. The endorsement is self-explanatory. The practice point is that if a project uses an EIFS product, the general contractor must be sure that the following exclusionary endorsement is not contained in its policy or in the policy of the EIFS subcontractor.



F. Exclusion – Construction Management Errors And Omissions

With the advent of construction management services, the role of a general contractor has become increasingly blurred between providing construction work and providing professional services. The following endorsement excludes coverage for “construction management services.”

EXCLUSION—CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I—Coverage A—Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I—Coverage B—Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

1. The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications by any architect, engineer

or surveyor performing services on a project on which you serve as construction manager, or

2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager.

This exclusion does not apply to "bodily injury" or "property damage" due to construction or demolition work done by you, your "employees" or your subcontractors.

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G. Exclusion – Engineers, Architects Or Surveyors Professional Liability

Similar to the exclusion for construction management services, the following endorsement excludes coverage for professional services provided by Engineers, Architects or Surveyors.

EXCLUSION—ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I—Coverage A—Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions of Section I—Coverage B—Personal And Advertising Injury Liability:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor

who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

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H. Exclusion -- Designated Operations Covered By A Consolidated (WRAP-UP) Insurance Exclusion Program

Owner Controlled Insurance Programs ("OCIPs") and Contractor Controlled Insurance Programs ("CCIPs") have become common place in recent years for larger (\$150 million plus) projects. However, there are potential gaps in coverage because coverage under the OCIP many times terminates upon completion of the project. If that is the case, then the OCIP would not provide coverage for the entire statute of limitations period or statute of repose period. As such, the general contractor's products-completed operations policy would provide coverage absent an exclusionary endorsement.

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EXCLUSION—DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

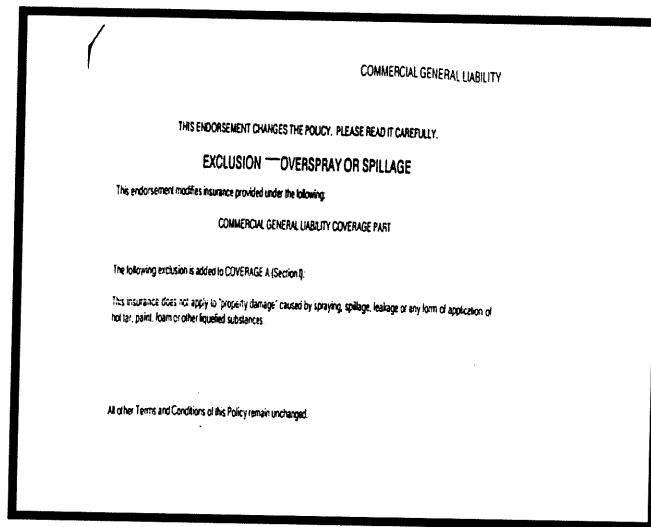
Description and Location of Operation(s):

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

continued

I. Exclusion – Overspray or Spillage

This endorsement is self-explanatory – it excludes coverage related to “property damage” caused by spraying, spillage, leakage or any form of application of hot tar, paint, foam or other liquefied substances.



IV. Builder's Risk Insurance

Most builder's risk insurance protects the contractor against loss to buildings under construction during the course of construction or repair, as well as any temporary structures and materials located adjacent to the building under construction that are used in the course of said construction.

Generally, coverage under these policies ceases when the building under construction is complete enough that it becomes occupied. Alternatively, the contractor may obtain a waiver of occupancy endorsement that allows coverage to continue even though the owner may partially occupy the building while construction continues.

A. Coverage Exclusions And Limitations

The discussion that follows reviews some of the more frequently encountered coverage exclusions or limitations found in all-risk builder's risk policies. When appropriate, Florida case law discussing similar conditions and exclusions in other property policies will be mentioned.

1. Increase Of Hazard By Insured

An insurance company accepts certain risks for an agreed premium based on its evaluation of the hazard. The insurance company does not want to insure the property if the insured changes the premises so that the risk of loss is increased after the insurance company has already accepted the risk. However, it has been held that to relieve the insurer of its obligations under the policy, the increase in hazard must be so substantial and material that "the insurer could not reasonably be presumed to have contracted to assume it." *Smith v. Peninsular Ins. Co.*, 181 So. 2d 212, 217 (Fla. 1st DCA 1966), 19 A.L.R.3d 1326; *Good v. Continental Ins. Co.*, 291 S.E.2d 198 (S.C. 1982); *see also* 30 FLA.JUR.2d Insurance §§2808, 3564, 3596.

2. Loss Due To Design, Specifications, Workmanship, Or Materials

In *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000), the court considered whether an all-risk builder's risk policy with an exclusion for "faulty workmanship" and "cracking" covered the cost of correcting the faulty construction of a tower

the insured builder had constructed. The original tower suffered from repeated cracking in the foundation over several years. *Id.* The court concluded that the builder had failed to identify any resulting damage not excluded by the policy that would allow the builder to escape the express exclusion provisions of the policy for cracking and faulty workmanship or design. *Id.* The court held that the damage resulting from the cracking due to faulty workmanship was excluded under the all-risk policy. *Id.*

In *Hartford Casualty Ins. Co. v. Evansville Vanderburgh Public Library*, 860 N.E. 2d 636 at 647 (Ind. Ct. App. 2007), the court affirmed the reasoning of *Alton Ochsner Med. Found.*, holding that an all-risk policy which excluded construction and workmanship losses did not cover foundation erosion that occurred after construction was done on the premises.

3. Loss Due To Wear And Tear, Deterioration, And Settling Foundation

In *Pioneer Chlor Alkali Co. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1226 (D. Nev. 1994), a chlorine gas manufacturer sued the insurer for breach of an all-risk policy in effect at the time of a gas leak, seeking coverage for damage to equipment, loss of gas, and business interruption losses. One issue in the case was the definition of “corrosion” under the insurance policy. *Id.* The court found that the term “corrosion” was not ambiguous and damage from corrosion was therefore excluded under the insurance policy. *Id.*

In *Hartford Accident & Indem. Co. v. Phelps*, 294 So. 2d 362 (Fla. 1st DCA 1974), the court considered whether an all-risk homeowners’ policy covered settling damage to a house caused by an underground leak in a water pipe. The policy expressly covered the risk of collapse but provided that “collapse does not include settling, cracking, shrinkage, bulging or expansion.” *Id.* at 363. The court held that this exception did not bar coverage because the settling was caused by a covered risk, the plumbing leak. *Id.* Quoting from 6 *Couch on Insurance* §1466 (1930), the court held that “where there is a concurrence of different causes, the efficient cause — the one that sets others in motion — is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.” *Hartford*, 294 So. 2d at 364.

4. Loss Due To Earth Movement

In *Wis. Builders, Inc. v. Gen. Ins. Co. of Am.*, 221 N.W.2d 832, 838 (Wis. 1974), the court held that the trial court’s definition of “earth movement” as including all movement of the earth “whether it be up, down or sideways” was erroneous and should have been limited by the scope of the policy.

In *In re Katrina Canal Breaches Litigation*, 495 F.3d 191 at FN 21, 217 (5th Cir. 2007), the court declined to apply the minority rule that earth movements “non-natural” in origin or source are not included in earth movement exclusions, as the distinction between natural and non-natural in the context of a broken levee would be an impossible one.

An earth movement exclusion from the builder's risk special extended coverage endorsement, in *Peach State Uniform Serv., Inc. v. Am. Ins. Co.*, 507 F.2d 996, 1000 (5th Cir. 1975), was held to refer "only to phenomena related to forces operating within the earth itself, and not to the merely superficial effects of external forces, such as erosion by run-off rainwater." Accordingly, collapse of a portion of a building resulting from rainwater run-off washing away fill dirt from the building's foundation was held not to be due to "earth movement." *Id.* A similar result was reached in *W. Am. Ins. Co. v. Rauch*, 412 So. 2d 956 (Fla. 4th DCA 1982).

5. Loss Caused By Surface Water Or Waves

"Surface water" has been defined as waters that "diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh." *McCorkle v. Penn Mut. Fire Ins. Co.*, 213 So. 2d 272, 273 (Fla. 3d DCA 1968), quoting from *Black's Law Dictionary* (4th ed. 1951). Applying this definition, the court in *McCorkle* held that water that backed up on a roof due to a clogged downspout and caused the collapse of the roof was not surface water for the purposes an all-risk insurance policy that contained a surface water exclusion. *Id.*; see also, *W. Am. Ins. Co. v. Rauch*, 412 So. 2d 956 (Fla. 4th DCA 1982) (loss was not caused by surface water when rain which water entered into a building under a construction through the open roof, poured out of the building through open doorways and eroded the foundation soil, causing the building to fall.).

In *Arjen Motor Hotel Corp. v. Gen. Accident Fire & Life Assurance Corp.*, 379 F.2d 265, 267 (5th Cir. 1967), the language "caused by, resulting from, contributed to or aggravated by . . . waves, tidal water or tidal wave" was held not to be ambiguous and therefore was effective to exclude coverage for the partial collapse of a beach motel restaurant caused by wave action.

6. Loss Caused By Theft

More recent policies use the phrase "not an integral part of the building or structure" to limit loss by theft. The "integral part" requirement for theft coverage gave rise to a diversity of judicial interpretation that was viewed as "proof positive" of ambiguity by the court in *Zanfagna v. Providence Washington Ins. Co.*, 415 A.2d 1049, 1051 (R.I. 1980). In *Zanfagna*, the court considered whether pilfered goods that had been stored in a garage on a lot where the insured was building a new house were an "integral part" of the house even though the goods had not yet been installed. *Id.* Finding that both the insurer's contention ("integral part" means those items actually installed and therefore physically attached to the structure) and the insured's contention ("integral part" refers to articles, supplies, and fixtures constituting an "essential" part of the building) were reasonable, the court accepted the insured's interpretation and ruled that the loss was covered. *Id.* A similar result was reached by the court in *Travelers Indem. Co. v. Milgen Dev.t, Inc.*, 297 So. 2d 845 (Fla. 3d DCA 1974).

7. Loss Occasioned Or Increased By Local Ordinance

When a roof partially collapsed under standing water because the entire roof had been constructed with the trusses upside down and the city declined to issue a building permit unless the entire roof was replaced, the quoted exclusion was held to limit the insurer's obligation to the cost of rebuilding the portion of the roof that collapsed. *Regency Baptist Temple v. Ins. Co. of N. Am.*, 352 So. 2d 1242 (Fla. 1st DCA 1977). The court distinguished this partial loss situation from cases in which an ordinance or requirement prevents repair of a damaged building, thus rendering the building a "constructive total loss." *Id.* In the latter situation, the insurer has been held liable for the building's entire value. *See, e.g., Feinbloom v. Camden Fire Ins. Assoc.*, 149 A.2d 616 (N.J. Super.Ct. App.Div. 1959).

8. Loss To Interior Of Building Caused By Rain, Snow, Sand, Or Dust

For interior damage resulting from rain, snow, sand, or dust to be within builder's risk policies containing the quoted exclusion, there must be "actual prior damage to the roof or walls occasioned by wind or hail" through which the damaging rain, snow, sand, or dust enters. *N.H. Ins. e Co. v. Carter*, 359 So. 2d 52, 54 (Fla. 1st DCA 1978). In *Carter*, because water entered through the roof solely because the insured had removed the protective covering while making repairs, the insured's property insurance policy did not cover the damage to contents of the house. *Id.*

9. Loss Concurrently Caused By Covered And Excluded Risks

Courts in various jurisdictions have struggled to develop a rule to govern property losses caused by the concurrent operation of both a covered risk and an excluded one. In *Hartford Accident & Indem. Co. v. Phelps*, 294 So. 2d 362, 364 (Fla. 1st DCA 1974), the court indicated that in concurrent cause cases, "the efficient cause — the one that set others in motion — is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."

The Florida District Court of Appeal, Third District, found the "efficient cause" analysis of little help in determining coverage under an all-risk homeowners' policy for a property loss caused by two independent, concurrent causes, one of which was covered while the other was excluded. *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988). Adopting the rule applied by the California Supreme Court in a liability insurance coverage dispute, the Florida court ruled that coverage exists whenever an insured risk constitutes one of the concurrent proximate causes of the loss. *Id.*

The *Wallach* decision was followed by the court in *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002). There, the insured, brought a declaratory action against the carrier, seeking coverage for the collapse of a roof. *Id.* The insured argued that due to excessive rain from a tropical storm, a pooling of water built up on the roof which caused the roof to collapse. *Id.* at 1317. According to the insured, the policy, which extended coverage for flood, collapse, and other damages including windstorm, must cover the loss. *Id.* The carrier contended that the collapse was caused by the deteriorated condition of the building — including

wet and dry rot – and that loss resulting from such wear and tear was expressly excluded from coverage. *Id.*

Following the *Wallach* decision, the Middle District concluded that the concurrent cause doctrine is the prevailing standard under Florida law. *Id.* at 1318. “The concurrent cause doctrine mandates that coverage shall be provided when a loss would not have occurred but for the joinder of independent covered and excluded causes.” *Id.*

However, the *Paulucci* court also addressed whether the anti-concurrent cause provision in the policy took precedence over the concurrent cause doctrine. *Id.* In short, the anti-current cause provision provided that if a loss was caused by a covered cause of a loss and an excluded cause of a loss, there would be no coverage. *Id.* The court held that, under Florida law, parties can contract around the concurrent cause doctrine through an express anti-concurrent cause provision. *Id.* at 1320.

V. Professional Liability

Professional Liability insurance covers claims against design professionals (e.g., architects and engineers) for errors and omissions in their design. More recently, Professional Liability insurance has become an integral part of the insurance program for contractors that also perform construction management services, primarily because a standard endorsement to a CGL policy excludes coverage for professional services.

When Professional Liability policies impose a duty on the insurer to defend the insured against allegations of negligence, error, mistake, or omission in the rendering of professional services, even if “groundless, false or fraudulent,” the scope of the insurer’s duty to defend is determined by the same principles applicable to general liability policies. *Grieb v. Citizens Cas. Co. of N.Y.*, 148 N.W.2d 103, 106 (Wis. 1967). *See generally, GRE Ins. Group v. Metropolitan Boston Housing P’ship, Inc.*, 61 F.3d 79 (1st Cir. 1995). Under these defense provisions, if the complaint alleges a claim covered by the policy’s terms, the insurer must defend the insured. *Canal Ins. Co. v. M & G Tank Lines, Inc.*, 2001 WL 530450 (S.D. Ala. 2001); *Runyan v. Continental Casy Co.*, 233 F. Supp. 214 (D. Or. 1964). Additionally, the insurer’s duty to defend is frequently broader than its duty to pay, because the duty to pay is controlled by the facts as ultimately determined. *See, Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307 (8th Cir. 1991); *Pattison v. Employers Reinsurance Corp.*, 900 F.2d 986 (6th Cir. 1990); *Lapierre, Litchfield & Partners v. Continental Cas. Co.*, 302 N.Y.S.2d 370 (App.Div. 1969); *Fla. Farm Bureau Mut. Ins. Co. v. Rice*, 393 So. 2d 552 (Fla. 1st DCA 1980). The duty to defend is determined by the allegations of the complaint, even if factually incorrect, and not by the ultimate determination of liability. *Nat’l. Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533 (Fla. 1977); *SM Brickell Ltd. P’ship. v. St. Paul Fire & Marine Ins. Co.*, 786 So. 2d 1204 (Fla. 3d DCA 2001); *Caremedic Systems, Inc. v. Hartford Cas. Ins. Co.*, 2008 WL 912437 (M.D. Fla. 2008).

Furthermore, when only some of the allegations against the insured come within the coverage of the liability policy, the insurer has a duty to defend the entire action, at least until the

covered claims are eliminated from the lawsuit. *Am. Hardware Mut. Ins. Co. v. Miami Leasing & Rentals, Inc.*, 362 So. 2d 28 (Fla. 3d DCA 1978); *C.A. Fielland, Inc. v. Fidelity & Ca. Co. of N.Y.*, 297 So. 2d 122 (Fla. 2d DCA 1974). These qualifying allegations can include both those explicitly contained in the complaint, as well as those that are not specifically pled if they are raised in litigation and the insurer has notice. *Evanston Ins. Co. v. Royal Am. Construction Co.*, 2007 WL 4240749 (N.D. Fla. 2007).

Finally, the duty to defend may also include the duty to appeal. In *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999), the court held that, if an insurance contract does not specifically exclude the duty to defend on appeal, the duty to defend includes a duty to appeal when reasonable grounds for an appeal exist.

On the other hand, in a case in which an architects' and engineers' professional liability policy did not directly impose a duty to defend the insured, the insurer was obligated to reimburse the insured only "for the costs, expenses and attorney fees in the defense of claims actually paid by [the insured] in a sum in excess of the deductible amount." *Gribaldo, Jacobs, Jones & Assoc. v. Agrippina Versicherungen A.G.*, 476 P.2d 406, 413 (Cal. 1970).

A number of decisions have considered whether defense cost reimbursement provisions require the insurer to reimburse the insured for expenses as they are incurred. Construing other types of claims-made professional liability policies, many courts have held that defense-cost reimbursement provisions do require insurance companies to pay defense costs, because they are incurred despite policy language suggesting that payment is not due until final disposition of the claim against the insured. See, e.g., *Okada v. MGIC Indem. Corp.*, 823 F.2d 276 (9th Cir. 1987); *Nat. Union Fire Ins. Co. of Pittsburgh, Pa. v. Brown*, 787 F. Supp. 1424 (S.D. Fla. 1991), *aff'd* 963 F.2d 385 (applying Florida law). Some courts, however, have rendered contrary holdings. See, e.g., *In re Ambassador Group, Inc. Litigation*, 738 F.Supp. 57 (E.D. N.Y. 1990); *Zaborac v. Am. Cas. Co. of Reading, Pa.*, 663 F. Supp. 330 (C.D. Ill. 1987).

VI. WRAP, OCIP, And CCIP Insurance

A "wrap-up" policy, often referred to as an OCIP (owner-controlled insurance policy) or a CCIP (contractor-controlled insurance policy), is a policy obtained by an owner or contractor to provide coverage for all of the major participants in a large (usually over \$100,000,000) construction project or a series of related, similar projects. The purpose of such policies is to avoid the expense of multi-party, multi-insurer construction lawsuits seeking recovery for the various liabilities and claims for indemnification among and between the owner, project manager, architect, engineer, subcontractors, contractors, and suppliers. See Walter J. Andrews and Ruth S. Kochenderfer, *Deconstructing Wrap-Up Policies*, 15 Coverage 16 (ABA Litigation Section, May/June 2000). These policies typically provide general liability insurance for all parties and workers' compensation, personal injury, employer's liability, and property coverage. They may also include professional liability, environmental liability, and builders risk coverage. These are very complicated types of insurance and should not be purchased without the advice of an experienced broker.

However, these policies have certain limitations when compared to the various types of individually obtained policies listed above. First, coverage usually ceases when the project is

completed, while ordinarily, the liability exposure of the parties to the project will likely continue after the wrap coverage expires. Hence, each participant should insure they have provided coverage that will be in excess to the wrap until it expires and becomes primary thereafter. Additionally, these policies raise interesting issues as to how the insurer will cover defendants and probably settle claims involving multiple claimants, multiple insureds, and claims among the insureds.

There have been relatively few cases reported concerning these policies, perhaps as a result of the reduced need for litigation among the participants. However, a few cases provide examples of how the policies have been construed.

An OCIP was held to cover a claim by an owner against its contractor and subcontractor for defective work. *See Zurich Am. Ins. Co. v. Penn. Mfrs. Assoc. Ins. Co.*, 2003 WL 23095605 (N.J. Super., App. Div. May 7, 2003). Similarly, an OCIP covered a workers' compensation claim of a subcontractors employee injured on the project site. *See Am. Protection Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989 (Me. 2003). Finally, an OCIP covered the defense costs and liability of an architect sued for design negligence by a public owner. *See Mohegan Tribal Gaming Authority v. Kohn Pedersen Fox Assoc., P.C.*, 2003 WL 23177483 (Conn. Super. Dec. 23, 2003).

Section 255.0517, Florida Statutes (2011), governs wrap-up policies on public projects in Florida. A state agency, political subdivision, state university, community college, airport authority, public agency in this state, or any subdivision thereof, may purchase an owner-controlled insurance program in connection with a public construction project if it is determined necessary and in the best interest of the public agency and if all of the following conditions are met:

- a. The estimated total cost of the project is:
 - i. Seventy-five million dollars or more;
 - ii. Thirty million dollars or more, if the project is for the construction or renovation of two or more public schools during a fiscal year; or
 - iii. Ten million dollars or more, if the project is for the construction or renovation of one public school, regardless of whether the project's duration extends beyond a fiscal year.
- b. The program maintains completed operations insurance coverage for a term during which the coverage is reasonably commercially available, as determined by the public agency, but for no less than ten (10) years.
- c. The bid or proposal specifications for the project clearly specify, for all bidders or proposers, the insurance coverage provided under the program and the minimum safety requirements that must be met.

- d. The program does not prohibit a contractor or subcontractor from purchasing any additional insurance coverage that the contractor or subcontractor believes is necessary for protection against any liability arising out of the contract. The cost of the additional insurance must be disclosed to the public agency.
- e. The program does not include surety insurance.
- f. The public agency may only purchase an owner-controlled insurance policy that has a deductible or self-insured retention if the deductible or self-insured retention does not exceed \$1 million per occurrence. Contractors, including any owner or principal acting as a general contractor, and subcontractors performing work under a construction project insured by an owner-controlled insurance program are not required to individually satisfy eligibility requirements for large deductible workers' compensation rating plans. Such contractors and subcontractors may combine their payrolls under the owner-controlled insurance program for workers' compensation coverage as long as the minimum deductible for the construction project is \$100,000 or more and the standard estimated premium for the construction project is \$500,000 or more.
- g. The public agency is responsible for payment of the applicable deductibles of all claims.
- h. The following types of projects are exempted from the statute:
 - (i). Any project of the Department of Transportation which is authorized under s. 337.11;
 - (ii). Any existing project or projects of a public agency which are the subject of an ongoing, owner-controlled insurance program issued before October 1, 2004; or
 - (iii). Any project of a public agency which is advertised by the public agency before October 1, 2004, for the purpose of receiving bids or proposals for the project.
 - (iv). Any project or projects of a public agency which are committed to an ongoing, owner-controlled insurance program issued before October 1, 2007.

VII. Conclusion

There are four general types of construction insurance – Commercial General Liability, Builder's Risk, Professional Liability and Owner Control Insurance Programs. Although there may be some overlap in coverage with respect to the various policies, each is designed to cover a type of risk. Nevertheless, the starting point in determining coverage is to carefully analyze the

language of the policy. As the Florida Supreme Court's decisions in *J.S.U.B.* and *Pozzi Windows* clearly demonstrate, the language controls, leading to different results when construing a post-1986 CGL policy as opposed to a pre-1986 policy. The same point applies to Builder's Risk, Professional Liability and OCIP policies – the language of the policy will control.