IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1295

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

v.

FIRST HOME BUILDERS OF FLORIDA,

Respondent.

BRIEF OF AMICI CURIAE FLORIDA HOME BUILDERS ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, ARVIDA/JMB PARTNERS L.P., ARVIDA MANAGERS, INC., ARVIDA/JMB MANAGEMENT L.P., AND MERCEDES HOMES CORPORATION

On Discretionary Review from the District Court of Appeal, Second District
L.T. No. 2D03-134

Keith Hetrick, Esq.
Florida Home Builders Association
201 East Park Avenue
Tallahassee, FL 32301
Telephone (850) 224-4316

R. Hugh Lumpkin, Esq.
Michael F. Huber, Esq.
Ver Ploeg & Lumpkin, P. A.
100 S. E. 2nd Street, Suite 2150
Miami, FL 33131-2151
Telephone: (305) 577-3996
Facsimile: (305) 577-3558

David K. Miller, P. A.
Ginger L. Barry, Esq.
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone: (850) 681-6810
Facsimile: (850) 521-1471

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STATEMENT IDENTIFYING AMICI AND THEIR INTEREST IN CASE

Amici, National Association of Home Builders ("NAHB"); Florida Home Builders Association ("FHBA"); Arvida/JMB Partners L.P., Arvida/JMB Managers, Inc., and Arvida Management L.P. (collectively "Arvida"); and Mercedes Homes, Inc. ("Mercedes"), file this Amicus Brief supporting the position of Respondent First Home Builders, and opposing the position of Petitioner United States Fire Insurance Company and the insurer amici (collectively the "Insurers").

NAHB is a nonprofit professional and trade association representing 225,000 members nationwide, promoting home ownership, fostering a healthy and efficient housing industry, and promoting policies that will keep safe, decent, and affordable housing a national priority. NAHB's website is at www.nahb.org.

FHBA is a nonprofit professional and trade association representing the home building and remodeling industry in Florida, with some 18,000 corporate members and 28 local associations; FHBA is an affiliate of the NAHB that shares its objectives. Its website is at www.fhba.com.

Arvida and Mercedes are large Florida residential developers that act as general contractors for their projects and contract with independent subcontractors. They and many other homebuilders routinely purchase the 1986 Commercial General Liability (CGL) form to cover any legal liability for subcontractors' faulty work that may cause property damage after construction is complete.

This case will have substantial impact on the manner in which the construction industry operates in Florida, on the availability of low and moderate income housing, and on the rights of the home buying public. The home building industry is characterized by many relatively small firms that operate over limited geographic areas and rely heavily on subcontractors who are licensed and staffed to perform specialized tasks to perform most on-site work. Some contractors must subcontract services under Fla. Stat. § 489.113(3). NAHB estimates that on average about 25 to 30 different subcontractors are used to build one home.

Contractors face the risk that after construction is complete, defective work by a subcontractor may cause damage to the rest of the structure or need repair or replacement itself. In such cases, the contractor may face liability for the subcontractor's defective work for breach of duties imposed by common law or by building codes, as either an implied warranty or negligence claim.

Amici urge affirmance of the ruling below, JSUB, Inc. v. U.S. Fire Ins. Co., 906 So.2d 303 (Fla. 2d DCA 2005). Amici request adherence to the rule that insurers may not invoke "public policy" to negate the terms of their contract, and must, under the contract terms, cover an insured contractor's liability for property damage occurring after the structure is complete, when such damage is caused by a subcontractor's defective work, that either damages other parts of the completed structure, or is damaged in itself, and requires repair or replacement.

SUMMARY OF THE ARGUMENT

A contractor is covered under the 1986 CGL form if it is (1) "legally obligated to pay damages" caused by (2) an "occurrence" that it neither expected nor intended (3) resulting in "property damage" (4) to a "completed operation" (5) as a result of a "subcontractor's" defective work. Any ambiguity in the contract terms is resolved in the insured's favor.

The Insurers contend a subcontractor's faulty work is not an "occurrence," but they cannot show the insured contractor expected or intended the faulty work and resulting damage in this case. The Insurers' interpretation negates the contract definition of "occurrence" and the entire "product-completed operations hazard" (PCOH) coverage, rendering the "your work" exclusion (L) superfluous.

The Insurers contend that faulty work cannot suffer "property damage," but the contract defines "property damage" to include "physical injury including all resulting loss of use." Faulty work may function adequately for years, then suffer injury or lose its usefulness due to weathering or wear.

Contractors normally expect proper subcontractor work and do not want litigation. The Insurers' view that covering this liability might encourage careless work is speculation and cannot substitute for the contract terms. They conjure a phantom "public policy" exclusion from cases construing prior CGL forms, which are inapposite. In 1986, the insurance industry amended its CGL form to add

PCOH coverage and limit the "your work" exclusion to assure coverage for property damage to the "work" (the completed structure) from a subcontractor's faulty work. Public policy does not limit coverage unless the insured expected or intended its actions to produce injury, and unless liability is imposed for reasons other than compensating victims. No such public policy limitation applies here.

The instant case meets all five elements cited above and is not excluded under the insurance contract's exclusions. The overriding "public policy" is to enforce the contract terms, with any ambiguity construed in favor of the insured and the home buying public, who unfairly will be left without a remedy if insurers are allowed to use speculative policy arguments to negate express coverage terms.

ARGUMENT AND CITATIONS OF AUTHORITY

I. NO PUBLIC POLICY SUPERSEDES THE PLAIN LANGUAGE OF THE 1986 CGL FORM, WHICH COVERS A CONTRACTOR'S LIABILITY FOR A SUBCONTRACTOR'S DEFECTIVE WORK THAT CAUSES PROPERTY DAMAGE UNDER PCOH.

1. "Sums the Insured Becomes Legally Obligated to Pay as Damages" Includes All Theories of Liability

This clause is the starting point for coverage analysis.[1] Although contractors usually work under written contracts, they are also liable for breaches of duties imposed by common law or statute, regardless of whether such claims sound in tort or contract. See Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA 1972), approved, 264

[1] The Appendix quotes contract terms from the opinion below (App. 1).

So.2d 418 (Fla. 1972) (common law implied warranty of fitness and merchantability imposed in part because the builder is more capable of spreading the costs of his mistakes than the home buyer); 4 Matthew Bender Construction Law ¶ 18.03[2] (1997) (implied warranty that construction will be done in good and workmanlike manner); U.S. Home Corp. v. Metropolitan Prop. & Liab. Ins. Co., 516 So.2d 3 (Fla. 2d DCA 1987) (breach of common law duty to disclose); Comptech Int'l Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219 (Fla. 1999) (breach of duty imposed by building code). These duties imposed by law are similar to the duty of reasonable care under negligence law.[2] The same damage may be actionable under either theory. See Conklin v. Hurley, 428 So.2d 654 (Fla. 1983) (initial homebuyer may sue for breach of implied warranty as a common law policy to protect consumers; subsequent purchaser may sue for negligence); Bass v. Jones, 533 So.2d 780 (Fla. 1st DCA 1988) (lessee may sue for negligence).

The contract phrase "legally obligated to pay as damages" makes no distinction as to which legal label the plaintiff fortuitously applies to its damages claim, see Vandenberg v. Superior Court, 982 P.2d 229, 244-46 (Cal. 1999); or what measure of damages (*e.g.*, repair or replacement cost) is imposed.

[2] The elements for the negligence standard and the implied warranty standard are the same. Audlane Lumber & Bldrs. Supply, Inc. v. D.E. Britt Assocs., Inc., 168 So.2d 333, 335 (Fla. 2d DCA 1964); see Milau Assocs. Inc. v. North Ave. Dev. Corp., 368 N.E.2d 1247 (N.Y. 1977) (implied warranty of fitness in service transaction means "performer would not act negligently").

2. Loss from Defective Subcontractor Work Is an "Occurrence"

The 1986 revision of the CGL form grants coverage for any "occurrence," broadly defined to mean an "accident." Three recent cases establish the framework by which Florida courts analyze the CGL occurrence-based coverage. First, in State Farm Fire & Cas. Co. v. CTC Dev. Co., 720 So.2d 1072 (Fla. 1998), the insured contractor knowingly built a home over the setback line, under a mistaken assumption that a variance had been granted. A neighboring owner sued for damages. The contractor's insurer denied coverage, contending that the defective construction was not an "accident." The Court held that absent a limiting definition, an "accident" includes "injuries or damage neither expected nor intended from the standpoint of the insured," including unexpected injury from the insured's intentional acts. The contractor did not intend or expect this injury, so it was an "accident" covered by the contract. Id. at 1075-77.

In Koikos v. Travelers Ins. Co., 847 So.2d 263 (Fla. 2003), the insured was sued for negligent security after a gunman shot two patrons at his restaurant. The Court held the "occurrence," the direct or immediate "cause nearest the loss," was each gunshot, not the passive negligence of the insured. Id. at 271. Here the "occurrence," the direct or immediate cause nearest the loss, is the subcontractor's faulty work, not the insured contractor's passive failure to supervise that work.

In the third case, Travelers Indemn. Co. v. PCR, Inc., 889 So.2d 779 (Fla. 2004) ("PCR"), an explosion in the insured's chemical plant killed and injured employees. In a prior appeal the Court held the explosion was objectively substantially certain to occur, not "accidental" within the meaning of the worker's compensation law. The employer's tort liability insurer argued that, because this dangerous event was objectively foreseeable, insurance should not cover it as a matter of public policy. However, the term "accident" in insurance contracts includes any damages not expected or intended "*from the insured's subjective point of view.*" Id. at 790-91, citing CTC, 720 So.2d at 1072 (emphasis in original). This includes damages resulting from intentional or volitional acts, unless the insured *actually expected* (with expectation measured to the degree of substantial certainty) its conduct would result in injury. The explosion was not actually expected, so it was a covered "occurrence." PCR at 790-91.

There is no showing that this insured contractor subjectively expected or intended the damage to a substantial certainty here, so it is a covered "occurrence." Foreseeability of damage is not the standard. CTC, above, at 1074; PCR, above. In this context, "expected" and "intended" mean the same thing, and require a higher degree of scienter and certainty than mere foreseeability. Grange Mut. Cas. Co. v. Thomas, 301 So.2d 158 (Fla. 2d DCA 1974); Farrer v. Gulf Coast Transp.,

809 So.2d 85 (Fla. 4th DCA 2002). Faulty performance is "foreseeable" in many contracts, but that does not mean the parties expect or intend that result.[3]

3. Faulty Subcontractor Work Can Cause and Suffer "Property Damage"

The Insurers argue that defective work cannot cause or suffer "property damage." This argument has no factual foundation. Defective work may initially function adequately, then gradually suffer damage, *e.g.*, due to wear or weathering.

The contract defines "property damage" to include "physical injury to property including all resulting loss of use of that property." The PCOH definition includes "all" "property damage" "arising out of your work." "All" is the broadest possible coverage term, and does not exclude any source or cause of damage, or any property, even if it is part of the "work." The contract definitions do not support the argument that defective work is excluded as a type of "property damage." Moreover, such defective work can cause "property damage" to other parts of the work – as when the shifting subsoil in this case damaged the properly constructed building.

The coverage-defining terms "occurrence," "property damage" and "PCOH" do not limit coverage based on which property or whose "work" is damaged, as

[3] Liability insurance covers even reckless pranks or horseplay that foreseeably can cause damage but is not intended to do so. See Castro v. Allstate Ins. Co., 724 So.2d 133 (Fla. 3d DCA 1999), citing cases. Of course, in this case and in most construction liability cases, the insured's conduct does not approach recklessness.

long as the cause of such damage is the subcontractor's work. Therefore, the argued limitation on coverage must be found, if at all, in the exclusions.[4]

4. Exclusion (L), "Damage to Your Work," Confirms Coverage

The contract assures PCOH coverage, but exclusion (L) excludes damages to "your work," including "completed operations." The PCOH coverage and this exclusion are *in pari materia*, and the exclusion cannot swallow the coverage.

This exclusion specifically excepts "damaged work" or "work out of which the damage arises" that was performed by a subcontractor (*e.g.*, soil preparation here). This indicates that the coverage granted for this risk remains intact and is not excluded. The only reading that harmonizes these terms is that PCOH covers a subcontractor's faulty work that damages itself or other property. The exclusion-exception confirms that this risk is otherwise covered, else it would be superfluous. See CTC, above, at 1074-75. Any ambiguity in the exclusion or between the exclusion and other terms is construed to maximize coverage.

[4] If a defective masonry wall falls outward and damages a parked car, no one disputes the "occurrence" of "property damage," but if it falls inward and damages the floor, the insurers label that a non-occurrence or not "property damage." See French v. Assurance Co., 448 F.3d 693 (4th Cir. 2006), noting the absurdity of this argument. Likewise, if the wall falls the day before the home buyer resells to a new owner, they contend it is not covered as a contract claim, but if it falls the day after resale, it is covered as a tort claim. There is no basis in the contract language for making liability coverage turn on these fortuitous circumstances, or any rational reason for the courts to invent such a limitation as a public policy.

5. Phantom "Public Policy" Exclusion Inapplicable

The heart of the Insurers' argument is not based on the contract language, but on a "public policy" to limit coverage. They contend that if coverage is upheld, insured contractors might no longer care whether subcontractors perform defective work, and may even allow defective work in order to be paid twice for such work. This is pure speculation, but even if the Court thinks this "public policy" concept is sound, it is not free to impose this exclusion as a phantom exclusion or by construing ambiguous terms in the insurer's favor.

The Insurers' "public policy" argument to preclude coverage fails both parts of the test adopted in PCR, above, 889 So.2d at 794-95. The first factor is whether the existence of insurance will encourage commission of the wrongful act giving rise to liability. Applying this factor, the Court concluded that "[w]here liability is not predicated on intent, the rule is not implicated." Id. at 794. The second factor looks to whether the purpose for imposing liability is to deter wrongdoers or to compensate victims. In PCR liability for the explosion served both purposes, and neither goal was primary, so public policy did not preclude coverage. Id. at 795.

Applying these factors, there is no basis for a public policy limitation in this case, because the damage was an "accident," not subjectively intended or expected

by the insured, and the liability serves to primarily compensate the injured party, not to deter some specified bad conduct.[5]

As a practical necessity, or as required by Fla. Stat. § 489.113(3), contractors must delegate specialized tasks to subcontractors, but do not always have the practical ability to control each subcontractor's work. See Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 653-54 (9th Cir. 1988):

> Having selected subcontractors, a general contractor may have little or no effective control over the manner in which subcontractors perform work. There are many situations where a general contractor knows little, if anything, about the exigencies of a subcontractor's work. An example is the soil testing performed prior to a construction project, which typically is subcontracted. … [W]e find unpersuasive the argument that because the prime contractor's control makes the work of a subcontractor a contractual business risk, the prime contractor should not be able to obtain insurance against that risk. (citation and footnote omitted).

Accord, O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 102 (Minn. Ct. App. 1996) (a general contractor's minimal practical control over the work of subcontractors is a reason not to apply the business risk exclusion).

Contractors normally expect proper workmanship from their subcontractors. No contractor wants to defend a lawsuit, and suffer inconvenience, embarrassment, and loss of time, reputation and goodwill, for which insurance reimburses nothing.

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[5] Liability insurance covers even punitive damages when imposed based on vicarious liability for another's wrong, not on the insured's personal fault. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1064 (Fla. 1983). A contractor's compensatory liability for a subcontractor's unexpected defective work is more like vicarious liability than an intentional wrong, and should be an insurable risk.

If a claim is proved, the contractor also stands to lose any deductible and may face higher future premiums,[6] or even non-renewal of coverage, based on loss experience. Finally, contractors may face disciplinary action for mismanagement, incompetence or neglect in professional work, under Fla. Stat. § 489.129(1)(g), (m) or (n). Contractors are motivated to avoid these risks, even if they believe insurance covers their liability to the owner in whole or part.

Indemnity is unlikely to create a windfall profit for the insured contractor, who must (1) pay its initial subcontractor on completion of the work to avoid a lien, then (2) pay a second subcontractor to repair or replace the work. The contractor gains nothing if insurance reimburses the latter payment. Indeed, the insurer can hire its own subcontractor to repair or replace the covered loss.

As an economic policy, there is no reason the courts should impose regulatory restrictions in place of insurers' and contractors' freedom to contract, forcing each contractor to take expensive over-precautions with subcontractors to avoid devastating personal liability, thus raising the cost of building particularly for low and moderate income housing. Florida promotes the supply of low and moderate income housing by eliminating needless regulation. Fla. Stat. § 187.201(4)(b)4. The risks and liability arising from subcontractors' faulty work

[6] An experienced "mom and pop" contractor can pay $8,000 to $10,000 a year for CGL-PCOH coverage and an inexperienced small contactor can pay twice that amount. The premium is not "nominal" from their perspective although apparently some insurers consider this amount "nominal" from an insurer's perspective.

can be more efficiently and fairly spread throughout the construction industry by allowing the insurance markets to cover these risks by contract, rather than having courts force contractors alone to bear such risks and liabilities.

CGL insurance is marketed and priced to spread the risk and protect insureds (and the public) in situations where the insured is at fault. This feature does not unduly promote careless work in other contexts. However, if the Insurers feel coverage promotes careless construction, they can prospectively write new exclusions, or raise premiums based on experience, or implement risk-sharing deductibles. They can contest coverage under the current contract if they think the contractor expected or intended the injury. The rarity of such cases suggests this "moral hazard" is just speculation. The insurer in this case made no such showing.

It is hard to understand why insurers, who write the contract terms, should ever ask the courts to impose "public policy" exclusions. Indeed, "public policy" supports the view that insurers should mean what they say and cover risks exactly as described in their contracts, for which they charge substantial premiums. The courts have no business relieving insurers of improvident bargains. Green v. Life & Health of America, 704 So.2d 1386, 1391 (Fla. 1998). Courts must use "extreme caution" before superimposing public policy to negate the parties' freedom of contract. Bituminous Cas. Co. v. Williams, 17 So.2d 98, 101-02 (Fla. 1944). Public policy, if not hitched to the contract language, is an "unruly horse."

See Fireman's Fund Ins. Co. v. Levine & Partners, P.A., 848 So.2d 1186 (Fla. 3d DCA 2003) (quoting former Justice Glenn Terrell's famous dictum). PCR, above, limits the role of public policy concerns to govern contracted liability coverage.[7]

The Insurers' argument, extended to its logical conclusion, would eliminate all coverage for the insured's human failures, which is exactly the risk-shifting security the insurance industry sells. Query: Do the Insurers mean they can never underwrite this risk, no matter what words they use in the contract, or what premiums they charge? The Court should reject this absurd argument.

6. Economic Loss Rule Inapplicable to Change Contract Terms

The Insurers' reliance on the economic loss rule in Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993), is misplaced, because that case did not interpret an insurance contract. Casa Clara held that for purposes of the owner's rights against the contractor, courts view the home as a single integrated product produced pursuant to the parties' contract, so their contract governs their respective rights and duties, not the common law of torts. As noted above, the law still imposes duties on contractors through implied warranties, required disclosures and building codes. More important, Casa Clara did not concern insurance coverage, and does not inject "public policy" into the

[7] Deni Associates, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1140 (Fla. 1998), rejected an insured's "reasonable expectations" claim. Turnabout is fair play. Insurers' assumptions, even if reasonable, cannot trump contract terms.

insurance contract to relieve insurers of risks they contract to cover (which would actually be contrary to the very reasoning and purpose for the economic loss rule).

PCR, above, held the term "accident" in the insurance contract is **not** construed under tort law principles, but rather under the principles governing construction of insurance contracts. PCR at 787-91. By the same reasoning, the Court cannot project "economic loss" concepts from the common law of torts into the insurance contract to limit coverage that the contract terms provide. Coverage depends on the contract language, subject to the *contra proferentem* rule, not on "economic loss" jurisprudence that is completely outside the insurance contract.

II. HISTORY OF CGL FORM EXPLAINS EVOLVING CASE LAW

Understanding the changes in the standard CGL contract terms is essential to understanding the changing case law applying this form. See Wielenski, Insurance for Defective Construction 153-160, 165-66 (2000); Shapiro, Point/Counterpoint: Inadvertent Construction Defects are an "Occurrence" Under CGL Policies, 22 Const. Law 13 (2002); and briefs of other amici discussing the history of the CGL.

Under the 1955 CGL form, Florida courts upheld coverage for this type of accident. In Michigan Mutual Liab. Co. v. Mattox, 173 So.2d 754 (Fla. 1st DCA 1965), the insured electrical subcontractor was covered for its cost to replace a

switchboard it had installed that was damaged in an electrical explosion. The decision did not mention any public policy concern about such coverage.

The 1966 and 1973 CGL forms specifically excluded this coverage as discussed in the articles cited above, and the briefs of other amici.

However, beginning in 1976, contractors could purchase, for an extra premium, an optional Broad Form Property Damage (BFPD) endorsement, which impliedly extended coverage for property damage arising from faulty subcontractor work. See Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 653-54 (9th Cir. 1988), citing insurance industry commentary.

In 1986, the standard CGL form was amended to add PCOH coverage and the "subcontractor" exception to the "your work" exclusion. The 1986 form retained the BFPD endorsement's optional coverage for property damage arising from faulty subcontractor work as an element of standard coverage by affirmative rather than implied provisions. See Wielenski, above, at 160, 165-66, 212; Shapiro, above at 15, and other amici briefs citing insurance industry publications explaining and marketing the 1986 CGL form as providing this coverage.

The Insurers rely primarily on LaMarche v. Shelby Mut. Ins. Co., 390 So.2d 325 (Fla. 1980), but that case is distinguished in several ways. In the first place, it involved defective work by the insured contractor, not by a subcontractor. Second, LaMarche was based on a standard CGL contract issued before 1980. LaMarche

did not extensively discuss the contract terms, but relied on the discussion of the then-standard CGL form in Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979). In Weedo, the insurer conceded that "but for the exclusions, coverage would obtain." Id. at 790 n. 2; see also id. at 792, discussing exclusions. "Business risk" was not a public policy to limit coverage, but just applied the exclusions in that version of the contract. The Insurers in this case argue that the 1986 CGL terms defining "occurrence" and "property damage" do not grant coverage at all, so they don't have to reach the contract exclusions! This shifting rationale is hardly adherence to the reasoning of LaMarche - Weedo.

Some District Courts nevertheless extend LaMarche to claims under the current form. E.g., Home Owners Warranty Corp. v. Hanover Ins. Co., 683 So.2d 527, 528 (Fla. 3d DCA 1996), Lassiter Constr. Co. v. American States Ins. Co., 699 So.2d 768 (Fla. 4th DCA 1997), and Auto-Owners Ins. Co. v. Tripp Const Co., 737 So.2d 600 (Fla. 3d DCA 1999). These cases did not analyze the 1986 CGL contract terms or the discussion of "occurrence" in CTC, Koikos and PCR, above.[8] However, LaMarche cannot be unhitched from the contract exclusions on which it

[8] The policyholder in Lassiter apparently argued that an exclusion created coverage, not the argument presented here. Moreover, Lassiter concerned property damaged while the insured was performing operations: "There are no allegations that the defective construction caused personal injury or damage to any property other than the school buildings *which were being constructed*" (e.s.). The Court cited exclusion "J," the "performing operations" exclusion. Id. at 769-70. Here the damage arose from completed operations, covered by PCOH, and subject only to exclusion "L" with its "subcontractor" exception, as Lassiter noted. Id. at 770.

was based, and given eternal life as a "public policy," regardless of what the contract says.

By contrast, the decision below, 906 So.2d 303, properly analyzed the 1986 form to find coverage, consistent with the reasoning in CTC, Koikos and PCR, because the subcontractor's defective work was not expected or intended from the insured contractor's subjective viewpoint and there is no public policy reason to preclude coverage in this case under the contract terms.

The Insurers argue that the decision below departs from Florida precedent. However, every Florida case that has analyzed the changes in the CGL contract has found coverage in these circumstances. In addition to the ruling below, federal courts have recognized the recent trend of cases. See Pozzi Window Co. v. Auto-Owners Ins. Co., 446 F.3d 1178 (11th Cir. 2006) (certifying Southern District's ruling in favor of coverage and noting that cases cited by Insurers are distinguishable based on different policy language and factual circumstances); Essex Builders Grp., Inc. v. Amerisure Ins. Co., 2005 U.S. Dist. LEXIS 41925 (M.D. Fla. 2005) (JSUB correctly applies LaMarche and CTC); Southern Landmarks, Inc. v. U.S.F.& G. Co., No. 5:99CV58-SPM (N.D. Fla. 2000) (copy of unpublished opinion at App. 2).

The recent trend, even in jurisdictions that previously denied coverage under the earlier CGL form, is to limit or re-evaluate those rulings and find coverage

under the 1986 form. See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 2006 WL 1561294 (Kan. 2006) (coverage for damage caused by leaking windows); Travelers Indemnity Co. of America v. Moore & Associates, Inc., 2005 Tenn. App. LEXIS 596 (Tenn. Ct. App. 2005), review pending (subcontractor's defective installation of windows and resulting water damage is "occurrence" under the CGL contract and "your work" exclusion did not eliminate coverage); Lennar Corp. v. Great Am. Ins. Co., 2006 Tex. App. LEXIS 1457 (Tex. App. 2006), review pending (thorough analysis of CGL contract and case law); French v. Assurance Co. of America, 448 F.3d 693 (4th Cir. 2006) (holding under Maryland law that CGL contract covers cost to remedy unexpected damage to nondefective part of structure); Supreme Services and Specialty Co., Inc. v. Sonny Greer, 930 So.2d 1077 (La. Ct. App. 2006) (CGL contract covers work of insured's subcontractrors); Broadmoor Anderson v. National Union Fire Ins. Co. of Louisiana, 912 So.2d 400 (La. App. 2005) (coverage to repair and replace defective shower assemblies installed by a subcontractor); Okatie Hotel Group, LLC v. Amerisure Ins. Co., 2006 U.S. Dist. LEXIS 2980 (D.S.C. 2006) (limiting holding in L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33 (S.C. 2005)).

See also Vandenberg v. Superior Court, 982 P.2d 229, 244-46 (Cal. 1999); Kalchthaler v. Keller Construction Co., 591 N.W.2d 169 (Wis. Ct. App. 1999); American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis.

2004); O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 103-04 (Minn. Ct. App. 1996) (leading cases).[9] Despite the Insurers' moral hazard argument, these decisions have not caused any actuarial disaster in their respective states.

This Court, under the reasoning of its recent cases, should hold the 1986 CGL form provides coverage here, and LaMarche and its progeny do not apply.

CONCLUSION

The Court should approve the Second District's decision under review.

Respectfully submitted,

s/David K. Miller

David K. Miller, P. A.
Florida Bar No. 213128
Ginger L. Barry, Esquire
Florida Bar No. 0294550
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone: (850) 681-6810
Facsimile: (850) 681-9792

Keith Hetrick, Esq.
Fla. Bar No. 0564168
Florida Home Builders Association
201 East Park Avenue
Tallahassee, FL 32301
Telephone: (850) 224-4316
Facsimile: (850) 224-7933

R. Hugh Lumpkin, Esq.
Florida Bar No. 308196
Michael F. Huber, Esq.
Florida Bar No. 765171
Ver Ploeg & Lumpkin, P. A.
100 S. E. 2nd Street, Suite 2150
Miami, FL 33131-2151
Telephone: (305) 577-3996
Facsimile: (305) 577-3558

[9] Where courts are divided on a coverage issue, this suggests ambiguity, which is resolved in favor of the insured. Security Ins. Co. v. Investor Diversified, Ltd., 407 So.2d 314, 316 (Fla. 4th DCA 1981); Annot., 4 A.L.R. 4th 1253 (1981).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U. S. Mail this 4th day of August, 2006:

Ronald L. Kammer, Esquire
rkammer@hinshawlaw.com
Valerie M. Jackson, Esquire
vjackson@hinshawlaw.com
Sina Bahadoran, Esquire
sbahadoran@hinshawlaw.com
Hinshaw & Culbertson, LLP
9155 S. Dadeland Blvd., Suite 1600
Miami, FL 33156
Telephone: (305) 358-7747
Facsimile: (305) 577-1063
Counsel for Petitioner

Joseph R. Miele, Esquire
jmiele@adorno.com
Adorno & Yoss
350 E. Las Olas Blvd., Suite 1700
Fort Lauderdale, FL 33301
Telephone: (954) 763-1200
Facsimile: (954) 766-7800
Counsel for Petitioner

June Galkoski Hoffman, Esq.
jhoffman@fowler-white.com
Fowler White Burnett, P. A.
Esperito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, FL 33131-3302
Telephone: (305) 789-9249
Facsimile: (305) 789-9201
Counsel for Petitioner

Mark A. Boyle, Esquire
Mark@fink-boyle.com
Fink & Boyle, P. A.
2050 McGregor Boulevard
Fort Myers, FL 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674
Counsel for Respondent

Warren H. Husband, Esq.
Metz, Hauser & Husband
P. O. Box 10909
Tallahassee, FL 32302-2909
Telephone: (850) 205-9000
Facsimile: (850) 205-9001
Counsel for Amicus Curiae, Associated General Contractors of America

Patrick J. Wielinski, Esq.
pwielinski@cbylaw.com
Cokinos, Bosien & Young, P.C.
2221 East Lamar Boulevard
Suite 750
Arlington, TX 76006
Telephone: (817) 608-9533
Facsimile: (817) 649-3300
Counsel for Amici Curiae, Associated General Contractors of America

Donna M. Greenspan, Esq.
dgreenspan@eapdlaw.com
Edwards Angell Palmer & Dodge LLP
One North Clematis Street, Suite 400
West Palm Beach, FL 33401
Telephone: (561) 820-0249
Facsimile: (561) 655-8719
Counsel for Petitioner

William D. Horgan, Esquire
Fuller, Johnson & Farrell
P. O. Box 1739
Tallahassee, FL 32302-1739
Telephone: (850) 224-4663
Counsel for Complex Ins. Claims Litigation Association

Laura A. Foggan
John C. Yang
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202)719-7000
Facsimile: (202)719-7049
Of Counsel for Complex Ins. Claims Litigation Association

Perry N. Bass, Esquire
P. O. Box 5216
Houston, TX 77052
Telephone: (281) 359-7440
Facsimile: (281) 359-7446
Counsel for Hartford Fire Ins. Co.

Duane A. Daiker, Esquire
Shumaker, Loop & Kendrick, LLP
101 Kennedy Boulevard, Suite 2800
Tampa, FL 33602-5151
Telephone: (813) 229-7600
Facsimile: (813) 229-1660
Counsel for Amwest Surety Ins. Co.

Pamela A. Chamberlain, Esquire
Mitrani, Rynor & Adamsky, P. A.
One S. E. Third Avenue
Miami, FL 33131
Telephone: (305) 358-0050
Facsimile: (305) 358-0550
Counsel for Mid-Continent Casualty Co.

Denise V. Powers
Denise V. Powers, P. A.
2600 Douglas Road, Suite 501
Coral Gables, FL 33134
Telephone: (305) 444-5100
Facsimile: (305) 444-4455
Counsel for National Association Mutual Insurance Company

Christopher W. Martin
Levon G. Hovnatanian
Martin Disiere Jefferson & Wisdom, LLP
808 Travis, Suite 1800
Houston, TX 77002
Telephone: (713)632-1700
Facsimile: (713)222-0101
Counsel for Hartford Fire Ins. Co.

John Bond Atkinson, Esquire
Rebecca A. Brownell, Esquire
Ellie A. Levy, Esquire
Atkinson & Brownell, PA
One Biscayne Tower, Suite 3750
2 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305)376-8840
Facsimile: (305)376-8841
Counsel for Amerisure Mut. Ins. Co.

Daniel J. Santaniello, Esquire
Luks & Santaniello, LLC
515 East Las Olas Blvd., Ste. 1100
Ft. Lauderdale, FL 33301-4203
Telephone: (954)761-9900
Facsimile: (954)761-9940
Counsel for Poole & Kent Co.

s/David K. Miller
ATTORNEY

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

WE HEREBY CERTIFY that this Amici Curiae Brief complies with the font requirements of Rule 9.210 (a)(2), Florida Rules of Appellate Procedure, because it is prepared in Word using a 14-point, Times New Roman font.

s/David K. Miller
ATTORNEY

APPENDIX I - EXCERPTS FROM 1986 CGL FORM AS QUOTED IN OPINION UNDER REVIEW

Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. (e.s.)

* * *

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence"….

Definitions

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. (e.s.)

16. "Products-completed operations hazard"

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

* * *

(2) Work that has not yet been completed or abandoned…. (e.s.)

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. …. (e.s.)

21. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

Exclusions

j. Damage to Property:

* * *

"Property damage" to

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or (e.s.)

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard." (e.s.)

l. 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."

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. (e.s.)

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