IN THE SUPREME COURT OF FLORIDA

Case No. SC05-1295
D.C. Case No. 2D 03-134
L.T. Case No. 01-5533 CA

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

v.

FIRST HOME BUILDERS OF FLORIDA,

Respondent.

BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF PETITIONER UNITED STATES FIRE INSURANCE COMPANY

Discretionary Appeal of Judgment by the Second District Court of Appeal

Laura A. Foggan
John C. Yang
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000 (phone)
(202) 719-7049 (fax)

Of Counsel

William D. Horgan (Bar No. 0176877)
FULLER, JOHNSON & FARRELL, P.A.
111 North Calhoun Street (32301)
Post Office Box 1739
Tallahassee, Florida 32302-1739
(850) 224-4663
(850) 561-8839 (Fax)

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

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MISCELLANEOUS

INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies. This brief is filed on behalf of the following CICLA members: Chubb & Son, A Division of Federal Insurance Company; Farmers Insurance Group of Companies; Hartford Insurance Group; Liberty Mutual Insurance Company; St. Paul Fire and Marine Insurance Company; Selective Insurance Company; The Travelers Indemnity Company; and Zurich American Insurance Company.

CICLA members provide a substantial percentage of the liability coverage written in Florida. CICLA has participated in numerous cases throughout the country, including several cases before this Court.[1] As a trade association with a broad outlook on the contract interpretation and public policy considerations before the Court, CICLA is uniquely positioned to address the policyholder's attempts to extend coverage for breaches of contract.

STANDARD OF REVIEW

The construction of insurance policies is reviewed *de novo*. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005).

[1] *See, e.g., Macola v. Gov't Employees Ins. Co.*, No. SC05-1021 (Fla. Brief filed Aug. 30, 2005); *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528 (Fla. 2004); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700 (Fla. 1993).

QUESTION PRESENTED

Does faulty workmanship, performed pursuant to a contractual relationship, constitute an occurrence causing property damage?

SUMMARY OF ARGUMENT

To decide whether coverage exists under a liability policy, the policy language requires a determination of (1) whether there has been an occurrence that (2) causes property damage, and (3) whether the resulting loss is otherwise excluded. Following these steps, it is clear under the terms of the insurance policy that no coverage is provided for the repair or replacement of defective work by a policyholder. In this case there is no allegation of damage to a third party that has no contractual relationship with the policyholder.

There is no coverage for repair of a policyholder's defective work because there has been no occurrence. An occurrence requires a fortuitous event, and, in the context of a home builder, defective work is simply a breach of contract. A breach of contract is inherently foreseeable and non-fortuitous.

If the Court were to decide that the policyholder's own faulty workmanship somehow did constitute an occurrence, it would then have to be determined whether there was resulting property damage. However, property damage is limited to physical injury to property. The damages resulting from a breach of contract are economic losses because they relate entirely to the failure to perform

and the cost to replace or remedy the faulty workmanship. Further, something that was never constructed properly in the first place cannot properly be deemed "damaged."

Finally, an exclusion to an insurance policy cannot be read to provide coverage that is not otherwise within the initial grant of the policy. In this case, the policyholder argues that an exception to an exclusion grants them coverage. This argument ignores the fact that there has been no occurrence causing property damage. Exclusions only limit the coverage that has been initially granted. The "your work" exclusion is not implicated unless there has been damage to a third party that has no contractual relationship to the insured. Because the exclusion has not been implicated, the exception to the exclusion cannot restore coverage.

ARGUMENT

I. GENERAL LIABILITY POLICIES DO NOT COVER THE COSTS OF DOING BUSINESS WHICH INCLUDE THE FORESEEABLE COSTS OF A BREACH OF CONTRACT

The District Court of Appeal erroneously believed that this Court's construction of the term "accident," including unexpected injury from an intentional act, would find faulty workmanship to be an occurrence under the liability policy in this case. *J.S.U.B., Inc. v. United States Fire Ins. Co.*, 906 So. 2d 303, 308-09 (Fla. 2d DCA 2005). In reaching this result the District Court of Appeal relied upon *State Farm Fire & Casualty Co. v. CTC Development Corp.*,

720 So. 2d 1072 (Fla. 1998). This reliance is inconsistent with all other Florida cases addressing this issue, and *CTC Development* is distinguishable from the facts of this case in any event. Further, it is clear that in this situation, where there is no allegation of damage to a third-party in a contractual relationship with the policyholder, that the liability stems directly from the contractual relationship and cannot be the result of an occurrence.

This Court considered coverage for construction defects in the landmark case of *LaMarche v. Shelby Mutual Insurance Co.*, 390 So. 2d 325 (Fla. 1980). The policyholder in that case sought coverage for the repair and replacement of its faulty workmanship. This Court denied coverage, stating that there is a fundamental boundary between "business risks" and "occurrences." *LaMarche*, 390 So. 2d at 326-27 (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791-92 (N.J. 1979)). This distinction has been followed by the only two District Courts of Appeal for Florida that have addressed the precise issue before this Court.

The District Court of Appeal for the Third District addressed this issue in *Home Owners Warranty Corp. v. Hanover Insurance Co.*, 683 So. 2d 527 (Fla 3d DCA 1996). In that case, a subcontractor was employed for much of the construction work, and after completion of the work the condominium association brought suit against the general contractor alleging "breach of implied warranty, negligence, violation of section 553.84, Florida Statutes, and strict liability." *Id.* at

528. The court quoted extensively from *LaMarche* and *Weedo*, holding that a general liability policy does not cover suits regarding construction defects. *Id*. at 529. On a motion for rehearing, the court refused to use exclusion *l* to create coverage that did not otherwise exist. *Id*. at 529-30.

The District Court of Appeal for the Fourth District has likewise held that construction defects do not constitute an occurrence. *Lassiter Constr. Co., Inc. v. Am. States Ins. Co.*, 699 So. 2d 768 (Fla. 4th DCA 1997). The contractor in that case built a school pursuant to a contract. The case concerned a suit regarding the faulty workmanship of a subcontractor. *Id*. at 769-70. The court rebuffed the attempts by the policyholder to invoke coverage through exclusions, declaring that there was no coverage in the first instance: "The insured has failed to demonstrate that there are any provisions in the coverage section of the policy which would provide coverage for this defective work." *Id*. at 770; *see also United States Fire Ins. Co. v. Meridian of Palm Beach Condo. Ass'n, Inc.*, 700 So. 2d 161 (Fla. 4th DCA 1997).

Respondent relies upon this Court's decision in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1998), to argue that the definition of occurrence has now changed and that this change somehow requires that construction defects be considered occurrences. However, the *CTC Development* case is distinguishable because (1) the liability in the underlying suit

was not based upon a contractual duty and (2) the suit was based upon damage to the neighbors rather than the defective construction of the house. In that case, the developer built a house in violation of set-back restrictions. *Id.* at 1073. Based on this violation, neighbors brought suit seeking damages for the violation of the association's set-back restrictions. *Id.* In considering the definition of occurrence, the Court concluded that there is an occurrence if there is unexpected or unintended damage to a victim. *Id.* at 1076 (citing *Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 803 (N.H. 1986)). Therefore, this Court held there was an occurrence in a situation in which a third party that had no contractual relationship with the policyholder was damaged. That holding has no bearing upon whether the breach of a *contractual* duty can somehow be an occurrence when only faulty workmanship is at stake.

As in *Home Owners* and *Lassiter*, other courts consistently agree that a breach of contract alone cannot constitute an occurrence. For example, in *Action Ads, Inc. v. Great American Insurance Co.*, 685 P.2d 42 (Wyo. 1984), the Wyoming Supreme Court held that third-party liability coverage provisions refer "to liability sounding in tort, not in contract." *Id.* at 43-44. In that case, the employer was contractually obligated to obtain medical insurance for the plaintiff but failed to do so. In failing to do so, the court held that this was not a liability risk within the policy, but rather a risk that the employer chose "to assume

pursuant to contract." *Id.* at 45. Here, the contractual risk of failing to construct a home in a workmanlike manner is also a risk that the policyholder chose to assume by contract and not a liability risk that third-party liability policies are intended to cover.

The United States Court of Appeals for the Ninth Circuit, applying Hawaii law, recently held that claims arising out of a contract to build a house do not constitute occurrences. *Burlington Ins. Co. v. Oceanic Design & Constr.*, 383 F.3d 940 (9th Cir. 2004). In that case, the homeowner brought suit against the general contractor, alleging "(1) breach of contract; (2) breach of express and implied warranties; (3) deceptive trade practices; (4) negligent and/or intentional infliction of emotional distress upon homeowner Han; and (5) punitive damages." *Id.* at 943. The court applied Hawaii's interpretation of occurrence, which holds there is no duty to defend or indemnify if "the injury…[is] the expected or reasonably foreseeable result of the insured's own intentional acts or omissions." *Id.* at 947 (quoting *Hawaiian Holiday Macadamia Nut Co. v. Indus. Indem. Co.*, 872 P.2d 230, 234 (Haw. 1994)). The court concluded that there was no occurrence because a breach of contract is a reasonably foreseeable result:

> If Oceanic breached its contractual duty by constructing a substandard home, then facing a lawsuit for that breach is a reasonably foreseeable result. . . . Allowing recovery for disputes between parties in a contractual relationship over the quality of work performed would convert this

> CGL policy into a professional liability policy or a performance bond.

Id. at 948-49 (citation omitted).

Another recent decision, this one by an appellate court of Illinois, also concludes that a construction defect does not constitute an occurrence. *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 831 N.E.2d 1 (Ill. App. Ct. 2005). In that case, the policyholder was responsible for constructing a school, and defects in its construction caused a portion of the building to collapse. *Id.* at 3. The court noted that "there is no 'occurrence when a subcontractor's defective workmanship necessitates removing and repairing work.'" *Id.* at 6 (quoting R. Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 Tort & Insurance L.J. 785, 789 (Spring 1995)). The court further stated that a breach of contract cannot be the basis of an occurrence because "it does not result from a fortuitous event." *Id.* at 7 (citation omitted). The court also noted that, in using shoddy materials or performing a construction contract negligently, the policyholder "takes a calculated business risk that no damage will take place. . . . [and] [t]here can be no coverage for such damage." *Id.* at 7 (quoting J. Yang, *No Accident: The Scope of Coverage for Construction Defect Claims*, 690 PLI/Lit 7, 36-37 (April 2003). As succinctly stated by the court, construction defects only constitute an occurrence to the extent there is third party damage: "CGL policies do not cover an occurrence of alleged negligent

manufacture; [they] cover [] negligent manufacture that results in an occurrence." *Id.* at 12 (citation omitted) (internal quotation marks omitted). Courts applying the law of Mississippi, Iowa, Kentucky, Colorado, Missouri, New York, Ohio, and Oregon agree.[2]

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[2] *ACS Constr. Co. v. CGU*, 332 F.3d 885, 891 (5th Cir. 2003) (applying Mississippi law) ("The faulty workmanship of [subcontractors] unfortunately amounts to negligence. Hiring subcontractors and installing the waterproofing membranes were not accidents under the terms of the policy."); *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Cos.*, 246 F.3d 1132, 1137 (8th Cir. 2001) (quoting *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 448 (Iowa 1970)) ("[A] claim characterized essentially as one for a contractor's defective workmanship in construction of a foundation, 'resulting in damages only to the work product itself,' was not caused by an 'occurrence' under Iowa law")); *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 583 (6th Cir. 2001) (applying Kentucky law) ("The majority of courts to consider the issue have concluded that policies do not provide coverage where the damages claimed are the cost of correcting the work itself, even in the context of the broad protections offered by comprehensive general liability ("CGL") policies."); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1202 (Colo. Ct. App. 2003) ("We similarly conclude that poor workmanship constituting a breach of contract is not a covered occurrence here and that the policy's exception to the contract exclusion does not apply."); *Am. States Ins. Co. v. Mathis*, 974 S.W.2d 647, 650 (Mo. Ct. App. 1998). ("Such a breach of a defined contractual duty cannot fall within the term 'accident.' Performance of its contract according to the terms specified therein was within [sub-subcontractor's] control and management and its failure to perform cannot be described as an undesigned or unexpected event."); *Hartford Accident & Indem. Co. v. A.P. Reale & Sons, Inc.*, 644 N.Y.S.2d 442, 443 (N.Y. App. Div. 1998) (holding that general liability policies do not provide coverage for contractual obligations); *Royal Plastics, Inc. v. State Auto. Mut. Ins. Co.*, 650 N.E.2d 180, 183 (Ohio Ct. App. 1994) (ruling that the damage claimed was damage to the subject of the contract based on improper manufacture and this could not be construed to be an accident which would constitute an occurrence); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254, 1257 (Or. 2000) ("This court has indicated that there can be no 'accident,' within the meaning of a

II. A CONSTRUCTION DEFECT CLAIM CONCERNS ECONOMIC LOSS, NOT PROPERTY DAMAGE.

Liability policies provide coverage for the policyholder's liability due to third-party property damage, but not for economic loss. A defective product or defective construction claim which does not allege damage to third-party property is a claim for economic loss. Additionally, in order for something to be "damaged," it must have had an undamaged state. In the case of defective manufacture, there is no undamaged state because the home never was constructed properly in the first place.

Florida courts have held that economic loss is not covered by liability policies as property damage. However, in the construction defect context Florida courts generally have concluded that the facts do not present an occurrence and, therefore, never reach the issue whether defective work constitutes property damage. If this Court were to decide there is an occurrence, it would still be necessary to conclude that defective work somehow constitutes property damage in order to invoke coverage under the policy. In the context of claims to repair and replace defective construction, there is no property damage within the terms of the policy.

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commercial liability policy, when the resulting damage is merely a breach of contract.") (citing *Kisle v. St. Paul Fire & Marine Ins.*, 495 P.2d 1198 (Or. 1972)).

A. **A Construction Defect Claim Without Third-Party Damage Constitutes Economic Loss, Not Property Damage.**

Florida case law consistently has held that economic losses do not constitute property damage. *See, e.g.*, *Old Republic Ins. Co. v. West Flagler Assocs., Ltd.*, 419 So. 2d 1174, 1177 (Fla. 3d DCA 1982) (holding that investment losses cannot constitute property damage); *Am. States Ins. Co. v. Pioneer Elec. Co.*, 85 F. Supp. 2d 1337, 1343 (S.D. Fla. 2000) ("ALS seeks indemnity for economic losses. Specifically, ALS's underlying Amended Complaint seeks the recovery of money that it became obligated to pay due to Pioneer Electric's breach of certain contractual obligations. Accordingly, the Court finds that American States is under no obligation to provide indemnity for ALS."). The same doctrine has been applied by many courts in cases where policyholders have sought coverage for construction defects. For example, in *Hartford Accident & Indemnity Co. v. A.P. Reale & Sons Inc.*, 644 N.Y.S.2d 442 (N.Y. App. Div. 1996), the court noted that a suit where "the product or completed work is not what the damaged person bargained for" represents a claim for "economic loss" and so is not covered by a liability policy. *Id*. at 443; *see also George A. Fuller Co. v. United States Fidel. & Guar. Co.*, 613 N.Y.S.2d 152, 155 (N.Y. App. Div. 1994), *appeal denied*, 84 N.Y.2d 806 (1994).

The California Court of Appeal also recently held that a construction defect was not property damage. *F&H Constr. v. ITT Hartford Ins. Co.*, 12 Cal. Rptr. 3d

896 (Cal. Ct. App. 2004). In that case, a subcontractor used poor grade materials, forcing the contractor to reinforce the work of the subcontractor. *Id.* at 897. The contractor then sought reimbursement for its costs against the subcontractor's insurer. The court noted that the poor grade materials were inadequate for their purpose, but did not damage any other work performed by the subcontractor. *Id.* at 898. The court cited, as the "prevailing view" that in order for a construction defect to constitute property damage it must cause damage to "some other part of the system" that was not the subcontractor's work. *Id.* at 901 (citation omitted). Because the only damage was the need to reinforce the work of the subcontractor, there was no insured property damage. *See also Viking Constr.*, 831 N.E.2d at 16-17 ("[W]here the underlying complaint alleges only damages in the nature of repair and replacement of the defective product or construction, such damages constitute economic losses and do not constitute 'property damage.'").

Respondent is not entitled to coverage when the only "damage" it can identify is its own defective work. The costs to repair and replace defective work are economic losses and cannot be recovered under an insurance policy covering third-party liability for tort damages.

B. **A Defect In The Policyholder's Construction Does Not Constitute "Property Damage."**

As an independent basis for finding that no coverage exists, this Court also should conclude that there was no property damage precisely because the house

was defectively built. A defect cannot constitute property damage because the very idea of damage to third-party property requires that there was third-party property in an undamaged state. Otherwise, the property is merely in the state that it always has been in and cannot be considered damaged.

The Court of Appeals of North Carolina, for instance, has recognized this as a prerequisite to coverage. In a case involving a claim for damages relating to the deficient construction of rubber oven feed lines, that court ruled: "The term 'property damage' in an insurance policy has been interpreted to mean damage to property that was previously undamaged, and not the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance." *Prod. Sys., Inc. v. Amerisure Ins. Co.*, 605 S.E.2d 663, 666 (N.C. Ct. App. 2004) (emphasis in original); *see also Wm. C. Vick Constr. Co. v. Pa. Nat. Mut.*, 52 F. Supp. 2d 569, 582 (E.D.N.C. 1999), *aff'd*, 213 F.3d 634 (4th Cir. 2000); *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833 (Tex. App. 1996, no pet.) ("The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state – for example, the car was undamaged before the collision dented the bumper. It would not ordinarily be thought to encompass faulty initial construction.") (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d at 269-72).

A claim for repair or replacement because of such a defect is merely a claim that one is not satisfied with the product received, not that it has been damaged. Here, Respondent cannot claim there has been property damage because it never constructed the house in a workmanlike manner in the first place.

III. POLICYHOLDERS CANNOT USE EXCLUSIONS TO EXPAND COVERAGE

This Court has stated that a policyholder cannot rely on an exclusion to create coverage where none otherwise exists. Simply put, exclusions exclude coverage and do not create coverage. *LaMarche v. Shelby Mut. Ins. Co.*, 390 So.2d 325, 326 (Fla. 1980) ("The district court was correct in concluding that an exclusion does not provide coverage but limits coverage."). The District Court of Appeal, however, relied upon exclusion *l* to create coverage that was not otherwise included. The court ruled that there must be coverage to give effect to the exception to the exclusion. However, the exception to the exclusion would have effect in cases where there was damage to a third-party that is not in contractual relationship with the policyholder. All of the other Florida appellate courts to address this issue have refused to grant coverage under similar facts. Moreover, a larger number of courts across the country have joined with the Florida authority and reasoned persuasively that "occurrence" does not include construction defects and construction defects do not constitute "property damage," even in the face of exclusion *l*.

The District Court of Appeal for the Fourth Circuit directly addressed whether a subcontractor exception to an exclusion granted coverage, and refused to expand the coverage available under the policy in light of the exception. *Lassiter Constr.*, 699 So. 2d at 770. The court held that the exclusion "cannot create coverage where there is no coverage in the first place. The insured has failed to demonstrate that there are any provisions in the *coverage section* of the policy which would provide coverage for this defective work." *Id.* (emphasis added). The District Court of Appeal for the Third Circuit made an identical ruling. *Home Owners*, 683 So. 2d at 530 ("The Florida Supreme Court has said, however, that 'an exclusion does not provide coverage but limits coverage.' That being so, it would appear that the subcontractor exception eliminates subcontractors from this particular exclusion but does not, in and of itself, create coverage."). *See also Rushing Co. v. Assurance Co. of Am.*, 864 So. 2d 446 (Fla 1st DCA 2004) (issuing an opinion in a construction defect case, where the work was performed by subcontractors, citing *LaMarche* and *Lassiter* in affirming summary judgment in favor of the insurers).

The recent Oregon Supreme Court case, *Oak Crest Construction Co. v. Austin Mutual Insurance Co.*, 998 P.2d 1254 (Or. 2000), cited by the insurer, is just one example of many cases that also refused to extend coverage in light of exclusion *l.* For instance, the Supreme Court of South Carolina recently reversed a

lower court decision granting coverage in light of exclusion *l*. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33 (S.C. 2005). In that case, subcontractors performed most of the work involved in constructing a roadway. *Id.* at 34. The roadway suffered premature deterioration due to the subcontractor's poor work, and a suit was brought against the general contractor alleging "breach of contract, breach of warranty, and negligence." *Id.* The court noted that South Carolina courts have held that "a CGL policy is not intended to cover economic loss resulting from faulty workmanship," and "any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." *Id.* at 35 (citations omitted). In light of this clear rule of law, the South Carolina high court ruled that there was no coverage under the policy.

In addition, the United States Court of Appeals for the Fourth Circuit, applying Virginia law, has recently ruled that exclusion *l* cannot create coverage. *Travelers Indemnity Co. v. Miller Bldg. Corp.*, 142 Fed. Appx. 147 (4th Cir. July 20, 2005). There, a subcontractor was hired to perform site development and selected defective fill material. *Id.* at 148. Virginia law holds that breaches of contract and construction defects do not constitute occurrences. *Id.* at 149. The policyholder nonetheless contended that exclusion *l* somehow created coverage. The court rebuffed this argument: "Because the damage to the Wal-Mart store was

not unexpected and, therefore, not an 'occurrence,' and because an exception to an exclusion does not grant or extend coverage, Travelers is not required under this policy to indemnify Miller for Wal-Mart's damages." *Id.* at 150.

The Indiana courts similarly have addressed the subcontractor exception to exclusion *l* and held that, in the case of defective work, there simply is no occurrence and, therefore, no coverage. In *R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co.*, 686 N.E.2d 160 (Ind. Ct. App. 1997), for example, the damages were the cost to replace and repair defectively designed condominium units. *Id*. at 161. The Indiana appellate court cited an Indiana Supreme Court decision for the proposition that the business expense of complying with contractual obligations does not constitute property damage. *Id*. at 162 (citing *Indiana Ins. Co. v. DeZutti*, 408 N.E.2d 1275, 1279 (Ind. 1980)). The court, therefore, ruled that there was no coverage despite the existence of exclusion *l*. Court's applying the law of Mississippi, Iowa, Illinois, and West Virginia agree.[3]

[3] *ACS Constr. Co. v. CGU*, 332 F.3d 885, 892 (5th Cir. 2003) (applying Mississippi law) ("The exclusionary language in the contract cannot be used to create coverage where none exists."); *Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co.*, 246 F.3d 1132, 1137-38 (8th Cir. 2001) (applying Iowa law) (ruling that defective construction did not constitute an occurrence, the court finds it unnecessary to address the applicability or inapplicability of the business risk exclusions); *Viking Constr.*, 831 N.E.2d at 3 (Ill. App. 2005) (holding that there was neither an occurrence nor property damage and noting that exclusion *l* was inapplicable to the current dispute); *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28, 33 (W.Va. 1999) (refusing to apply the "completed operations

Recognizing the strength of the law traditionally holding either a lack of an occurrence, the absence of property damage, or both, Respondent emphasizes that this suit is based on a revised coverage form. However, there is no basis for this Court to ignore the decisions of all cases prior to this form. The definitions of occurrence and property damage did not change in relevant part. In the current form, and the policy before this Court, "occurrence" is still defined as an "accident," and an insurer is still only required to indemnify for liability for third-party property damage that the policyholder becomes legally obligated to pay. The majority of states have not changed their rule that construction defects do not constitute an occurrence or property damage in light of the exception to the exclusion relied upon by Respondent. A change in the exclusions is irrelevant because the insurance policy does not afford coverage in the first instance.[4]

IV. A GENERAL LIABILITY POLICY SHOULD NOT BE TREATED AS A SURETY BOND

Courts in other jurisdictions have recognized the inappropriateness of providing coverage for claims seeking the repair or replacement of work. Public Policy does not support treating liability policies as surety arrangements, which is

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hazard" when the policyholder had failed to show that there was an occurrence based on its faulty workmanship).

[4] The exception to the exclusion, however, would take effect in a situation where the subcontractor's work damages a third-party that does not have a contractual relationship with the policyholder.

exactly what the District Court of Appeal has done in this case. Such an arrangement would encourage poor work and breaches of contract. This fear of encouraging breaches of contract has prompted some courts to recognize that obligations stemming from contractual relations are not and cannot be insured under third-party liability policies. *WDC Venture v. Hartford Accident & Indem. Co.*, 938 F. Supp. 671, 679 (D. Haw. 1996); *see also George A. Fuller Co. v. United States Fid. & Guar. Co.*, 613 N.Y.S.2d 152, 155 (N.Y. App. Div. 1994) ("To interpret the policy as did the IAS court would transform USF & G into a surety for the performance of Fuller's work. USF & G's liability policy was never intended to insure Fuller's work product or Fuller's compliance, as a general contractor or construction manager, with its contractual obligations.").

Under a performance bond, in contrast to an insurance policy, the carrier simply serves as a quasi-surety for the faithful performance of the contract. The carrier typically retains the right to seek reimbursement from its bond principal, the insured. Thus, a performance bond carrier called upon to complete or redo a project has the right to sue its principal for payment of all of the completion expenses incurred by the bond carrier, the insurer. Even a well-known policyholder advocate acknowledges that: "Most construction projects are bonded. The typical surety arrangement in the construction industry requires the contractor – the principal on the surety bond – to indemnify the surety for any losses it pays

out by virtue of issuing the particular bond." Patrick J. Wielinski, *Insurance for Defective Construction, Beyond Broad Form Property Damage Coverage*, 103 (2000). A liability policy should not be transformed into a performance bond without the personal guarantee that goes with it.

As all of these courts recognize, policy rationales reinforce what the plain language of the contracts require: that defective construction constituting a breach of contract does not constitute an "occurrence" or insured third-party "property damage."

CONCLUSION

For the foregoing reasons, Complex Insurance Claims Litigation Association urges the Court to conclude that defective construction constituting a breach of contract is not "property damage" caused by an "occurrence."

Respectfully Submitted,

By:_____

Laura A. Foggan
John C. Yang
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000 (phone)
(202) 719-7049 (fax)

Of Counsel

William D. Horgan (Bar No. 0176877)
FULLER, JOHNSON & FARRELL, P.A.
111 North Calhoun Street (32301)
Post Office Box 1739
Tallahassee, Florida 32302-1739
(850) 224-4663
(850) 561-8839 (Fax)

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2006, a true and correct copy of the foregoing was served by U.S. Mail to:

Joseph R. Miele, Jr.
ADORNO & YOSS LLP
350 East Las Olas Blvd, Suite 1700
Fort Lauderdale, FL 33301

Ronald L. Kammer
Valerie M. Jackson
Sina Bahadoran
HINSHAW & CULBERTSON LLP
9155 S. Dadeland Blvd., Suite 1600
Miami, FL 33156

June Galkoski Hoffman
FOWLER WHITE BURNETT P.A.
1395 Brickell Ave., 14th Floor
Miami, FL 33131

Donna M. Greenspan
EDWARDS ANGELL PALMER & DODGE LLP
1 N. Clematis St., Suite 400
West Palm Beach, FL 33401

Attorneys for Petitioner United States Fire Insurance Company

Mark A. Boyle
FINK & BOYLE, P.A.
2030 McGregor Blvd.
Fort Myers, FL 33902

Attorneys for Respondent First Home Builders of Florida

Duane A. Daiker
SHUMAKER, LOOP & KENDRICK, LLP
101 Kennedy Boulevard, Suite 2800
Tampa, FL 33602

Attorneys for Amicus Curiae Amwest Surety Insurance Company

David K. Miller
BROAD & CASSEL
Sun Trust Bank Bldg. , Suite 400
215 South Monroe Street
Tallahassee , FL 32301

Attorneys for Amicus Curiae Florida Home Builders Association and National Association of Home Builders

Denise V. Powers
2600 Douglas Road, Suite 501
Coral Gables, FL 33134

Attorney for Amicus Curiae National Association of Mutual Insurance Companies

/s/ William D. Horgan
William D. Horgan (Bar No. 0176877)
FULLER, JOHNSON & FARRELL, P.A.
111 North Calhoun Street (32301)
Post Office Box 1739
Tallahassee, Florida 32302-1739
(850) 224-4663
(850) 561-8839 (Fax)

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

CERTIFICATE OF COMPLIANCE

The foregoing brief is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a). The lettering is black, in distinct type, double spaced, and the paper has margins no less than 1 inch thick. The lettering is in Times New Roman 14-point font.

/s/ William D. Horgan
William D. Horgan (Bar No. 0176877)
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Counsel for Amicus Curiae
Complex Insurance Claims
Litigation Association