MAB/eac

IN THE SUPREME COURT OF FLORIDA

UNITED STATES FIRE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

Case No.: SC05-1295
2d DCA Case No.: 2D-03-0134
Lee Co. Case No.: 01-5533CA

J.S.U.B., INC. as partner of FIRST HOME BUILDERS OF FLORIDA, a joint venture and LOGUE ENTERPRISES, INC., as partner of FIRST HOME BUILDERS OF FLORIDA, a joint venture,

Respondents.
_____//

RESPONDENTS', J.S.U.B., INC. as partner of FIRST HOME BUILDERS OF FLORIDA, a joint venture and LOGUE ENTERPRISES, INC., as partner of FIRST HOME BUILDERS OF FLORIDA, a joint venture, AMENDED ANSWER BRIEF ON THE MERITS

Mark A. Boyle, Sr., Esquire
Michael G. Fink, Esquire
Geoffrey H. Gentile, Sr., Esquire
FINK & BOYLE, P.A.
2050 McGregor Boulevard
Fort Myers, Florida 33901
Phone: (239) 337-1303
Facsimile: (239) 337-7674

TABLE OF CONTENTS

CITATION OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PREFACE

This Answer Brief is filed on behalf of FIRST HOME BUILDERS OF FLORIDA and its partners, J.S.U.B., INC. and LOGUE ENTERPRISES, INC.

"AMICI" – Refers to Petitioner, UNITED STATES FIRE INSURANCE COMPANY'S, Amicus counsel.

"BFPDE" – Refers to Broad Form Property Damage Endorsement.

"BUILDER" – Refers to the Respondent, FIRST HOME BUILDERS OF FLORIDA and its partners J.S.U.B., INC. and LOGUE ENTERPRISES, INC.

"CGL" – Refers to Commercial General Liability Policy.

"DISTRICT COURT OPINION" – Refers to the Opinion of the Second District Court of Appeals in this matter, J.S.U.B., Inc. v. United States Fire Ins. Co., 906 So. 2d 303 (Fla. 2nd DCA 2005), *review granted,* (Fla. April 5, 2006).

"DISTRICT COURT" – Refers to the Second District Court of Appeals.

"INSURER" – Refers to Petitioner, UNITED STATES FIRE INSURANCE COMPANY.

"IRMI" – Refers to International Risk Management Institute.

"ISO" – Refers to Insurance Services Organization.

"PCOH" – Refers to products completed operations hazard.

"R" – refers to the Record on Appeal.

"T" - refers to the Transcript of Proceedings dated May 21, 2002 for the non-jury trial which was held in this matter.

"Trial Court" – Refers to the Honorable William C. McIver, Circuit Judge.

STATEMENT OF THE CASE AND FACTS

BUILDER accepts, for appellate purposes, the Statement of the Case and Facts set forth by INSURER, but wishes to add the following additional facts.

Prior to trial, the parties stipulated that BUILDER did not intend the damage which gave rise to the litigation. [T 8.] With respect to the homes in question, BUILDER acted as the general contractor, but did **not** perform any soil compaction or engineering testing of the soil prior to the placement of the foundation on the compacted soil. [R. 268-70.] BUILDER subcontracted out each of these tasks. BUILDER also did not produce, manufacture, or deliver the soil in question which was purchased by the soil subcontractors who were charged with compacting the soil. [R. 268-70, 424-26]. Following the completion of operations, the soil beneath the subject homes subsided, triggered by rain, resulting in damage to the foundation, drywall, and other interior portions of the homes. [T. 29.]

The subject CGLs are standard form ISO policies. BUILDER had a per occurrence limit of $1,000,000.00, a general aggregate limit of $2,000,000.00, and a separate PCOH aggregate limit of $2,000,000.00 for which separate and additional premiums were charged. The "PCOH" is defined as:

> 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:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be

deemed completed at the earliest of the following times:

(a) When all of the work called for in your **contract** has been completed.

(b) When all of the work to be done at the job site has been completed if your **contract** calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

"Your work" is defined as:

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.

"Your work" includes:

a. **Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and**

b. The providing of or failure to provide warnings or instructions.

[emphasis added].

SUMMARY OF ARGUMENT

Unintended and unexpected physical damage to a general contractor's work, which occurs after completed operations and which work was performed by the

general contractor's subcontractor, constitutes a covered loss under the post-1986 standard form CGL sold to BUILDER in this case. Unintended and unexpected physical damage to the general contractor's work product constitutes a covered "occurrence," "accident," and "property damage" as those terms are used in the CGL. Prior to 1986, it was common for CGLs to exclude coverage for all damage to the insured's work. However, CGLs have substantially changed. It is now common for such policies to include PCOH coverage. 9 Lee R. Russ & Thomas F. Segalla eds., Couch on Insurance § 129:14 (3d ed. 2004). In 1986, carriers added an **exception** to the standard "business risk" exclusion for "your work" which allows coverage for types of incidents which are the subject of this lawsuit. Under the 1986 amendments to the CGL, an exception to otherwise excluded losses exists "if the damaged work, or work out of which the damage arises, was performed on your behalf by a Subcontractor." Thus, coverage is available to BUILDER in the instant matter.

Under this Court's rules of insurance policy construction, the definitions of "occurrence" and "property damage" clearly support the conclusion that allegations of defective construction against a general contractor that result in unintended physical damage to his work easily fall within the grant of coverage of the CGL. The presence of carefully crafted building industry specific exclusions and the exceptions to those exclusions, as well as endorsements eliminating the

exceptions to the exclusions, establish that the CGL was, in fact, intended to insure claims which fall within the undisputed fact pattern of the instant action. Thus, coverage is available to BUILDER in this case and other contractors with CGLs where the following insurance policy conditions are met:

1. The insured purchased a CGL which includes PCOH coverage;
2. There is an "occurrence" which constitutes an accident under the policy of insurance;
3. There is physical damage to property;
4. The insured is "legally obligated" to pay damages because of (2) and (3);
5. The "property damage" and "occurrence" were the result of the errors or omissions of a subcontractor;
6. The errors or omissions of a subcontractor gave rise to damage which first manifested after operations were complete.

INSURER and its AMICI urge this Court to rewrite the CGL by having the judiciary create an *ex post facto* "endorsement" which disallows coverage in contravention of the policy language. INSURER'S arguments focus on INSURER'S presumed purpose of the CGL, ignoring the actual language used to define coverage and disregarding this Court's broad pronouncements that unintentional construction errors constitute an "occurrence" under Florida law. The arguments on which INSURER and its AMICI focus exclusively are the insuring agreement (i.e. the "occurrence," "property damage," and "legally obligated" requirements) and extraneous legal doctrines (i.e. the "business risk," "economic loss," "fortuity," "fundamental intent" and "public policy"),

supplanting the actual CGL language which includes specific exclusions designed to delineate the scope of the coverage afforded to an insured for construction related damages. Effectively, INSURER attempts to import these extra-contractual doctrines and other limitations on coverage found in the exclusions into the definitions of "occurrence," "property damage," and "legally obligated." INSURER'S construction of the CGL improperly renders construction industry oriented exclusions b., j., k., l., and m. surplusage, giving them the status of mere ink blots in the policy of insurance. INSURER'S theory of the case requests, and in fact requires, that this Court ignore the very language of the CGL sold by INSURER and paid for by BUILDER. There is simply no view of contract law or public policy of the State of Florida which warrants saving INSURER from the very adhesion contract it carefully drafted, marketed and sold, and for which INSURER received premiums.

The District Court correctly determined that the subject policies, when read in their entirety, afforded coverage. The decision should be affirmed.

STANDARD OF REVIEW

BUILDER agrees that interpretation of the subject CGLs is a question of law subject to de novo review. Jones v. Utica Mut. Ins. Co., 463 So. 2d 1153, 1157 (Fla. 1985).

ARGUMENT

I. Many of INSURER'S issues were not preserved for review.

Several of the issues raised by INSURER in its Brief were never raised at the Trial Court or District Court of Appeals level and are therefore waived. The following issues were not preserved:

1. That the CGL does not cover breaches of contract.
2. Public policy prohibits coverage for breaches of contract under the CGL.
3. The CGL does not cover "economic losses."
4. The losses in dispute do not constitute "property damage."

These claims are demonstrably incorrect, as will be shown *infra*, were waived, and cannot be considered by this Court. Dober, et al. v. Worrell, 401 So. 2d 1322 (Fla. 1981) and Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925 (Fla. 2005).

II. The District Court Opinion correctly concluded coverage exists for the subject loss, applying this Court's precedents and rules of insurance policy construction.

A. Interpretation of insurance policies.

Construction of an insurance policy is controlled by contract principles and not tort law principles. Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 793 n.15 (Fla. 2004). The Court must give effect to the plain language of an insurance policy. Swire Pac. Holdings v. Zurich Ins. Co., 845 So.2d 161, 165 (Fla. 2003). A court cannot and should not, under the guise of construction, rewrite the insurance contract. General Accident Fire and Life Assurance Corporation v. Liberty Mutual

Insurance Company, 260 So. 2d 249 (Fla. 4th DCA 1972). Florida law requires that a policy of insurance be read as a whole, endeavoring to give every provision its full meaning and operative effect. Id. and § 627.419 of Florida Statutes (2006). Each provision of an insuring contract should be given meaning and effect, and apparent inconsistencies reconciled, if possible. Excelsior Insurance Company v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979).

If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the policy is ambiguous and must be construed against the carrier. Auto-Owners Insurance Company v. Anderson, 756 So. 2d 29, 34 (Fla. 2000). "Proof of the pudding" of ambiguity is appropriately found where the reasoned judgment of numerous courts come to opposite or differing conclusions from a study of essentially the same policy language. Security Insurance Company of Hartford v. Investors Diversified Limited, 407 So. 2d 314, 316 (Fla. 4th DCA 1981). While the intent of the parties is not dispositive in policyholder disputes, the reason which motivated the parties to make the contract is a relevant consideration. Travelers, 889 So. 2d at 788 n.9.

B. LaMarche's adoption of the reasoning of Weedo establishes that unintended construction defects constitute an "occurrence" under the CGL.

For INSURER to prevail, this Court must overrule LaMarche and its' adoption of Weedo. BUILDER readily admits that until the decision below in

J.S.U.B. v. United States Fire Ins. Co., 906 So. 2d 303, 307-09 (Fla. 2nd DCA 2005), *review granted*, (Fla. 2006), Florida courts have historically disallowed a contractor from obtaining CGL coverage for property damage to its own work. The cases disallowing coverage purport to follow this Court's decision in LaMarche v. The Shelby Mutual Insurance Company, 390 So. 2d 325 (Fla. 1980). As it will be seen, LaMarche, and the decision which served as its basis, Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979), have been misapprehended and misapplied by most of the courts which have interpreted them. LaMarche merely held, under the then existing CGL, that coverage for faulty workmanship was taken away via **exclusion**. In the post-1986 CGL form at issue here, the exclusions have changed and do not eliminate coverage under the undisputed facts in this case.

A review of the Florida cases which disallow coverage for "faulty workmanship" demonstrate that our courts have not been analytically consistent in describing why construction defect claims were not covered. Some cases have held that "business risks" fall within an exclusion. See LaMarche, 390 So. 2d 325, citing Weedo, 405 A.2d 788, and Hardaway Co. ex rel. Wright Contr. Co. v. United States Fire Ins. Co., 724 So. 2d 588 (Fla. 2nd DCA 1998). Others have suggested that "business risks" fall outside the grant of coverage. Home Owners Warranty Corp. v. Hanover Ins. Co., 683 So. 2d 527, 528-9 (Fla. 3rd DCA 1996). Other cases have over-generalized their analyses by merely referring to these

claims as "business risk," without analyzing the actual policy language. See Lassiter Constr. Co. v. American States Ins. Co., 699 So. 2d 768, 769-70 (Fla. 4th DCA 1997). At least three (3) courts have held that the CGL does not cover damage to an insured's work as a matter of public policy. Aetna Cas. & Sur. Co. of Am. v. Deluxe Sys., 711 So. 2d 1293 (Fla. 4th DCA 1998); Sekura v. Granada Ins. Co., 896 So. 2d 861 (Fla. 3rd DCA 2005); and Centex Homes Corp. v. Prestressed Systems, Inc., 444 So. 2d 66 (Fla. 3rd DCA 1984). The cases denying coverage have even extended the rule to the errors of subcontactors. Tucker Constr. Co. v. Mich. Mut. Ins. Co., 423 So. 2d 525 (Fla. 5th DCA 1982). The Middle District, applying Florida law, recognized that "property damage" from faulty workmanship constitutes an "occurrence" and "accident" under a CGL, but still held that coverage was unavailable for such a loss without further analysis of the exclusions or policy language, instead merely citing to LaMarche. See Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002). The U.S. 11th Circuit Court of Appeals recently noted, "viewing the language of the Policies in isolation, the … conclusion that coverage exists arguably would seem proper." Pozzi Window Co. v. Auto-Owners, Inc., 446 F.3d 1178 (11th Cir. 2006). These cases all claim LaMarche as their polestar, and as such, the launch point for any treatment of this issue is LaMarche.

This Court's decision in LaMarche barely fills two (2) pages of the Southern Second Reporter, and the facts receive little treatment. The facts are discussed in slightly more detail in the Second District Court of Appeal's decision which led to Supreme Court review. See Shelby Mut. Ins. Co. v. LaMarche, 371 So. 2d 198 (Fla. 2nd DCA 1979). Neither opinion addressed the nature of the accident or incident giving rise to the lawsuit by the homeowner against the home builder. Obviously, the LaMarche court was dealing with a predecessor form. LaMarche undeniably holds, as to the prior policy form:

> ... that the purpose of **this** comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.

LaMarche, 390 So. 2d at 326 [emphasis added]. This holding, or portions of it, have repeatedly been taken, in isolation, divorced from the policy terms, and without analysis, by numerous Florida courts resulting in the confusion which no doubt led this Court to accept jurisdiction. The true holding of LaMarche was:

> We find this interpretation was not the intent of the contractor and the insurance company when they entered into the subject contract of insurance, and the language of the policy clearly **excludes** this type of coverage.

Id. [emphasis added]. Based upon the above language, LaMarche clearly substantiates BUILDER'S position that faulty workmanship constituted a covered occurrence. LaMarche merely held that under the then-existing CGL, coverage for

such property damage was taken away **via exclusion**. In the post-1986 CGL at issue here, the exclusions have changed and do not eliminate coverage. This view is consistent with the reason for this Court having accepted jurisdiction over the LaMarche decision. In deciding LaMarche, this Court rejected the determination of the court in Fontainebleau Hotel Corp. v. United Filigree Corp., 298 So. 2d 455 (Fla. 3rd DCA 1974). In Fontainebleau, the court held that the business risk exclusions in the 1973 CGL were ambiguous. This contrasted with the LaMarche district court decision where the court held that the exclusions unambiguously excluded construction related losses. Accordingly, it is clear that the LaMarche court was making determinations regarding the exclusions, not deciding the case based on a lack of coverage under the CGL.

The fact that LaMarche held that coverage would be provided but for the pre-1986 exclusion is further evidenced by reviewing the only case cited in this Court's LaMarche decision, the Weedo decision from the Supreme Court of New Jersey. The Weedo court distinguished between what it considered to be uninsured "business risks" and "occurrences" giving rise to insurable liability. The court held that faulty workmanship that must be replaced or repaired was an **excluded** risk, but faulty workmanship that caused consequential damage to other persons or property is a covered "occurrence." Weedo, 405 A.2d 788, 791-92. Immediately after this portion of the Weedo decision, the New Jersey Supreme Court noted:

> The standardized provisions in the CGL intended to convey this concept include, *inter alia*, the very **exclusion clauses** at issue herein.

Id. at 792 [emphasis added]. The New Jersey Supreme Court then held that the "insured products" and "work performed" exclusions functioned "to restrict and shape the coverage **otherwise afforded.**" Id. at 790. Weedo finally noted:

> Pennsylvania National conceded at oral argument before us, as apparently it did before the Appellate Division, see 155 N.J. Super. At 479, that **but for the exclusions in the policy, coverage would obtain.** Hence we need not address the validity of one of the carrier's initially-offered grounds of non-coverage, namely, that the policy did not extend coverage for the claims made even absent the exclusions.

Id. at 790 n.2. Because LaMarche fully adopted the "logic and reasoning" of Weedo, it is irrefutable that unintended "construction defects" **do constitute a covered "occurrence"** under Florida law. LaMarche, 390 So. 2d at 327. Cases such as Home Owners Warranty, Lassiter, and Deluxe Systems interpreting LaMarche to the contrary are simply in error. These cases are almost entirely based on over-generalizations which result from plucking limited portions of LaMarche out of context, with no reference to specific policy language in dispute. It is indisputable that LaMarche and Weedo were decided based on the exclusions in the 1973 CGL form. Nothing in the LaMarche decision prohibits an insurer from changing the policy and insuring additional risk. Moreover, while INSURER and its AMICI imagine that LaMarche hinges on "public policy," this phrase, or any species of it, is nowhere to be found in the opinion. The only "policy"

discussed in LaMarche is the insurance policy. INSURER'S tortured view of the law of insurance would have this Court believe that LaMarche forever "froze" the coverage available under future CGLs based on a phantom consideration of "fundamental intent." INSURER and its AMICI are trying to divorce the result in LaMarche from the foundation and rationale upon which the result was derived, the then-existing exclusions. Florida builders did not purchase the CGLs with a "LaMarche endorsement;" they bought CGLs with policy language different from that in LaMarche. **Since LaMarche, the policy form has changed, and the result must change along with the amendment to the policy form.**

This Court reached the correct result under the 1973 policy form at issue in LaMarche. However, the policy was substantially amended in 1986. While the 1986 changes to the policy form left the "occurrence" and "property damage" definitions essentially the same, it brought two (2) significant changes to the policy: 1) the advent of PCOH and, 2) an exception to Exclusion l. regarding damages to "your work." See Section D, *infra*. **It is these changes, when applied to the facts of this case, which compel coverage herein.**

C. The undisputed facts of this case satisfy the "occurrence," "property damage," and "legally obligated" requirements of the CGL insuring agreement.

1. The insuring agreement.

The relevant grants of coverage provide:

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. 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.

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

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

The policies define "occurrence" as:

An accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The policies define "property damage" as:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The CGL form is designed with an intentionally broad coverage grant which addresses all of the insured's potential liability for property damage or bodily injury. Coverage is then narrowed by operation of exclusions whose function is "to restrict and shape coverage that would otherwise be afforded." Weedo, 405

A.2d at 790. Under the broad insuring agreement, there are three (3) requirements to trigger coverage. First, there must be an "occurrence," meaning accident. Second, there must be "property damage." Finally, there must be a legal obligation to pay damages as a result of the first two (2) requirements. Once these three (3) elements are present, coverage is required unless otherwise excluded. Each of these elements will be discussed separately below.

2. This Court broadly interprets the terms "occurrence" and "accident" in CGL policies.

In State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072 (Fla. 1998), this Court held that unintentional construction errors were a covered occurrence under a 1986 CGL with substantially identical policy language to the policies in the instant case. In so holding, this Court receded from its longstanding opinion in Hardware Mut. Cas. Co. v. Gerrits, 65 So. 2d 69 (Fla. 1953). In Gerrits, the insured, a contractor, constructed a home which encroached on the neighbor's property line. This Court held that such activities did not constitute an "accident" within the scope of insurance coverage. Id. at 71. In its 1998 decision in CTC, this Court receded from Gerrits and held that Gerrits improperly incorporated tort law foreseeability principles into the interpretation of the term "accident" within insurance policies. See CTC, 720 So. 2d at 1074, 1076. This Court in CTC explained that the concept of "accident" in a liability policy, when not defined,

encompassed not only accidental events, but also injuries or damages neither expected nor intended from the standpoint of the insured. This Court held that coverage was available to the insured contractor who mistakenly constructed a home beyond the setback lines of a lot. Id.

The focus of INSURER'S Brief and that of its AMICI appears to be the question of whether "faulty workmanship" constitutes an "occurrence" under the CGL. This question exaggerates the argument being made by BUILDER. BUILDER is not arguing that all faulty workmanship constitutes a covered occurrence.[1] Instead, BUILDER argues that faulty workmanship which leads to unintended physical damage or loss of use of the subject homes which BUILDER

[1] This argument has the added convenience of creating the carriers' Frankenstein-like strawman – that BUILDER is converting the CGL policy into a performance bond. INSURER and its AMICI spend much time beating the stuffing out of this strawman, however, BUILDER is not coming to its rescue. The CGL insuring agreement covers damages because of "property damage" caused by an "occurrence." Therefore, although defective construction may constitute an "occurrence," the INSURER indemnifies the insured only for the resulting "property damage" arising after the project is completed. In contrast, a performance bond is much broader than a CGL in that it guarantees "the completion of the construction contract upon the default of the general contractor." See Florida Bd. of Regents v. Fidelity & Deposit Co., 416 So. 2d 30, 32 (Fla. 5th DCA 1992), rejected on other grounds by Federal Ins. Co. v. Southwest Fla. Retirement Ctr., 707 So. 2d 1119 (Fla. 1998). Therefore, a variety of deficiencies that do not constitute "property damage" may be covered by a performance bond, as not all deficiencies cause "property damage" as defined in the CGL. Consequently, allowing coverage for some "property damage" resulting from defective construction does not transform the CGL into a performance bond and require the CGL carrier to pay anytime the insured fails to complete its work or otherwise comply with its contract.

is legally obligated to correct, constitutes a covered loss under the CGL insuring agreement. Simplistically, it is not the faulty workmanship which makes the loss covered, but the effect of the faulty workmanship, that being the unexpected and unintended damage to the homes. In the instant case, it is not the improper soil compaction and testing, nor the settling of the soil itself which represents a covered loss. Rather, it is the resulting unintended physical damage to the foundation, drywall, cabinetry, and floor tiling that constitutes the covered loss under the CGL insuring agreement. In interpreting the term "occurrence" in CTC, this Court recognized that the crucial word in the definition of "occurrence" was the term "accident." This Court quoted favorably from its prior decision in Dimmitt Chevrolet v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 702-3 (Fla. 1994), which interpreted the term "accident" to include not only:

> … an accidental event, but also for the unexpected injury or damage resulting from the insured's intentional acts.

CTC, 720 So. 2d at 1075-6 [citations omitted]. This Court further noted that the term **"accident"** within a liability policy is, **when not defined, "susceptible to varying interpretations and should be construed in favor of the insured."** Id. Here, it is undisputed and, in fact, was stipulated to by the parties at trial, that the resulting damage to the homes was not intended by BUILDER when the homes were built. [T 39.]

INSURER tries to escape the precedential application of CTC by creating a false distinction that CTC's analysis requires damage to third-party property. The opinion contains no reference to either physical damage or loss of use of any third-party's property. The property damage issue does not appear to be a topic worthy of discussion, much less the dispositive factor of the Court's analysis. Accordingly, CTC cannot be interpreted as a case limiting CGL coverage to cases involving third party damage, but should be considered as this Court's clear and **unanimous** expression about the breadth of the term "occurrence" and "accident," and how those terms should be interpreted under Florida law. Accordingly, BUILDER'S view of the term "occurrence" has already been embraced by this Court in CTC and the subsequent cases relying on that decision, Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003) and Travelers, 889 So. 2d 779.

A hypothetical makes clear the fallacy of INSURER'S position. Assume a building collapses after its completion due to construction errors. The collapse injures persons within the building, furniture, and the building itself. INSURER and its AMICI would have this Court believe that the collapse constitutes an "occurrence" and "accident" for the purpose of damage to the persons and furniture within the structure, but not an "occurrence" or "accident" for the damage to the building itself. Obviously, the entire event is an "accident" and "occurrence" as those terms are understood within the coverage grant, which make

no distinction between different types of property. The question of which aspects of damage are covered are determined by an analysis of the remaining insurance policy provisions, primarily the exclusions and the exceptions thereto.

Florida's broad view of coverage of "occurrences" and "accidents" is in keeping with the majority rule throughout the United States which holds that construction related damage to the insured's own work constitutes a covered "occurrence" under the standard form CGL when there is physical damage or loss of use. It is clear that the 1986 amendments were not merely intended to modify the exclusions. In King v. Dallas Fire Ins. Co., 85 S.W.3d 185 (Tex. 2002), the court recognized that the changes to the CGL form were designed to broaden the terms "occurrence" and "accident," leaving to the exclusions any limitations on coverage which would apply. Id. at 192-193. These changes were designed to shift all the inquiry about "intent" and expectation to the exclusionary language of the policy. Id. As another court noted:

> One other distinction between the 1973 ISO CGL policy and the 1986 ISO CGL Policies is the definition of "occurrence." Rather than containing a separate exclusion from coverage for property damages "expected or intended from the standpoint of the insured," as does the 1986 version of the ISO CGL policy, i.e., exclusion (a), the 1973 version includes the same language within its definition of occurrence. "'Occurrence' is defined by the 1973 [ISO CGL] policy as 'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the Insured.'"

French v. Assurance Co. of Am., 448 F.3d 693, 698 (4th Cir. 2006), citing to Lerner Corp. v. Assurance Co. of Am., 707 A.2d 906 (Md. Ct. Spec. App. 1998). Another court has correctly noted:

> Whether there has been an occurrence, however, depends upon whether there has been an accident, not upon the legal cause or consequence of that accident. Defective workmanship or the incorporation of defective materials is an "accident" … **With construction defects, the real issue usually is not whether there has been an "occurrence," but whether there has been property damage during the policy period and, if so, whether the "work" exclusion is applicable.** If the roof leaks or the wall collapses, the resulting property damage triggers coverage under an "occurrence" basis policy, even if the sole cause is improper construction and the only damage is to the work performed by the contractor. Whether coverage for such an "occurrence" is excluded by the work, product or other exclusion is a separate, very important inquiry. ... On the other hand, **the mere existence of a construction defect does not trigger coverage under an "occurrence" basis policy; coverage is triggered only if the defect causes property damage during the policy term.**

Iberia Parish Sch. Bd. v. Sandifer & Son Constr. Co., 721 So. 2d 1021, 1023 (La.App. 3rd Cir. 1998) [emphasis added]. These cases all follow the CTC analysis of the term "occurrence." **Specifically, these cases all understand, and hinge upon, the idea that the resulting property damage was unintended and unexpected from the standpoint of the insured.** This is the lynchpin of this Court's decisions in CTC, Koikos, and Travelers v. PCR.

3. The losses in the instant case constitute "property damage" as that term is defined under the policy.

BUILDER'S CGLs cover "property damage" caused by an "occurrence," and defines "property damage," in part, as "physical injury to tangible property." INSURER now argues that BUILDER'S claims do not constitute "property damage," contending that damage to the homes themselves cannot constitute "property damage." That contention, however, does not comport with the definition of "property damage" in the policy. More specifically, the definition of "property damage" in this case **does not** state "physical injury to tangible property of **others**" or "physical injury to tangible property **of third parties,**" or "physical injury to **work not performed by the insured or its subcontractors**." Carriers can, and have, included such definitions of property damage in their policy. See Adair Group v. St. Paul Fire & Marine, 2005 U.S. Dist. LEXIS 32102 (D. Colo. 2005) (no coverage where "property damage" was **defined** as damage to property of others) and Nabholz Constr. Corp. v. St. Paul Fire & Marine, 354 F. Supp. 2d 917 (E.D. Ark. 2005) (same). Rather, by its explicit terms, the "property damage" definition only requires that there be physical injury to tangible property.

Most courts have rejected the myth that "property damage" must be to property owned by a third party. As one court has noted:

> Travelers claims that the trial court erred by concluding that Diamaco met its threshold burden of establishing that the "property damage"

> here was within the insuring clause of the policies. ... Travelers argues that Diamaco's claim was not eligible for coverage as "property damage" because there was no damage to the property of others, only to the property of the insured. We reject this argument. ... **Had Travelers intended to exclude from its insuring clause the property of the insured in this case, it could easily have done so.**

Diamaco, Inc. v. Aetna Cas. & Sur., 983 P.2d 707, 709-11 (Wash. Ct. App. 1999) [emphasis added]. At present, no state's highest court holds that there is a "third party" requirement in INSURER'S definition of "property damage." The majority of commentators and courts that have considered this issue have refused to judicially import the third-party damage concept into the definition of "property damage" where the policy itself did not include it. Phillip L. Bruner & Patrick J. O'Connor, 4 Bruner & O'Connor on Construction Law, Ch. 11 (1st ed. 2002) (updated 2005) at 114; Patrick J. Wielinski, Insurance for Defective Construction, Ch. 5 at 117-18 (2d ed. IRMI 2005); and James Duffy O'Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction, 21 WTR Construction Law, 15, 17 (2001).

INSURER, in an effort to avoid the actual policy language, simply seeks to recast "property damage" as "economic loss." While it is true that **purely** economic losses are not covered (i.e., economic losses not tied to any "property damage"), the same is not true for consequential economic losses that arise from or relate to "property damage" (i.e., physical injury to tangible property and/or loss of

use). CGLs unambiguously cover such damages. The policy's insuring agreement states: "We will pay those sums that the insured becomes legally obligated to pay as damages **because of** ... 'property damage'." The words "because of" indicate that the legal liability must have as its source, or arise from, physical injury to or loss of use of tangible property. Once "property damage" has been established, the CGL then covers economic losses that flow from the "property damage." See Donald S. Malecki & Arthur L. Flitner, Commercial General Liability 8-9 (7th ed. 2001) ("In light of the "because of" wording, all damages flowing as a consequence of bodily injury or property damage would be encompassed by the insurer's promise, subject to any applicable exclusion or condition. This includes purely economic damages, as long as they result from otherwise covered bodily injury or property damage."); Wielinski *supra* at Ch. 3; Allan D. Windt, and Insurance Claims & Disputes, Representation Of Insurance Companies and Insureds § 11:1, at 285 (4th ed. 2001 & Supp. 2005).

INSURER'S claim that CGLs do not provide coverage for "property damage" to the insured's own work, is a gross overgeneralization, which although sometimes true, is useless and confusing unless tied to specific provisions of the CGL and analyzed on a case by case basis. The generalization turns out to be true in many cases because acts of faulty workmanship often do not fall within the grant of coverage, as they are not an "occurrence," "accident," or "property

damage," or they are excluded from coverage by operation of the construction industry's specific exclusions, j.(5), j.(6), l., and m., all of which are inapplicable in this case.

In the instant case, there was unintended and unexpected physical damage to the homes in question, bringing the loss within the insuring agreement. It is also clear that exclusion j. does not apply as the loss occurred after operations were complete. Exclusion l. would have barred coverage for the subject loss but for the exception which causes the exclusion to be inapplicable. Crucially, nothing in the definition of either "occurrence" or "property damage" allows a distinction between whether the property damaged is the insured's work or the property of another. **This concept is communicated in the insurance policy via the exclusions.** If INSURER wished to make such a distinction, they could and should have done so in the definitions of "occurrence," "property damage," or by the use of other exclusions. This is not a case where the insurer merely failed to draft its exclusions tightly, instead, this is a case where the insurer, by specific exception to the "your work" exclusion, intentionally afforded additional coverage to its insureds, starting with the BFPDE and continuing to the 1986 policy form. See Section D, *infra*.

Given the above analyses, the claim by BUILDER for coverage in the instant case is even stronger than the claim for coverage by the insured in CTC. In

CTC, the insured builder intentionally, volitionally and purposefully built the subject home over the setback line, albeit believing he was authorized to do so. CTC, 720 So. 2d at 1073. Notwithstanding this intentional act, the court found coverage due to the unintended result. In the instant case, it is undisputed and stipulated that the damage to the homes was unintended and unexpected, and triggered by rain. In CTC, there was no claim for physical damage. Id. The instant case involves stipulated, actual, physical damage including damage to the foundation, drywall, floor tiling, and cabinetry, which was caused by soil subcontractors' errors and an Act of God, but which did not manifest themselves until after the work had been completed. Here, there is no claim to repair the improperly compacted soil, but instead the damage which resulted from the improperly compacted soil. Neither the act nor the consequences were intended or expected **by the insured**. Thus, BUILDER'S claims herein clearly constitute fortuitive covered damages which were not expected or intended from the standpoint of BUILDER.

4. CGLs cover contractual liability where the insured is legally obligated to pay for unintended and unexpected physical damage.

As noted previously, INSURER did not preserve its claim that the subject policy does not cover breaches of contract as this issue was not raised in the Trial Court. INSURER contends that the CGL, even with a PCOH endorsement, does

not cover breaches of contract. The only courts considering Florida law on this discrete issue, as well as a majority of courts and commentators throughout the country, have found that the nature of the claim (i.e. contract-based theory, tort-based theory, or statutory-based theory) against the insured is irrelevant, and the true question is whether an accident has occurred and whether the accident caused "property damage" or "bodily injury" as those terms are defined in the CGL.

The relevant portion of the coverage grant provided:

> 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.

Crucially, the terms "legally" and "obligated" are not defined individually or collectively. While INSURER would have this Court believe that the claims covered under the CGL are limited to claims in tort, no such reference is made in the policy terms. In fact, the terms "tort," "negligence," "contract," or "warranty" do not appear in the coverage grant or the definitions of the terms "property damage" or "occurrence." There are specific references to contractual obligations throughout the policy that also make clear that the policy was intended to cover contract related claims assuming no exclusions applied. The definitions of both "your work" and "your product" include warranties and representations made at any time with respect to the fitness, quality, durability, performance, or use of the products and work. These terms are incorporated directly into the definition of the

PCOH for which BUILDER purchased specific coverage. The CGL also specifically excludes, in exclusion 2.b., certain aspects of contractual liability wherein the insured assumed liability for the fault of another. This obviously begs the question of why these references to contractual breaches are in the CGL. The reason is self-evident. The CGL was always intended to cover "accidents," even where the theory against the insured was based on a breach of contract. Since all contractors and subcontractors necessarily orient their business around contracts, it is unlikely that the industry would have excluded all contractual breaches. This would render the policy a virtual nullity.

Only two (2) cases have interpreted Florida law as to the discrete issue of whether the CGL covers claims couched as contractual breaches which result in "property damage," and both cases have found coverage. In Essex Builders v. Amerisure Ins. Co., 429 F. Supp. 2d 1274 (M.D. Fla. 2005) and Zurich Am. Ins. Co. v. Cutrale, 15 Fla. L. Weekly Fed. D152 (M.D. Fla. 2002), the courts applied Florida's standard rules of construction and recognized that the CGL was not limited to those claims sounding in tort. This view is also consistent with CTC, where the builder was sued for breaching his contractual duties. The only Florida case cited by INSURER for its proposition is the case of Waste Corp. of Am., Inc. v. Genesis Ins. Co., 382 F. Supp. 2d 1349 (S.D. Fla. 2005). Waste Corp. involved claims for breach of contract and fraud arising out of intentional financial

improprieties and did not involve "property damage" or an "accident." Id. Accordingly, the result is the correct one.

Nationally, the lead case dealing with the meaning of the term "legally obligated" is the case of Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999). In Vandenberg, the Supreme Court of California held that "legally obligated" in the CGL was intentionally broad enough to provide coverage for losses arising out of contract breaches. Id. The court also noted that the distinction between contract and tort in the context of evaluating the availability of coverage was arbitrary. Id. The Vandenberg court noted that its position was consistent with the handling of such matters by the insurance industry and industry commentators, and cited to Couch on Insurance, noting:

> [W]hether a particular claim falls within the coverage afforded by a liability policy is **not** affected by the form of the legal proceeding. Accordingly, the legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered. (9 Couch, Insurance (3d ed. 1997) § 126:3, p. 126-8.)

Id. at 243 [emphasis added]. See also Wielinski, *supra*; Malecki & Flitner, *supra*; Scott C. Turner, Insurance Coverage of Construction Disputes, §6.8 (2d ed. 1999); Edward J. Zulkey, 3 CGL Reporter, 310-8, 9 (1983); and George H. Tinker, Comprehensive General Liability Insurance – Perspective and Overview, 25 Fed'n Ins. Coun. Q. 217, 265 (1975). In addition to the Vandenberg court, the vast majority of courts that have analyzed the issue have held that coverage exists.

These authorities illustrate the problems that result when courts rely on general conclusions and abstract arguments unsupported by the language of the CGL, rather than applying the terms of the CGL. Application of ironclad rules based on vague principles cause cases to be decided without regard to the particular facts of the defective work claimed or the particular provisions of the CGL issued to and purchased by the insured. Such a superficial analysis may cause a court to improvidently and improperly deny coverage out of hand when it should instead analyze the policy provisions and the facts of a particular case. Wielinski, *supra* at 30.

INSURER'S position that the CGL only covers "tort" liability has one final fatal flaw in that it renders the CGL moot. INSURER takes the position that the CGL covers only torts as all breaches of contract are "foreseeable" and "expected." One then has to wonder what torts would be covered as tort liability is axiomatically premised on foreseeability. Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001). Presumably, insurers would argue that an automobile insured should expect that if he runs a yellow or red light he will be involved in an accident. However, Florida law is clear such acts and omissions, even **if** quite likely to cause damage or injury, **are insurable in Florida as long as the harm was not intended.** This Court should reject INSURER'S attempt to transform its CGL into **a**n illusory contract which covers only unforeseeable torts which do not exist in Florida.

D. Because of the existence of an "occurrence" and "property damage", coverage is available to BUILDER pursuant to an exception to Exclusion l.

1. The "damage to your work" exclusion.

The exclusion and its exception reads as follows:

2. Exclusion - This insurance does not apply to:

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.

BUILDER does not claim that exclusion l. creates coverage. Coverage exists because of an "occurrence" and "property damage," and the absence of any applicable exclusion. The above exclusion would be applicable and bar coverage but for the subcontractor exception which restores coverage.

2. The history and intent of the "damage to your work" exclusion make clear that coverage is available to BUILDER under the 1986 CGL form.

In response to LaMarche, Weedo, and similar decisions interpreting the 1973 policy form throughout the country, "Many contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors." American Family Mut. Ins. Co. v. American Girl, Inc.,

673 N.W.2d 65 (Wis. 2004). See also Russ & Segalla, *supra* § 129: 18 ("Due to the increasing use of subcontractors on construction projects, many general contractors were not satisfied with the lack of coverage provided under [the 1973 ISO CGL] commercial general liability policies where the general contractor was not directly responsible for the defective work."). In response to this unhappiness, beginning in 1976, an insured, under the 1973 ISO CGL form, could pay a higher premium to obtain a BFPDE which excluded coverage **only** for property damage to work actually performed by the general contractor. Maryland Casualty Co. v. Reeder, 221 Ca. App. 3d 961 (Cal. Ct. App. 1990); Russ & Segalla, *supra* § 129: 18; and Eric M. Holmes, Holmes' Appleman on Insurance 2d, § 132.9 at 153. Thus, liability coverage was intended to extend to the insured's completed work when the damage arose out of work performed by a subcontractor. Reeder, 221 Cal. App. 3d at 972; Russ & Segalla, *supra*, § 129:18; and Holmes, *supra* at 153. Later, the subcontractor exception to exclusion l. which was derived from the BFPDE was incorporated into the 1986 version of the CGL, and has survived the more recent amendments to the CGL. Wielinski, *supra*, at Ch. 11.

Because of these changes, cases interpreting CGLs which do not contain the BFPDE or the 1986 changes are of limited value in analyzing the availability of coverage for construction related losses. From the inception of the 1986 policy

changes, the insurance industry and commentators have agreed with and recognized BUILDER'S position:

> There is, however, an exception to exclusion "l" of substantial importance to insured contractors, which provides that "[t]his 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." This exception should allow for coverage, for example, if an insured general contractor is sued by an owner for property damage to a completed residence, caused by faulty plumbing or electrical work done by a subcontractor. The coverage in that circumstance should extend to all "work" damaged, whether it was done by the contractor or by any subcontractor, since the "work out of which the damage arises was performed … by a subcontractor." The only property damage to completed work which is excluded by exclusion "l" is damage to the insured contractor's work, which arises out of the insured contractor's work.

J. D. Hendrick and J. P. Wiezel, The New Commercial General Liability Forms – An Introduction and Critique, 36 Fed'n Ins. Corp. Couns. Q. 317, 360 (1986).

After the 1986 form had been in use, this issue was squarely addressed within the insurance industry by Fire, Casualty and Surety Bulletins, Public Liability, Aa 16-17 (The National Underwriter Co. (1993)), which notes:

> Exclusion (l.), Damage to Your Work, while similar to the "your products" exclusion, differs in two significant respects. First, exclusion (l.) by definition applies only to work within the products-completed operations hazard. Accordingly, exclusion (l.) is not applicable to work in progress. Second, exclusion (l.) does not apply if the damaged work or the work out of which the damage arises was performed on the insured's behalf by a subcontractor.
>
> An example of how exclusion (l.) could apply is as follows. The named insured is a general contractor who has built an apartment

> house with the services of numerous subcontractors. After the building is completed and put to its intended use, a defect in the building's wiring (put in by a subcontractor) causes the building, including work of the general contractor and other subcontractors, to sustain substantial fire damage. The named insured is sued by the building's owner. Although the named insured's policy excludes damage to "your work" arising out of it or any part of it, the second part of the exclusion makes it clear that the exclusion does not apply to the claim.

Even the industry's more recent publications agree with BUILDER'S position. The IRMI notes the following about Exclusion l.:

> This exclusion precludes coverage to the named insured's work after it has been completed, arising out of the work or any part of it. **By specific exception, the exclusion does not apply if the work that is damaged, or that causes the damage was done on behalf of the named insured by a subcontractor …** The cost of repairing or replacing the named insured's work other than completed operation losses may still be excluded under the CGL policy - most probably under the provisions of Exclusion j.(5) and j.(6) discussed above.
>
> An example will help illustrate the application of this exclusion. Assume a general contractor builds a warehouse subcontracting out 50 percent of the work. One year later, the building is destroyed in a fire caused by faulty electrical work. The warehouse owner's fire insurer pays the claim and then subrogates against the general contractor to recover the amount paid to the owner. If the electrical work was performed by one of the general contractor's subcontractors, the exclusion will not apply; the general contractor's policy will cover the entire loss (subject, of course, to its limit of liability). If, on the other hand, the electrical work was performed by the general contractor, the policy will exclude coverage for the damage to the work done by the general contractor (50 percent of the loss) but will cover the damage to the work that was completed by subcontractors.

Commercial Liability Annotated CGL Policy, IRMI (7th Reprint, January 2001), Section 5 at V.D. 47-8 [emphasis added]. See also Windt, *supra*, at § 11.3; T. J. Casamassima and J. E. Jerles, Defining Insurable Risk in the Commercial General Liability Insurance Policy: Guidelines for Interpreting the Work Product Exclusion, WL 12-JAN CONSLAW 3 (Jan. 1992); J. D. Pierce, Jr., Allocating Risk Through Insurance and Surety Bonds, WL 425 PLI/Real 193, 199 (1998); and Comprehensive General Liability Policy Handbook, p. 106 (Nelson, P., Ed.).

By and large, courts throughout the United States have upheld the intent behind the 1986 and subsequent CGL revisions. Wielinski, *supra*, at 219. The lead case, O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 103 (Minn. Ct. App. 1996), *petition for review denied* (Minn. 1996), *abrogated on other grounds*, Gordon v. Microsoft Corp. 645 N.W.2d 393 (Minn. 2002), notes:

> Here, we are faced not with an omission, but an affirmative statement on the part of those who drafted the policy language, asserting that the exclusion does not apply to damages arising out of the work of a subcontractor. **It would be willful and perverse for this court simply to ignore the exception that has now been added to the exclusion.**
>
> We cannot conclude that the exception to exclusion (1) has no meaning or effect. The CGL policy already covers damage to the property of others. The exception to the exclusion, which addresses "'property damage' to 'your work,'" must therefore apply to damages to the insured's own work that arise out of the work of a subcontractor. Thus, we conclude that the exception at issue was intended to narrow the Business Risk Doctrine.

Id. A Wisconsin court similarly concluded:

> For whatever reason, the industry chose to add the new exception to the business risk exclusion in 1986. We may not ignore that language when interpreting case law decided before and after the addition. To do so would render the new language superfluous. [Citation omitted.] We realize that under our holding a general contractor who contracts out all the work to subcontractors, remaining on the job in a merely supervisory capacity, can ensure complete coverage for faulty workmanship. However, it is not our holding that creates this result: it is the addition of the new language to the policy. **We have not made the policy closer to a performance bond for general contractors, the insurance industry has.**

Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169, 173 (Wis. Ct. App. 1999) [emphasis added].

Prior to J.S.U.B., only three (3) Florida cases had even referenced the subcontractor exception to Exclusion l., which followed the 1986 amendment to the CGL. These are the previously referenced cases of Home Owners Warranty, Lassiter, and Deluxe Systems. These cases appear to hold, purportedly relying on LaMarche, that faulty workmanship did not fall within the grant of coverage under the CGL. Based on a perfunctory analysis, these courts did not address the ramifications of the subcontractor exception. These holdings are clearly erroneous under a proper view of LaMarche, as confirmed by CTC. Those Florida courts which have considered both CTC and the subcontractor exception to exclusion l. have invariably found coverage. J.S.U.B., 906 So. 2d 303; Essex, 429 F. Supp. 2d 1274; and Pozzi, 446 F.3d 1178.

3. Recognizing the subcontractor exception to exclusion l. creates a harmonious and sensible coverage regime.

Before the Trial Court, INSURER claimed that BUILDER'S loss was excluded by operation of Exclusion j. and several other exclusions. INSURER has now jettisoned all arguments relating to the exclusions, quite rightly recognizing that any inquiry in this area eviscerates their position. The CGL insuring agreement terms "occurrence," "accident," and "property damage" work together with exclusions j.5, j.6, and l. to create a harmonious and sensible coverage regime for construction claims which, in keeping with the requirement of Florida law, gives meaning to each and every portion of the CGL, interpreting the "policy as a whole." J.S.U.B., 906 So. 2d at 310. Where the "occurrence" manifests during operations, exclusion j. will apply and exclude coverage for almost all defects when the general contractor is still on the job. Thus, the general contractor and subcontractor must remedy any errors before construction is complete. In contrast, within the PCOH period, where exclusion l. applies, the builder will have coverage for the errant work of his subcontractor which results in "property damage" unexpected from the perspective of the insured. This construction of the policy eliminates the "moral hazard" and "fortuity" concerns of INSURER.

The CGL was amended first by the BFPDE in 1976 and then by wholesale changes in 1986 to cover the undisputed fact pattern of the loss in this case. The

new policy form, rather than eviscerating the business risk rule, merely creates a narrow exception allowing coverage only when the following contractual conditions are met:

1. The insured purchased a CGL which includes PCOH coverage;
2. There is an "occurrence" which constitutes an accident under the policy of insurance;
3. There is physical damage to property;
4. The insured is "legally obligated" to pay damages because of (2) and (3);
5. The "property damage" and "occurrence" were the result of the errors or omissions of a subcontractor;
6. The errors or omissions of a subcontractor gave rise to damage which first manifested after operations were complete.

The CGL then effectively shifts the risk to the carrier to pursue the party who actually performed the improper construction, the subcontractor. Obviously, the CGL carrier would remain subrogated to the rights of its insured, and would have the full right to pursue such a claim against the subcontractor. Alternatively, it is not uncommon in the insurance industry for the CGL carrier of the general contractor to require, as a condition of coverage, that the general contractor be listed as an additional insured under his subcontractor's policies of insurance. This allows the contractor's CGL carrier to make its exposure excess to those damages covered by the subcontractor's policy.

The ISO has, since 2000, issued endorsements which would eliminate the subcontractor exception to the "your work" exclusion. See, Patrick J. Wielinski,

Full Circle Regression: The New ISO "Your Work" Endorsements, www.irmi.com/Expert/Articles/2002/Wielinski01.aspx (IRMI 2002), discussing CG 22 94 (deleting entire subcontractor exception to exclusion l.) and CG 22 95 (deleting exception to exclusion l. as to specific listed projects). These new endorsements were plainly unnecessary if INSURER'S position is correct and there was no coverage for faulty workmanship in the first instance because there was no "occurrence" or "property damage." Carriers unhappy with their adhesionary contracts may change them. With this in mind, it appears that the marketplace may well be ahead of the courts on these issues.

E. The existence of divergent case law across the country establishes ambiguity in the CGL insuring agreement.

INSURER falsely claims the majority of courts in the United States hold that "faulty workmanship" does not constitute an "occurrence," "property damage," or represents an uncovered breach of contract. While many cases have repeated the unremarkable and simplistic verse - faulty workmanship, **standing alone**, is not covered under a CGL - the key inquiry is whether there has been "property damage," as that term is defined in the CGL. Absent physical damage or loss of use, there is no claim for coverage. The minority of cases which appear to hold, as a blanket rule, that "faulty workmanship" is not covered under a CGL, would have been better decided on other grounds found in the CGL. A review of case law

across the country establishes that most states and a vast majority of courts which have evaluated the modern CGL or CGLs with BFPDE allow coverage where property damage is present and the business risk exclusions are either inapplicable on their face or subject to one of the exceptions to the business risk exclusions. Eighteen (18) jurisdictions have case law favoring BUILDER'S position.[2] Twelve (12) jurisdictions have conflicting case law, some of which supports BUILDER'S

[2] Fejes v. Alaska Ins. Co., Inc., 984 P.2d 519 (Alaska 1999); Southwest Metalsmiths, Inc. v. Lumbermens Mut. Cas. Co., 85 Fed. Appx. 552 (9th Cir. Ariz. 2004) (unpublished); Maryland Cas. Co. v. Reeder, 221 Cal. App. 3d 961 (Cal. App. 4th Dist. 1990); Garamendi v. Golden Eagle Ins. Co., 2006 Cal. App. Unpub. LEXIS 1375 (California Unpublished Opinions 2006); Vill. Homes of Colo., Inc. v. Travelers Cas. Co. of Conn., 2005 Colo. LEXIS 1021 (Colo. Nov. 15, 2005); AE-Newark Assoc., LP. v. CNA Ins. Cos., 2001 Del. Super. LEXIS 370 (Del. Super. Ct. 2001); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. June 9, 2006); Iberia Parish Sch. Bd. V. Sandifer & Son Constr. Co., 721 So. 2d 1021 (La. App. 3 Cir. Oct. 28, 1998); Broadmoor Anderson v. Nat'l. Union Fire Ins. Co., 912 So. 2d 400 (La. App. 2 Cir. Sept. 28, 2005); French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. Va. 2006) (interpreting Maryland law); Wanzek Constr., Inc. v. Emplrs. Ins., 679 N.W.2d 322 (Minn. 2004); Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877 (Minn. 2002); Amerisure Mut. Ins. Co. v. Paric Corp., 2005 U.S. Dist. LEXIS 30383 (D. Mo. 2005); Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co., 645 F. Supp. 596 (D. Mo. 1986); Lindsay Drilling & Contracting v. U.S.F. and G., 676 P.2d 203 (Mont. 1984); Portal Pipe Line Co. v. Stonewall Ins. Co., 845 P.2d 746 (Mont. 1993); Auto-Owners Ins. v. Home Pride Cos., Inc., 684 N.W.2d 571 (Neb. 2004); McKellar Dev. v. Northern Ins., 837 P.2d 858 (Nev. 1992); CGU/Hawkeye Sec. Ins. v. Oasis Las Vegas Motor Coach Park, 65 Fed. Appx. 182 (9th Cir. 2003) (interpreting Nevada law); High Country Assoc. v. New Hampshire Ins. Co., 648 A.2d 474 (N.H. 1994); Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. Or. 1998); Padilla v. Levitt Homes Puerto Rico, Inc., 2006 PR App. LEXIS 1514 (P.R. Ct. App. June 21, 2006); Am. Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004).

position.[3] Eleven (11) states and the District of Columbia have no case law interpreting the modern CGL or CGLS with BFPDE.[4]

Further, many of the cases cited by INSURER are plainly distinguishable, actually support BUILDER'S position, and/or are decided on bases not asserted by INSURER in this action. Many of these cases are distinguishable because they:

1. Fail to constitute an "occurrence" or "accident." Assurance Co. of Am. v. Dusel Builders, 78 F. Supp. 2d 607 (W.D. Ky. 1999);

[3] J.S.U.B. v. U. S. Fire Ins. Co., 906 So. 2d 303 (Fla. 2nd DCA 2005); Stratton & Co. v. Argonaut Ins. Co., 469 S.E.2d 545 (Ga. Ct. App. 1996); Harbor Ins. Co. v. Tishman Constr. Co., 578 N.E.2d 1197 (Ill. App. Ct. 1st Dist. 1991); Monticello Ins. Co. v. Wil-Freds Constr., 661 N.E.2d 451 (Ill. App. Ct. 2nd Dist. 1996); James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991); Bundy Tubing Co. v. Royal Indem. Co., 298 F.2d 151 (6th Cir. Mich. 1962); Radenbaugh v. Farm Bureau Gen. Ins. Co., 610 N.W.2d 272 (Mich. Ct. App. 2000); Transportes Ferreos De. Venez. II Ca v. NKK Corp., 239 F.2d 555 (3d Cir. N.J. 2001); C. O. Falter, Inc. v. Crum & Forster Ins. Cos., 361 N.Y.S.2d 968 (N.Y. Sup. Ct. 1974); Hotel des Artistes, Inc. v. General Accident Ins. Co. of Am., 9 A.D.3d 181 (N.Y. App. Div. 2004); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 128 S.E. 2d 19 (N.C. 1962); Travelers Indem. Co. of Am. v. Miller Bldg. Corp., 142 Fed. Appx. 147 (4th Cir. 2005) (unpublished opinion) (interpreting North Carolina law); Erie Ins. Exch. V. Colony Dev. Corp., 2003 Ohio App. LEXIS 6518 (Ohio Ct. App. 2003); Panzica Constr. Co. v. Ohio Cas. Ins. Co., 1996 Ohio App. LEXIS 1975 (Ohio Ct. App. 1996); Okatie Hotel Group v. Amerisure Ins. Co., 2006 U.S. Dist. LEXIS 2980 (D.S.C. 2006); Travelers Indem. Co. of Am. v. Moore & Assoc., 2005 Tenn. App. LEXIS 596 (Tenn. Ct. App. 2005), *appeal granted* Travelers v. Moore, 2006 Tenn. LEXIS 206 (Tenn. Mar. 20, 2006); Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651 (Tex. App. 2006); Great Am. Ins. Co. v. Woodside Homes Corp., 2006 &.S. Dist. LEXIS 61453 (N.D. Utah August 28, 2006).

[4] Alabama, Connecticut, District of Columbia, Idaho, Mississippi, New Mexico, North Carolina, Oklahoma, Rhode Island, Vermont, Washington and Wyoming.

2. Do not involve "property damage." Oak Crest v. Austin Mut. Ins. Co., 998 P.2d 1254 (Ore. 2000);
3. Do not involve subcontractors' errors for which a general contractor is liable. Ray v. Valley Forge Ins. Co., 77 Cal. App. 4th 1039 (Cal. App. 2nd Dist. 1999);
4. Involve exclusion j. which applies only during operations; Lassiter, 699 So. 2d 768;
5. Involve exclusion k., the "your product" exclusion. Commerce Ins. Co. v. Betty Caplette Builders, 647 N.E.2d 1211 (Mass. 1995).[5]
6. Do not have PCOH coverage. Auto-Owners v. Marvin Dev. Corp., 805 So. 2d 888 (Fla. 2nd DCA 2001);
7. Involve policy forms with specialized language. Nabholz Constr. v. St. Paul Fire and Marine, 354 F. Supp. 2d 917 (E.D. Ark. 2005);
8. Involve pre-1986 CGL forms. U.S.F. & G. v. Warwick Dev., 446 So. 2d 1021 (Ala. 1984);
9. Involve irreconcilably differing opinions in the same state. Custom Planning & Dev. Inc. v. Am. Nat. Fire Ins. Co., 606 S.E.2d 39 (Ga. Ct. App. 2004), cf Stratton & Co. v. Argonaut Ins. Co., 469 S.E.2d 545 (Ga. Ct. App. 1996);
10. Are not construction related. Action Ads, Inc. v. Great Am. Ins. Co., 685 P.2d 42 (Wyo. 1984);

Examples of cases where there is no coverage because no "property damage" is involved are repeatedly cited in INSURER and its AMICI'S briefs, as exemplified by West Orange Lumber Company, Inc. v. Ind. Lumbermens Mut. Ins. Co., 898 So. 2d 1147 (Fla. 5th DCA 2005). In West Orange, the lumber company was alleged to have provided lower quality cedar siding than was required by the

[5] BUILDER has, quite correctly, not asserted the "your product" exclusion. The modern definition of "your product" specifically excepts real estate from its definition, and as such, construction claims are analyzed under the j. and l. exclusions under the modern CGL. Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 327 (Minn. 2004).

contract. Id. The only damage alleged was the cost or expense of the vendor to remove the product and supply an acceptable substitute. Id. Crucially, there is nothing in the case which indicates that there was any physical damage to tangible property or loss of use of the subject property. The opinion does not discuss whether the builder intentionally or inadvertently used the improper siding. Certainly, if the builder had purposefully and volitionally chosen the improper siding, this would not constitute an "occurrence" or "accident." Even assuming that the use of the improper siding was sufficient to qualify as an "occurrence," there was simply no "property damage," which would have also been required to trigger coverage. Accordingly, the result of the West Orange case is correct even if its reasoning is not. The West Orange facts stand in complete contrast to the instant case where, as a result of the errors of BUILDER'S subcontractors, a rain induced collapse of the soil took place, causing damage to the foundation, interior walls, drywall, cabinets, and moldings to the homes. **It is this distinction that makes coverage available under the CGL.** Where faulty workmanship exists but does not lead to damage to property, no coverage exists Examples of faulty workmanship which do not involve "property damage" include, but are not limited to, use of incorrect or insufficient materials, wrong color or type of paint, failure to complete job related tasks, and improper installation of doors that open in the wrong direction. However, where the defective construction results in unintended

physical damage to tangible property, coverage is available unless otherwise excluded by the CGL. These cases demonstrate that the terms "property damage" and "occurrence" **do** have a role in the initial coverage evaluation, but are not dispositive with respect to faulty workmanship which causes unintended physical damage or loss of use of property.

Some of the cases cited by INSURER are factually indistinguishable and still hold that faulty workmanship even where it results in "property damage" is not an "occurrence." These cases almost invariably suffer from two (2) errors. First, they incorporate a parsimonious view of the term "occurrence" which improperly incorporates tort related concepts of expectation and foreseeability into the contract of insurance. Secondly, these cases almost without exception, fail to analyze the evolution of the subcontractor exception to exclusion l. These cases suggest that damage to the insured's own work from failure to perform a construction contract is presumed to be expected, while damage of the work or property of a third-party is presumed to be unexpected. This Court quite rightly rejected this line of reasoning in CTC and its progeny. This view is impossible to countenance and causes one to wonder why the drafters of the CGL felt it necessary to include the numerous "business risk" exclusions if coverage did not exist in the first instance. Bruner & O'Connor, *supra*, Ch. 11. Certainly, this constrained view of the CGL is not what the insurance industry promoted when it revised the CGL to include the

"subcontractor exception." Moreover, one has to wonder how the "subcontractor exception" to Exclusion l. would ever apply under this view of the CGL.

There is a massive nationwide dispute, with numerous state and federal courts reaching different views as to coverage under the same policy forms, which demonstrate ambiguity in the CGL relative to the terms "occurrence," "property damage," and coverage for breach of contract. Investors Diversified, 407 So.2d 314. The more recent and better reasoned cases trend towards BUILDER'S position. This Court is not faced with a few rogue courts interpreting policies favorably to policyholders. One federal circuit court has been left in the anomalous position of ruling three (3) different ways on the same issue before this Court, predicting three (3) different outcomes. Limbach Co., LLC v. Zurich Am. Ins. Co., 396 F.3d 358 (4th Cir. 2005) (applying Pennsylvania law to hold that a CGL covers all damage caused by subcontractors' error in the completed operations), French, 448 F.3d 693 (applying Maryland law and holding that an occurrence exists as to any damage one subcontractor's work does to the work of the general contractor or other subcontractors), Travelers v. Miller Bldg. Corp., 142 Fed. Appx. 147 (applying North Carolina law and holding that defective construction which allowed water to leak into hotel damaging walls and carpet constituted an occurrence). If this divergence of holdings does not prove ambiguity, nothing can.

F. BUILDER'S proposed construction of the CGL does not implicate any public policy concerns.

INSURER erroneously claims that the subject loss would implicate "public policy" concerns, disallowing coverage. INSURER'S resort to public policy is a tacit admission that the loss in this case is covered, and a naked request this Court save INSURER from its own creation. This Court has long recognized that the courts should hold themselves bound to observance of extreme caution when called upon to declare a transaction void on the grounds of public policy. Atlantic C. L. R. Co. v. Beazley, 45 So. 761 (Fla. 1907). In the context of insurance policies, in the absence of statutory provisions to the contrary, insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations. France v. Liberty Mut. Ins., 380 So. 2d 1155 (Fla. 3rd DCA 1980). It is beyond the privy of the courts of Florida to insulate carriers from insuring unusual risks in their adhesionary contracts as a matter of public policy. Stack v. State Farm Mut. Auto. Ins. Co., 507 So. 2d 617 (Fla. 3rd DCA 1987).

This Court has recently reaffirmed the narrow circumstances under which a policy of liability insurance is deemed contrary to public policy. Travelers, 889 So. 2d 779. In that case, this Court reaffirmed the two-factor test stated in Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005 (Fla. 1989): 1) "whether the existence of insurance will directly **stimulate** commission of the wrongful act",

and 2) whether the purpose served is "to deter wrongdoers or compensate victims." It is telling that while INSURER and its AMICI seek refuge from their policy language under the guise of "public policy," they do not even endeavor to apply the Bal Harbour test to the facts of this case. Applying the Bal Harbour test, public policy does not prohibit coverage in this case. As to the first prong, "[w]here liability is not predicated on intent, however, the rule is not implicated." Travelers, 889 So. 2d at 794. In our case, the parties have stipulated that liability was not predicated on intent and that the damage was clearly unintended and accidental. As to the second prong, protecting Florida homeowners by repairing their homes pursuant to the 1986 changes to the CGL insuring agreement furthers and indeed serves public policy of the State of Florida. The damages sought by the homeowners in this case have nothing whatsoever to do with deterring the actions of builders, but instead represent compensation. Crucially, those cases in Florida which have held that public policy prohibits coverage for faulty workmanship claims, perform no analysis under the Bal Harbour test. Instead, these courts have reflexively cited to LaMarche for propositions it clearly does not support.

INSURER and its AMICI argue that insuring construction defects represents a moral hazard, more specifically, that the availability of insurance will encourage builders to improperly discharge their contractual duties. The history of liability insurance in Florida has proved otherwise. To be sure, all forms of liability

insurance represent a potential moral hazard. Even a standard malpractice policy issued to an engineer, doctor, or attorney creates a "moral hazard" that the person will not properly discharge his contractually agreed to duties. However, society has long gotten past any concerns over these issues and we regularly accept first and third party insurance as necessities of modern life. Lawyers, doctors and builders have many other pressures which will keep them from acting improvidently due to the existence of a liability policy. All of these parties face regulatory control in the form of licensing, marketplace pressures related to their ability to compete and obtain business, and the certainty that if claims are made, insurance premiums will go up or policies will be cancelled or non-renewed. The CGL sold by INSURER is no different from other common policies. INSURER'S parade of horribles is a fantasy that ignores market and regulatory reality.

The only types of insurance coverage which the courts of Florida have held void against public policy are those covering intentional acts which were intended to cause harm and claims for punitive damages against the actual wrongdoer. Prudential Property & Casualty Ins. Co. v. Swindal, 622 So. 2d 467 (Fla. 1993); Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989); Bal Harbour, 549 So. 2d 1005; Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52 (Fla. 2nd DCA 1965); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983); Mason v. Florida Sheriffs' Self-Insurance Fund, 699 So. 2d 268 (Fla. 5th DCA 1997); and

Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So. 2d 636 (Fla. 3rd DCA 1994). Nothing about construction defect cases justifies adding them to this limited list while other professional liability claims remain insurable. Further, this Court has never limited the availability of coverage for damage to property as a matter of public policy. Certainly, the type of insurance in question in this case is less pernicious and socially dangerous than the coverage which was afforded in Travelers, 889 So. 2d 779 (holding that coverage was available despite allegations of activities that were substantially certain to cause injuries). BUILDER merely seeks enforcement of the very narrow exception (intentionally placed in the policy) to the business risk exclusions. This exception to the exclusion **does not protect the builder from any of his own negligence, but instead protects the builder from the inadvertent construction errors of another party, the subcontractor,** and only when the loss occurs after operations are complete. This is syllogistically indistinguishable from this Court's holdings allowing insurance coverage for the passive tortfeasor who becomes responsible for punitive damages as a result of the conduct of the active tortfeasor. U.S. Concrete, 437 So. 2d 1061. This case involves an additional level of fortuity in that an act of God, rain, gave rise to the defects which are in dispute. The insurance industry has the ultimate power at their disposal to avoid liability they do not wish to insure. They need only draft clear, unambiguous contracts which delineate what is or what is not within the

scope of coverage. This Court should not rewrite the bargain. Those cases in Florida purporting to do so fail to apply the Bal Harbour test, instead reflexively following LaMarche for a proposition it does not support. Many cases around the country recognize the "policy" behind the "business risk" exclusions, however, this does not give the reasons for the exclusions life on their own apart from their appearance as terms in the CGL. LaMarche and Weedo are examples of these cases. This Court should reject INSURER'S invitation to be the first state supreme court in the country to use public policy to trump the plain language and intended result of the modern CGL.

G. The Economic Loss Doctrine has absolutely no applicability to the interpretation of the insurance policies involved in this case.

INSURER is, for the first time in this appeal, attempting to weave the Economic Loss Doctrine into their arguments of how to interpret the subject policy of insurance. This issue was not raised or preserved below. The Economic Loss Doctrine as defined by this Court in Casa Clara Condominium Ass'n, v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) is a liability defense and remedies doctrine which has no role in the evaluation of insurance coverage. Importing Casa Clara's Economic Loss Doctrine results in a confusing mish mash of concepts borrowed from substantive law which do not aid in analyzing coverage under the CGL. Travelers, 889 So. 2d 779, 793 n.15. The majority of courts that

have considered this issue have resoundingly held that the Economic Loss Doctrine has no role in proper analysis of the policy language. See Vandenberg, 982 P.2d 229; American Girl, 673 N.W.2d 65.

The Economic Loss Doctrine would be of little value to the INSURER in the instant case in any event. Every homeowner in Florida has remedies, pursuant to Florida's standard building code, via § 553.84 of Florida Statutes (2005). See Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999).

CONCLUSION

Applying Florida's rules of insurance policy construction, the claim for coverage in the instant case is absolutely clear. The District Court below followed these rules and correctly granted coverage. INSURER should not be allowed to avoid coverage which was granted and intended under its policy. BUILDER asks this Court to join the vastly emerging majority of courts interpreting the modern CGL to allow coverage under the undisputed fact pattern of this case. The judgment of the District Court should be approved.

Respectfully submitted,

By:_____
Mark A. Boyle, Sr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail on this ____ day of November, 2006, to: See attached list.

FINK & BOYLE, P.A.
2050 McGregor Boulevard
Fort Myers, FL 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674
E-mail: Mark@fink-boyle.com

By:_____
Mark A. Boyle, Sr.
FBN: 0005886

By:_____
Michael G. Fink
FBN: 0825743

By:_____
Geoffrey H. Gentile, Sr.
FBN: 898562

SERVICE LIST - CASE NO. SC05-1295

Ronald L. Kammer, Esquire
rkammer@hinshawlaw.com
Valerie M. Jackson, Esquire
vjackson@hinshawlaw.com
Sina Bahadoran, Esquire
sbahadoran@hinshawlaw.com
Hinshaw & Culbertson LLP
9155 South 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 East Las Olas Blvd., Ste. 1700
Fort Lauderdale, FL 33301
Telephone: (954) 763-1200
Facsimile: (954) 766-7800
Counsel for Petitioner

June Galkoski Hoffman, Esquire
jhoffman@fowler-white.com
Helaine S. Goodner, Esquire
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

Donna M. Greenspan, Esquire
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

Denise V. Powers, Esquire
2600 Douglas Road, Suite 501
Coral Gables, FL 33134
Telephone: (305) 444-5100
Facsimile: (305) 444-4455
Counsel for National Assoc. Mut. Ins. Co.

David K. Miller, Esquire
dmiller@broadandcassel.com
Ginger L. Barry, Esquire
Broad and Cassel
215 S. Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone: (850) 681-6810
Facsimile: (850) 681-9792
Counsel for Florida Home Builders Association and National Association of Home Builders

R. Hugh Lumpkin, Esquire
hlumpkin@vpl-law.com
Michael F. Huber, Esquire
mhuber@vpl-law.com
Stephen A. Marino, Jr., Esquire
smarino@vpl-law.com
Ver Ploeg & Lumpkin, P.A.
100 S.E. 2nd Street, Suite 2150
Miami, FL 33131
Telephone: (305) 577-3996
Facsimile: (305) 577-3558
Counsel for Arvida/JMB Partners, L.P. Arvida/JMB Managers, Inc., Arvida Mgmt. Limited Partnership, and Mercedes Homes, Inc.

Steven G. Schember, Esquire
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.

Patrick J. Wielinski, Esquire
Cokinos, Bosien & Young, P.C.
2221 East Lamar Blvd., Suite 750
Arlington, TX 76006
Telephone: (817) 608-9533
Facsimile: (817) 649-3300
Counsel forAssoc'd. General Contractors of America/FL A.G.C. Counsel, Inc./The Assoc'd. General Contractors of Greater FL, Inc./South FL Chapter of the Assoc'd. General Contractors/FL East Coast Chapter of Assoc'd. General Contractors of America/American Subcontractors Assoc./American Subcontractors of FL

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.

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

Perry N. Bass, Esquire
Post Office Box 52163
Houston, TX 77052
Telephone: (281) 359-7440
Facsimile: (281) 359-7446
Counsel for Hartford Fire Ins. Co.

Christopher W. Martin, Esquire
Levon G. Hovnatanian, Esquire
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.

Joseph L. Oliva
Oliva & Associates
11838 Bernardo Plaza Court, Suite 101
San Diego, CA 92128
Telephone: (858) 385-0491
Interested Party

Donald E. Elder, Esquire
Tressler, Soderstrom, Maloney & Priess, LLP
233 S. Wacker Drive, 22nd FL
Chicago, IL 60606
Telephone: (312) 627-4000
Facsimile: (312-627-1717

John Bond Atkinson, Esquire
Rebecca A. Brownell, Esquire
Ellie A. Levy, Esquire
Atkinson & Brownell, P.A.
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.

Warren H. Husband, Esquire
whh@metzlaw.com
Metz, Hauswer & Husband
Post Office Box 10909
Tallahassee, FL 32302-2909
Telephone: (850) 205-9000
Facsimile: (850) 205-9001
Counsel for Assoc'd. General Contractors of America

Daniel J. Santaniello, Esquire
Paul S. Jones, Esquire
Luks & Santaniello, L.L.C.
515 East Las Olas Boulevard, Suite 1100
Fort Lauderdale, FL 33301-4203
Telephone: (954) 761-9900
Facsimile: (954) 761-9940
Counsel for Poole & Kent Co.

Keith Hetrick, Esquire
201 E. Park Avenue
Tallahassee, FL 32301-1511
Telephone: (850) 224-4316
Facsimile: (850) 224-7933
Counsel for FL Home Builders Association

James P. Waczewski, Esquire
Post Office Box 2185
Orlando, FL 32802-2185
Telephone: (407) 461-8020
Facsimile: (407) 658-6629

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief complies with the font requirements of Fla.R.App.P. Rule 9.100(1). The font utilized is Times New Roman, 14-Point.

FINK & BOYLE, P.A.
2050 McGregor Boulevard
Fort Myers, FL 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674
E-mail: Mark@fink-boyle.com

By:_____
Mark A. Boyle
FBN: 0005886
Michael G. Fink
FBN: 0825743
Geoffrey H. Gentile, Sr.
FBN: 898562

z:\200100 fhb v soil\200100 fhb v soil\appeal\supreme court\answer brief.doc