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# IN THE SUPREME COURT OF FLORIDA

AUTO OWNERS INSURANCE,

Appellant,

vs.

CASE NO.: SC06-779
U.S.C.A. Case No.: 05-10559

POZZI WINDOW COMPANY, ET AL.,

Appellee.
_______________________________________//

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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AMICUS CURIAE BRIEF OF J.S.U.B., INC. as Partner of FIRST HOME BUILDERS OF FLORIDA, a general partnership n/k/a FHBF PARTNERS, LLP and LOGUE ENTERPRISES, INC., As Partner of FIRST HOME BUILDERS OF FLORIDA, a general partnership n/k/a FHBF PARTNERS, LLP, AUBUCHON HOMES, INC., CAMDEN DEVELOPMENT, INC., and KEENAN, HOPKINS, SCHMIDT & STOWELL CONTRACTORS, INC. IN SUPPORT OF APPELLEE, POZZI WINDOW COMPANY

FILED BY CONSENT OF THE PARTIES AND BY LEAVE OF THE COURT

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## PREFACE

"AUBUCHON" – Refers to Aubuchon Homes, Inc.

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

"Bryan Scott" – Refers to Brian Scott Builders, Inc., the subcontractor who installed the windows.

"BUILDERS" – Refers to Amicus Curiae, J.S.U.B., Inc. as partner of First Home Builders of Florida, a general partnership n/k/a FHBF PARTNERS, LLP and Logue Enterprises, Inc., as Partner of First Home Builders of Florida, a general partnership n/k/a FHBF PARTNERS, LLP, Aubuchon Homes, Inc., Camden Development, Inc. and Keenan, Hopkins, Schmidt & Stowell Contractors, Inc.

"CAMDEN" – Refers to Camden Development, Inc.

"CGL" – Refers to Commercial General Liability policy.

"FIRST HOME" – Refers to J.S.U.B., Inc. as partner of First Home Builders of Florida, a general partnership n/k/a FHBF PARTNERS, LLP and Logue Enterprises, Inc., as Partner of First Home Builders of Florida, a general partnership n/k/a FHBF PARTNERS, LLP.

"INSURED" – Refers to Coral Construction of South Florida, Inc., the contractor, who assigned their rights to Pozzi Window Company.

"INSURER" – Refers to Auto-Owners Insurance Company, Appellant.

"ISO" – Refers to Insurance Services Office.

"KHS&SC" – Refers to Keenan, Hopkins, Schmidt & Stowell Contractors, Inc.

"PCOH" – Refers to products completed operations hazard coverage.

"POZZI" – Refers to Pozzi Window Company, the manufacturer of the windows installed by Brian Scott Builders, Inc., who took an assignment from INSURER's INSURED, Coral Construction of South Florida, Inc.

## IDENTITY AND INTEREST OF AMICUS CURIAE

FIRST HOME is the Appellee in the related case of United States Fire Ins. Co. v. J.S.U.B., Inc., et al., Florida Supreme Court Case No. SC05-1295. The appeal in the instant case includes the issue of whether changes to the 1986 CGL allow coverage for damage to the insured contractor's work during completed operations which results from the faulty workmanship of subcontractors, the same issue being litigated in United States Fire Ins. Co. v. J.S.U.B., Inc., et al. AUBUCHON is a luxury custom home builder that builds homes primarily in Southwest Florida. CAMDEN is one of the largest multi-family builders in the nation, specializing in a wide range of construction services including pre-development, design/build, project management, construction management, and general contracting. KHS&SC is the largest interior/exterior contractor in the country, and the nation's leading theme contractor. FIRST HOME, AUBUCHON, CAMDEN and KHS&SC are active builders in Florida who have carried and continue to carry commercial general liability insurance coverage with PCOH. BUILDERS are each presently involved in litigation, and accordingly have a direct interest in the resolution of the legal issues involved in this appeal.

## STATEMENT OF THE ISSUES

Does the standard form Commercial General Liability policy, as amended in 1986, provide coverage for a general contractor's work which suffers property damage caused by the errant work of its subcontractor?

## SUMMARY OF ARGUMENT

INSURER'S arguments focus entirely on considerations outside of the contract of insurance which is the subject of the instant dispute. This entire line of argument is improper, as Florida law requires that the policy be interpreted like any other contract, based upon its language. Interpreting the policy in accordance with its language and applying Florida's rules of construction leads to the clear requirement that coverage is available.

INSURER weaves numerous arguments, all of which have their basis outside the contract of insurance, into the rubric that coverage is unavailable under the undisputed facts of this case as a result of "public policy" concerns. INSURER fails to analyze the public policy issue under this Court's clear test for analyzing such cases. When properly analyzed, there are simply no public policy concerns about providing insurance coverage for the fact pattern of this case.

INSURER falsely claims that the majority of states and courts that have considered the issue before this Court have held in favor of INSURER. A closer

review of the cases indicate that the opposite is true, and that by a more than two to one margin courts have held coverage is available where the following elements are present under the modern CGL:

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.

This majority rule of interpreting the CGL is entirely consistent with the history and intention of the changes to the CGL which occurred subsequent to the LaMarche v. The Shelby Mutual Insurance Company, 390 So. 2d 325 (Fla. 1980) decision.

This Court should affirm the Trial Court's determination of the availability of coverage.

## ARGUMENT

### I. BUILDERS' 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 Indemnity Company v. PCR, Inc., et al., 889 So. 2d 779 (Fla. 2004). 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 seeks refuge from its policy language under the guise of "public

policy," it does not even endeavor to apply the Bal Harbour test to the facts of this case. INSURER has not attempted to apply this Court's public policy analysis because there is no question that there is no intentional misconduct in the context of this case. Additionally, this Court's test for disallowing insurance coverage on the basis of Florida's public policy has no applicability because the claim arises out of the actions of the general contractor's subcontractor.

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. There is no evidence the INSURED intended the damages in this case. 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 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 argues 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. Accordingly, 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) (coverage available for accidental shooting which occurred during an intentional struggle); Landis v. Allstate Ins. Co., 546 So. 2d 1051 (Fla. 1989) (homeowner's policy did not provide coverage for intentional sexual assault of children); Bal Harbour, 549 So. 2d 1005 (Fla. 1989); Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52 (Fla. 2nd DCA 1965) (no coverage for punitive damages for acts of wrongdoer in light of purpose of punishing wrongdoer); U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061 (Fla. 1983) (insured's coverage should be available for punitive damages imposed solely on the basis of vicarious liability); Mason v. Florida Sheriffs' Self-Insurance Fund, 699 So. 2d 268 (Fla. 5th DCA 1997) (no insurance coverage available to a deputy for intentional sexual battery as providing coverage would have the effect of stimulating crime); and Lindheimer v. St. Paul Fire & Marine Ins. Co., 643 So. 2d 636 (Fla. 3rd DCA 1994) (no coverage available under professional liability policy where dentist sexually molested patient). 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). BUILDERS merely seek enforcement of the very narrow exception (intentionally placed in the policy) to the business risk exclusions. This exception to the exclusion does not protect a 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. 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 deny CGL coverage for "faulty workmanship" on public policy grounds fail to apply the Bal Harbour test, instead reflexively following LaMarche for a proposition it does not support. Many cases 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. This Court should reject INSURER'S invitation

to be the first state supreme court in the country to use public policy to trump the language of the CGL.

The irony of INSURER's position in this case is that a premium has already been charged by INSURER for the very coverage they now seek to deny. Florida law links the premiums to be charged for insurance in this state to the rate formulas and classifications promulgated by the ISO. See § 624.482(6); § 624.315(2)(i); and § 624.315(2)(o) of Florida Statutes (2004) and 69O-170.006 F.A.C. Since it is clear that the ISO intended for coverage to apply in this situation, the courts of Florida have left Florida's commercial insureds in the anomalous position of paying for a premium rating which has built in the cost for coverage which INSURER is asking to have taken away. BUILDERS respectfully submit that under no analysis can this be the public policy of the State of Florida.

## II. The history of the subcontractor exception to exclusion l. makes clear the availability of coverage.

### 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.

BUILDERS do not claim that exclusion l. creates coverage. Coverage exists because of an "occurrence" which led to unintended "property damage," and the absence of any applicable exclusion. The existence of an "occurrence" and "property damage" were stipulated in this case. This candid admission stands in stark contrast to the companion case of United States Fire Insurance Company v. J.S.U.B., et al., Florida Supreme Court Case No. SC05-1295, where the insurer continues to argue before this Court, and argued before the District Court that there was no "occurrence" or "property damage" and that the losses did not fall within the insuring agreement. This admission is consistent with a proper reading of LaMarche and the case which served as its basis, Weedo v. Stone-e-Brick, Inc., 405 A.2d 788 (N.J. 1979), as well as this Court's more recent pronouncements on the issue of "occurrence" in State Farm Fire and Casualty Company v. CTC Development Corporation, 720 So. 2d 1072 (Fla. 1998). Admittedly, the above exclusion would be applicable to bar coverage but for the subcontractor exception which restores coverage which would have otherwise been excluded.

### 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, 68 (Wis. 2004). See also 9 Lee R. Russ & Thomas F. Segalla eds., Couch on Insurance § 129:18 (3d ed. 2004). 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. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 825 A.2d 641 (Pa. 2003), *appeal granted* 848 A.2d 925 (Pa. 2004); 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. Kvaerner Metals, 825 A.2d at 656; 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. Patrick J. Wielinski, Insurance for Defective Construction, Ch. 11 (2d ed. International Risk Management Institute 2005).

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.

James D. Hendrick and James 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.

Id. Even the industry's more recent publications agree with BUILDERS' position. The International Risk Management Institute 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, International Risk Management Institute (7th Reprint, January 2001), Section 5 at V.D. 47-8 [emphasis added]. See also Allan D. Windt, Insurance Claims & Disputes, Representation Of Insurance Companies and Insureds § 11:3 (4th ed. 2001 & Supp. 2005); Thomas J. Casamassima and Jeanette 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); Jotham 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 (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.

O'Shaughnessy, 543 N.W.2d at 103 [emphasis added]. 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]. See also Appendix 3.

Prior to J.S.U.B., Inc. v. United States Fire Ins. Co., 906 So. 2d 303 (Fla. 2nd DCA 2005), 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 cases Home Owners Warranty Corporation v. The Hanover Insurance Company, 683 So. 2d 527 (Fla. 3rd DCA 1996); Lassiter v. American States Insurance Company, 699 So. 2d 768 (Fla. 4th DCA 1997); and Aetna Cas. & Sur. Co. of Am. v. Deluxe Systems, 711 So. 2d 1293 (Fla. 4th DCA 1998). These cases appear to hold, purportedly relying on LaMarche, that faulty workmanship was not "covered" 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 the subcontractor exception to exclusion l. and its history have invariably found coverage. J.S.U.B., 906 So. 2d 303; Essex

Builders v. Amerisure Ins. Co., 429 F. Supp. 2d 1274 (M.D. Fla. 2005); and Pozzi Window Co. v. Auto-Owners Ins., 446 F.3d 1178 (11th Cir. 2006).

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

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 "public policy" concerns of INSURER.

The ISO has, since 2000, issued endorsements which would eliminate the subcontractor exception to the "your work" exclusion. See CG 22 94 (deleting entire subcontractor exception to exclusion l.) and CG 22 95 (deleting exception to

exclusion l. as to specific listed projects), copies of which are attached as Appendices “4” and “5” respectively. 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.

## III. The majority of states allow coverage for defective workmanship where there is unintended and unexpected "property damage" under the modern CGL.

INSURER falsely claims the majority of courts in the United States hold that “faulty workmanship” does not constitute an “occurrence,” “property damage,” or represent 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 Appendix 3 clearly establishes that a majority of courts and states recognize coverage under the

modern CGL for faulty workmanship where "property damage" is present and no exclusion is applicable. A review of Appendices 1, 2 and 3 make clear INSURER'S claim of having "majority view" is at best inaccurate and certainly incorrect. Forty (40) states have case law deciding the issue of coverage under either the BFPDE or the post-1986 CGLs. Twenty-one (21) of those states have cases which favor POZZI. Nine (9) states have case law favoring INSURER. Ten (10) states have mixed opinions on this issue. The issue is presently before the Supreme Courts of Texas, Tennessee, Ohio, and, of course, Florida. In the new millennium, only one state's supreme court, West Virginia, has taken the blanket view that faulty workmanship claims never constitute a covered "occurrence." In contrast, the Supreme Courts of Kansas, North Dakota, South Dakota, Minnesota, and Wisconsin have all recently held that faulty workmanship which leads to unintended "property damage" constitutes an "occurrence" under the modern CGL or prior CGLS with BFPDE coverage. Two (2) states' highest courts, Nebraska and South Carolina, have taken a middle ground view that the error of one subcontractor which causes damage to the work of another subcontractor or separate work of the general contractor constitute an "occurrence."

The cases holding that no coverage exists for faulty workmanship, even where it resulted in "property damage," invariably suffer from two (2) errors.

First, these cases incorporate a parsimonious view of the term "occurrence" which improperly incorporates tort related concepts of expectation and foreseeability into the CGL. Secondly, these cases almost without exception fail to analyze the evolution of the subcontractor exception to exclusion l. These cases then go on to hold that damage to the insured's own work from failure to perform a construction contract is presumed to be expected, while the 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. It also begs the question of why the construction industry specific exclusions j. and l. even exist. Certainly, this constrained view of the CGL is not what the insurance industry promoted when it revised the CGL to include the "subcontractor exception."

## CONCLUSION

The unambiguous language of the CGL policy as amended in 1986 provides coverage for the subject loss. Prior cases holding that such losses do not fall within the grant of coverage are based on a misapprehension of the Florida Supreme Court's decision in LaMarche and the decision of the New Jersey Supreme Court in Weedo incorporated therein. When viewed through Florida's standard rules of insurance policy construction, the subject policy clearly affords coverage for the subject loss.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U. S. Mail to EDMUND M. KNEISEL, ESQUIRE, 1100 Peachtree St., #2800, Atlanta, GA 30309-4530, DENISE V. POWERS, ESQUIRE, 2600 Douglas Rd., #501, Coral Gables, FL 33134, DAVID K. MILLER, ESQUIRE, P. O. Drawer 11300, Tallahassee, FL 32302, NANCY W. GREGOIRE, ESQUIRE, 100 S.E. 3rd Ave., 9th FL, Fort Lauderdale, FL 33394, KEITH HETRICK, ESQUIRE, 201 E. Park Ave., Tallahassee, FL 32301-1511, DAVID S. JAFFEE, ESQUIRE, 1201 15th St. N.W., Washington, DC 20005, RONALD L. KAMMER, ESQUIRE and SINA BAHADORAN, ESQUIRE, 9155 S. Dadeland Blvd., #1600, Miami, FL 33156, WARREN H. HUSBAND, ESQUIRE, P. O. Box 10909, Tallahassee, FL 32302-2909, PATRICK J. WIELINSKI, ESQUIRE, 2221 East Lamar Blvd., #750, Arlington, TX 76006, and R. HUGH LUMPKIN, ESQUIRE, 100 S.E. 2nd St., #2150, Miami, FL 33131, on this ____ day of August, 2006.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the requirements of Rule 32(a)(5) and (6) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, and contains 6,921 words.

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