

**DEFECTIVE CONSTRUCTION CLAIMS: WHY DO ILLINOIS COURTS  
TREAT CONSTRUCTION COMPANIES LIKE CRIMINALS?**

**American Bar Association  
Tort Trial & Insurance Practice Section  
Insurance Coverage Litigation Committee**

**Chicago, IL  
January 14, 2016**

**David H. Anderson<sup>1</sup>  
Hoke Attorneys at Law LLC  
117 N. Jefferson Street, Suite 100  
Chicago, IL 60661  
(312) 575-8562  
danderson@hokellc.com**

---

<sup>1</sup> David H. Anderson is a partner at Hoke Attorneys at Law LLC in Chicago, where he represents policyholders in insurance coverage disputes and counsels them in risk management matters. The views expressed in this article are the author's own. Copyright © 2016 David H. Anderson. All rights reserved.

## A. Introduction

The year 2016 marks the twenty-fifth anniversary of the Illinois appellate courts' adoption of the "natural and ordinary consequences" test to determine whether there has been an accident (and therefore an "occurrence") sufficient to trigger a commercial general liability ("CGL") policy for defective construction claims. Under this test, which the courts reserve almost exclusively for inherently harmful or criminal acts and defective construction claims, the natural and ordinary consequences of an act do not constitute an accident. In applying the test to defective construction claims, the appellate courts have concluded that defective construction is merely the natural and ordinary consequence of allegedly faulty workmanship. Defective construction thus can never constitute an accident or an "occurrence" *unless* faulty workmanship damages something other than the insured's work. In other words, when determining whether insurance coverage exists for defective construction claims, the appellate courts completely disregard whether the insured contractor expected or intended the injury. Instead, the courts effectively *infer* intent on the part of the insured by way of the "natural and ordinary consequences" test whenever the underlying complaint contains allegations of faulty workmanship. The Illinois Supreme Court has not yet addressed the issue.

This article will examine the history behind the Illinois appellate courts' use of the "natural and ordinary consequences" test in an attempt to understand why the appellate courts apply a test that takes the extraordinary step of *inferring* the intent and expectation of the insured on the "occurrence" issue in essentially only two circumstances: (1) inherently harmful or illegal acts; and (2) defective construction claims. The article will explain why applying what amounts to a tort-based standard of foreseeability to the CGL policy – or any liability policy – defeats the purpose of the policy and renders it meaningless. The article also will examine how the "natural and ordinary consequences" test is significantly at odds with well-established Illinois precedent regarding the judicial interpretation of insurance policies and furthermore how the overwhelming majority of state supreme courts have held that allegations of faulty workmanship

do constitute an “occurrence” under a CGL policy. Finally, the article will discuss how the “natural and ordinary consequences” test violates basic duty to defend principles and operates to deprive the insured of the benefit of the litigation insurance it purchased. The time is long overdue for the Illinois Supreme Court to fix this ongoing, twenty-five-year-debacle and bring Illinois within the mainstream of insurance coverage jurisprudence concerning defective construction claims.

**B. The Current State of Illinois Law Regarding Whether Faulty Workmanship Resulting in Defective Construction Constitutes an “Occurrence.”**

Before proceeding further into an examination of the “natural and ordinary consequences” test, it is worth taking a brief look at the current state of Illinois law on the “occurrence” issue in the defective construction context. In the recent case of *Nautilus Ins. Co. v. Bd. of Directors of Regal Lofts Condo. Ass’n*, 764 F.3d 726, 731–32 (7th Cir. 2014), the U.S. Court of Appeals for the Seventh Circuit provided a concise summary:

By their terms, the policies apply to “property damage” only if such damage is caused by an “occurrence,” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” While the policies do not define the term “accident,” in interpreting insurance policies, “Illinois courts have defined ‘accident’ as an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character.” *Westfield Nat’l Ins. Co. v. Cont’l Cmty. Bank & Trust Co.*, 346 Ill. App. 3d 113, 281 Ill. Dec. 636, 804 N.E.2d 601, 605 (2003) (citation omitted). Moreover, “[t]he natural and ordinary consequences of an act do not constitute an accident.” *Id.*

[¶] Applying this principle in the context of development and building construction, several Illinois cases have held that “damages that are the natural and ordinary consequences of faulty workmanship do not constitute an ‘occurrence’ or ‘accident.’” *Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 321 Ill. Dec. 114, 888 N.E.2d 633, 652 (2008) (collecting cases). To hold otherwise and “[f]ind[ ] coverage for the cost of replacing or repairing defective work,” *Stoneridge* reasoned, “would transform the policy into something akin to a performance bond.” *Id.*, 321 Ill. Dec. 114, 888 N.E.2d at 653 (quoting *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 258 Ill. Dec. 792, 757 N.E.2d 481, 503 (2001) (internal quotation marks and citations

omitted)). Another reason to disfavor such an interpretation is that “insurance proceeds could be used for damages from defective workmanship,” or “a contractor could be initially paid by the customer for its work and then by the insurance company to repair or replace the work.” *Lagestee–Mulder, Inc. v. Consol. Ins. Co.*, 682 F.3d 1054, 1057 (7th Cir. 2012) (quoting *CMK Dev. Corp. v. W. Bend Mut. Ins. Co.*, 395 Ill. App. 3d 830, 335, Ill. Dec. 91, 917 N.E.2d 1155, 1168 (2009)) (internal quotation marks omitted). In order to avoid such undesirable outcomes, Illinois courts require that for an incident to constitute an “occurrence” or “accident” in the building construction context, “there must be damage to something other than the structure, *i.e.*, the building, in order for coverage to exist.” *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 294 Ill. Dec. 478, 831 N.E.2d 1, 16 (2005) (citations omitted). “[T]he natural and ordinary consequences of defective workmanship ... d[o] not constitute an ‘occurrence.’” *Id.*

Accordingly, under the current state of Illinois law, defective construction is the natural and ordinary consequence of faulty workmanship and therefore is not an accident or an “occurrence.” Notwithstanding that broadly and frequently articulated rule, faulty workmanship *can* constitute an “occurrence” depending on the nature of the property damaged. Damage to the “project,” the “structure,” or the “building” is not an “occurrence,” but damage to “other property” is an “occurrence.” *Pekin Ins. Co. v. Richard Marker*, 289 Ill. App. 3d 819, 823 (2d Dist. 1997) (finding an “occurrence” where the contractor’s work damaged building owner’s “furniture, clothing, and antiques”). Under *Richard Marker* and its progeny, the definition of “occurrence” in a CGL policy is dependent on the nature of the property that was damaged. Generally speaking, unless the underlying complaint contains allegations of damage to property to something other than the construction project, Illinois courts will hold that the insurer has no duty to defend because the plaintiff has not alleged an “occurrence.” In light of this framework, the more recent cases tend to address (with mixed results) whether there is an “occurrence” when the damaged property is outside the scope of the contractor’s work, even if the damage is to the project, structure, or building.<sup>2</sup>

---

<sup>2</sup> See, e.g., *Westfield Ins. Co. v. Nat’l Decorating Serv., Inc.*, No. 14 C 1572, 2015 WL 7568444, at \*1 (N.D. Ill. Nov. 25, 2015) (holding that damage beyond the scope of the named insured’s work at a building is “property damage” resulting from an “occurrence”); *Empire Fire & Marine Ins. Co. v. HLL Corp.*, No. 05

The Illinois Supreme Court has not yet addressed the issue of whether faulty workmanship can constitute an “occurrence” under a CGL policy.<sup>3</sup> However, the overwhelming majority of state supreme courts have concluded that faulty workmanship constitutes an “occurrence” under a CGL policy, regardless of the nature of the property damaged.<sup>4</sup>

---

CH 7565, slip op. at 13-14 (Circuit Court of Cook County, Chancery Div., Nov. 9, 2015) (finding no “occurrence” despite damage to steel columns and footings that were not part of building renovation project); *West Bend Mut. Ins. Co. v. Pulte Home Corp.*, 2015 IL App (1st) 140355 (vague allegations of “resultant damage” and “other damage” were sufficient to trigger duty to defend), *appeal denied*, 39 N.E.3d 1012, Ill., Sep. 30, 2015; *Auto Owners Ins. Co. v. Hagler*, No. 13-cv-884-JPG-PMF, 2015 WL 3862713 at \*5 (S.D. Ill. Jun. 22, 2015) (damage to home that was outside the scope of installer’s work triggered duty to defend); *Old Republic Ins. Co. v. Leopardo Cos., Inc.*, No. 1:14-cv-02421, slip op. at 7-9 (N.D. Ill. March 11, 2015) (Dkt. 55) (unavailable on LexisNexis and Westlaw) (allegations of property damage outside the limited scope of subcontractor’s work constituted an “occurrence” that triggered insurer’s duty to defend general contractor as an additional insured on subcontractor’s CGL policy); *Paradise Inground Pools, Inc. v. Black Diamond Plumbing & Mechanical, Inc.*, 2012 IL App (2d) 110819-U, ¶ 14 (finding no “occurrence” even though plumbing contractor’s faulty work damaged other parts of the building); *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶ 28 (finding an “occurrence” where subcontractor’s negligent workmanship damaged parts of the building that were outside the scope of its work).

<sup>3</sup> The Illinois Supreme Court’s last foray into defective construction claims in the context of a CGL policy was in *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486 (1985). In *Brochu*, a homeowner sued a home builder for property damage after allegedly faulty workmanship caused the house to sink into the ground, causing the foundation to crack, the support beams to sag, the doors and frames to be out of sync, and the interior fixtures to separate from the walls. The policy at issue was a pre-1986 comprehensive general liability policy, the predecessor to the modern CGL policy. Notably absent from the *Brochu* is any discussion of whether there had been an “occurrence.” The court held without any discussion that “the insuring provisions of the policy initially provide[d] coverage” for the homeowner’s claim, thereby implicitly accepting that the complaint’s allegations of faulty workmanship had met the policy’s definition of an “occurrence.” *Id.* at 498. The court instead found that exclusions (n) and (o), which limited the completed operations coverage by excluding damage to the product or work of the insured, applied to preclude coverage because the homeowners sought compensation solely for property damage to the house built by the insured. *Id.*

<sup>4</sup> *Compare Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So.3d 148 (Ala. 2014) (holding that faulty workmanship by homebuilder constituted an “occurrence”); *Fejes v. Alaska Ins.*, 984 P.2d 519 (Alaska 1999) (holding there was an “occurrence” and coverage for damages caused by a subcontractor’s defective work on a septic system); *Capstone Building Corp. v. American Motorists Ins. Co.*, 308 Conn. 760, 67 A.3d 961 (2013) (holding that, because negligent work is unintentional from the point of view of the insured, it may constitute an “occurrence”); *United States Fire Ins. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007) (holding that a subcontractor’s defective soil preparation, which was neither expected nor intended from the standpoint of the general contractor, was an “occurrence” under the CGL policy and the structural damage to the completed homes was property damage under the CGL policy); *Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co.*, 293 Ga. 456, 746 N.E.2d 587 (2013) (holding homebuilder’s faulty workmanship was covered because the usual and common meaning of an “occurrence” does not require damage to the property or work of someone other than the insured); *Sheehan Constr. v. Continental Cas. Co.*, 935 N.E.2d 160, *modified* 938 N.E.2d 685 (Ind. 2010) (on other grounds) (holding that faulty workmanship may constitute an “occurrence” if the resulting damage is an event that occurs without expectation or foresight); *Lee Builders, Inc. v. Farm Bureau Mut. Ins.*, 281 Kan. 844, 137 P.3d 486 (2006) (holding unforeseen and unintended damage from leaking windows installed by

**C. Illinois Courts Usually Interpret the Undefined Term “Accident” to Require an Inquiry Into Whether the Insured Intended or Expected the Injury.**

The insuring agreement of the CGL policy provides that the insurer “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.” The insurance “applies to ‘bodily injury’ and ‘property damage’ only if . . . caused by an ‘occurrence.’” CGL Form CG 00 01 07 98,

---

an insured’s subcontractor was caused by an “occurrence”); *Wanzek Constr., Inc. v. Employers Ins.*, 679 N.W.2d 322 (Minn. 2004) (holding damage to a swimming pool caused by a subcontractor was covered under a CGL policy); *Architex Ass’n, Inc. v. Scottsdale Ins.*, 27 So.3d 1148 (Miss. 2010) (holding the term “occurrence” cannot be construed in such a manner as to preclude coverage for unexpected or unintended “property damage” resulting from negligent acts or conduct of a subcontractor unless otherwise excluded); *Revelation Indus. v. St. Paul Fire & Marine Ins.*, 350 Mont. 184, 206 P.3d 919 (2009) (holding property damage to an insured’s products or completed work done for the insured by a subcontractor is an “accident” and the CGL policy provides coverage to the insured); *McKellar Dev. v. Northern Ins.*, 108 Nev. 729, 837 P.2d 858 (1992) (holding soil compaction performed by subcontractors, which caused damage to buildings built by an insured, was an “occurrence” and covered under the Broad Form Property Damage endorsement); *High Country Assocs. v. N.H. Ins.*, 139 N.H. 39, 648 A.2d 474 (1994) (holding that actual damage to the structure of the condominium units by continuous exposure to moisture from defective construction resulted in an “occurrence” covered by the CGL policy); *Auto Owners Ins. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009) (holding that a subcontractor’s negligent application of stucco to a home resulted in an “occurrence” under the CGL policy’s grant of coverage for the resulting progressive property damage to the home), *overruled by Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins.*, No. 26909, 2011 WL 93716, at \*1, 2011 S.C. LEXIS 2, at \*1 (S.C. Jan. 7, 2011), *withdrawn and substituted by* 395 S.C. 40, 717 S.E.2d 589 (2011) (adhering to the result in *Newman*); *Corner Constr. v. United States Fid. and Guar.*, 638 N.W.2d 887 (S.D. 2002) (holding that CGL policy provided coverage for a general contractor’s liability for property damage to the building as a result of the subcontractor’s faulty workmanship, which was an “accident” resulting in property damage); *Travelers Indem. Co. of America v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn. 2007) (holding that defective workmanship may constitute an “occurrence” under a CGL policy; damages caused by faulty workmanship are “property damage” and “damages resulting from the faulty workmanship of a subcontractor are not excluded from coverage”); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007) (holding that a general contractor’s defective construction or faulty workmanship in building a house foundation is an “occurrence” within the meaning of the CGL policy); *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013) (holding that defective workmanship causing bodily injury or property damage is an “occurrence”); *American Family Mut. Ins. v. American Girl, Inc.*, 268 Wis. 2d 16, 673 N.W.2d 65 (2004) (holding that damage to a warehouse caused by soil settlement, which occurred because of a subcontractor’s faulty site-preparation advice was accidental, not intentional or anticipated, and was an “occurrence” within the meaning of the CGL policies); with *Essex Ins. v. Holder*, 370 Ark. 465, 261 S.W.3d 456 (2008) (holding defective or incomplete construction, standing alone, that results in damage only to the work product itself is not an “occurrence” under the CGL policy); *Cincinnati Ins. v. Motorists Mut. Ins.*, 306 S.W.3d 69 (Ky. 2010) (holding a claim for poor workmanship in building a home does not involve the fortuity required to constitute an accident and is therefore not an “occurrence”); *Oak Crest Constr. v. Austin Mut. Ins.*, 329 Or. 620, 998 P.2d 1254 (2000) (holding costs for the repair of a subcontractor’s deficient work did not arise from an accident under the CGL policy, but leaving open the question when there is damage to other property); *Kvaerner Metals v. Commercial Union Ins.*, 589 Pa. 317, 908 A.2d 888 (2006) (holding poor workmanship in the construction of a coke battery, resulting in the product not meeting contract specifications and warranties, was not an “occurrence” under the CGL policy language).

Insurance Services Office, Inc. (1997). “Occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” *Id.* “Property damage” is defined, in relevant part, as “[p]hysical injury to tangible property, including all resulting loss of use of that property.” *Id.*

Notably, the term “accident” is not defined in the CGL policy. Illinois courts generally agree that an “accident” is “an unforeseen occurrence, usually . . . an undesigned sudden or unexpected event of an inflictive or unfortunate character.” *West American Ins. Co. v. Midwest Open MRI, Inc.*, 2013 IL App (1st) 121034, ¶ 22. The Illinois Supreme Court has held (in the context of a CGL policy) that a court should not determine whether something is an accident by looking at whether the actions leading to the damage were intentionally done. According to the court, the real question is whether the person performing the acts leading to the result intended or expected the result. If the person did not intend or expect the result, then the result was the product of an accident. *U.S. Fidel. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 77-78 (1991); see also *Insurance Corp. of Hanover v. Shelborne Assoc.*, 389 Ill. App. 3d 795, 801 (1st Dist. 2009) (“[t]he focus of the inquiry in determining whether an occurrence is an accident is whether the *injury* is expected or intended by the insured, not whether the *acts* were performed intentionally”) (quoting *Lyons v. State Farm Fire & Cas. Co.*, 349 Ill. App. 3d 404, 409 (5th Dist. 2004)) (emphasis in original).

Illinois courts thus typically focus on the subjective intent or expectation of the insured when determining whether there has been an “occurrence.” In construction defect cases, however, Illinois appellate courts ignore the insured’s subjective intent and instead *infer* intent based on a foreseeability standard. As discussed in the next section, the appellate courts hold that defective construction is the “natural and ordinary” (*i.e.*, foreseeable) consequence of faulty workmanship and therefore cannot constitute an accident or an “occurrence” under a CGL policy.

**D. Illinois Appellate Courts Apply the Tort-Based “Natural and Ordinary Consequences” Test to Interpret the Term “Accident” in the Contexts of (1) Inherently Harmful or Illegal Acts and (2) Defective Construction Claims.**

For approximately twenty-five years, Illinois appellate courts repeatedly have applied the “natural and ordinary consequences” test to the “occurrence” issue in defective construction cases.<sup>5</sup> As the court in *Stoneridge* acknowledged, the “natural and ordinary consequences” test traces back to the First District Appellate Court’s decision in *Aetna Cas. & Sur. Co. v. Freyer*, 89 Ill. App. 3d 617 (1st Dist. 1980). The overwhelming majority of the defective construction cases decided by the Illinois appellate courts since 1991 have cited *Freyer* when holding that defective construction is the natural and ordinary consequence of faulty workmanship.<sup>6</sup>

In *Freyer*, the insured, Lewis Freyer, was a defendant in an underlying lawsuit brought by Shirley Kleinman. Kleinman’s suit alleged that Freyer had wrongfully and violently assaulted Kleinman, struck her with his fists in the face and on the body, gave her black eye, injured her head and face, and tore out some of her hair. There were allegations of a similar violent assault five months later as well as allegations that Freyer had destroyed some property in Kleinman’s home. Each of the two counts of the complaint alleged violent, wanton, willful, and wrongful conduct by Freyer. Freyer tendered the suit to his insurer, Aetna, who filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Freyer for the Kleinman action.

---

<sup>5</sup> See, e.g., *Design Concrete Foundations Inc. v. Erie Ins. Prop. & Cas. Co.*, 2014 IL App (1st) 130353-U; *Stoneridge Dev. Co., v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 756-57 (2d Dist. 2008); *Viking Const. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 53 (1st Dist. 2005); *Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 277 Ill. App. 3d 697, 705-06 (2d Dist. 1996); *Bituminous Cas. Corp. v. Gust K. Newberg Const. Co.*, 218 Ill. App. 3d 956, 965-66 (1st Dist. 1991).

<sup>6</sup> The Illinois Supreme Court has never applied the “natural and ordinary consequences” test to an “occurrence” under a CGL policy.



The Aetna policy<sup>7</sup> insured Freyer against liability caused by an “occurrence,” which was defined as “an accident including injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage.” According to the court:

This extension of coverage from “accidents” to “occurrences” has been considered to broaden coverage, and eliminates the need for an exact finding as to the cause of damages so long as they are neither expected nor intended from the standpoint of the insured. Nevertheless, the occurrence must still be accidental. An accident has been defined as an unforeseen [sic] occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character. *The natural and ordinary consequences of an act do not constitute an accident. An injury caused by an assault and battery normally is not considered to be accidental.*

*Id.* at 619 (emphasis added, internal citations omitted).<sup>8</sup>

Illinois appellate courts have used *Freyer’s* “natural and ordinary consequences” test to determine the “occurrence” issue almost exclusively in two narrow contexts: (1) in what one commentator has characterized as cases involving “inherently harmful or illegal acts;”<sup>9</sup> and (2) defective construction cases. In the former context, intent similarly is *inferred* by the court via the natural and ordinary consequences test regardless of the insured’s subjective intent. See, e.g., *State Farm Fire & Cas. Co. v. Weber*, 2014 IL App (1st) 130156-U, ¶ 23 (no “occurrence” where injuries were the natural and ordinary consequences of being repeatedly stabbed with a knife); *State Farm Fire & Cas. Co. v. Young*, 2012 IL App (1st) 103736, ¶ 29 (no “occurrence” where injuries and eventual death were the natural and ordinary consequences of providing heroin, severely beating victim during overdose, and failing to call 911); *Pekin Ins. Co. v. Dial*,

---

<sup>7</sup> Although the *Freyer* court did not identify the specific type of insurance policy in force in 1974 when the insured allegedly assaulted the plaintiff, it was almost certainly a homeowner’s or renter’s policy, in light of the fact that Freyer was sued in his individual capacity.

<sup>8</sup> The *Freyer* court cited *Farmers Elevator Mut. Ins. Co. v. Burch*, 38 Ill. App. 2d 249 (4th Dist. 1962), for the proposition that the natural and ordinary consequences of an act do not constitute an accident. The *Burch* opinion contains that language, but does not cite to any legal authority for the premise. *Burch*, 38 Ill. App. 2d at 253.

<sup>9</sup> B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* § 8.03[f], pp. 668-78 (15th ed. 2010).

355 Ill. App. 3d 516, 521 (5th Dist. 2005) (injuries were the natural and probable result of sexual assault); *Westfield Nat. Ins. Co. v. Cont'l Cmty. Bank & Trust Co.*, 346 Ill. App. 3d 113, 119-20 (2d Dist. 2003) (injuries were the natural and probable result of the insured's enabling of the sexual abuse of minors); *State Farm Fire & Cas. Co. v. Leverton*, 314 Ill. App. 3d 1080, 1087 (4th Dist. 2000) (injuries were the natural and ordinary consequence of swinging at someone with a beer bottle).

So what exactly is the common thread, if any, between insurance coverage cases involving inherently harmful or criminal acts, on the one hand, and faulty workmanship by a construction contractor, on the other, that justifies abandoning any examination of the subjective intent of the insured when determining whether there has been an “occurrence?” In the inherently harmful/criminal act context, the cases evidence the notion that an insurance company should be under no duty to defend or indemnify an insured who commits assault and battery, sexual assault, child molestation, and similar acts “because the nature of the conduct itself conclusively establishes as a matter of law that the insured expected or intended to injure the victims.”<sup>10</sup> *Cont'l Cmty. Bank & Trust Co.*, 346 Ill. App. 3d at 119. But can a similar argument really be made that the nature of a contractor's role at a construction project is such that the mere allegation of faulty workmanship conclusively establishes that the contractor expected or intended to cause defective construction-related damages?

Illinois appellate courts seem to think so. The First District Appellate Court has stated that the “rationale” for applying the natural and ordinary consequences test to construction cases is “the requirement implicit in every liability insurance policy—specifically, that coverage is

---

<sup>10</sup> There is a related concern often present in the inherently harmful/illegal act cases that the injured plaintiff is attempting to “manufacture” insurance coverage for the defendant's intentional acts by pleading them in the form of a negligence count. When there has been conviction in a criminal court, the parties to subsequent civil litigation may be estopped from arguing that the conduct was unintentional, and therefore potentially covered, by an insurance policy. *American Family Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378 (2000). Short of a conviction, however, courts often preclude coverage by inferring the insured's intent to injure.

provided only for fortuitous losses.” *Viking Const. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 43 (1st Dist. 2005) (quoting J. Yang, *No Accident: The Scope of Coverage for Construction Defect Claims*, 690 Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, 7, 36 (April 2003)). According to the court:

“if a contractor uses inadequate building materials, or performs shoddy workmanship, he takes a calculated business risk that no damage will take place. If damage does take place, it flows as an ordinary and natural consequence of the contractor's failure to perform the construction properly or as contracted [and][t]here can be no coverage for such damage.” Yang, 690 PLI/Litig. at 36–37.

*Id.*

The court’s justification for using the “natural and ordinary consequences” test seems greatly at odds with the realities of the modern construction industry. It presumes that every contractor alleged to have performed faulty work has done so in the context of taking a “calculated business risk,” weighing the likelihood damage will occur versus the presumptive cost savings associated with using inadequate building materials or performing substandard work. Such a position assumes that the contractor “deliberately sabotaged the very same construction project it worked so diligently to obtain at the risk of jeopardizing its professional name and business reputation in the process.” *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508, 520 (2013). As the Texas Supreme Court has held, “[t]he determination of whether an insured’s faulty workmanship was intended or accidental is dependent on the facts and circumstances of the particular case. For purposes of the duty to defend, those facts and circumstances must generally be gleaned from the plaintiffs’ complaint.” *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (2007).

The spectre of moral hazard – of the insured somehow profiting from its own loss by collecting insurance – also pervades many of the appellate courts’ defective construction cases. According to one court, “if insurance proceeds could be used to pay for the repair or replacement of poorly constructed buildings, a contractor could receive initial payment for its

work and then receive subsequent payment from the insurance company to repair or replace it. This would transform the [CGL] policy into something akin to a performance bond.<sup>11</sup> See, e.g., *Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 277 Ill. App. 3d 697, 710 (2d Dist. 1996) (internal citations and quotations omitted). As one commentator has noted:

In addition to taking pride in a job well done, a contractor is incentivized to do its work well, despite the existence of liability insurance, in order to get paid for the work, obtain future work, and avoid claims and litigation. If the work is not done right, the contractor will not be paid; nor will the contractor be hired again. Further, even if the contractor is able to eventually recover from its insurer, very few litigants would describe litigation as a pleasant or valuable use of their time, particularly while they are trying to run a profitable construction business.

Moreover, proponents of the “moral hazard” theory do not point to any empirical evidence that a contractor actually reviews his or her insurance policy to determine whether the insurance will cover the resulting damage before proceeding to do a job sloppily. In short, “moral hazard” arguments in the context of construction defect claims are based solely on theory, not empirical evidence.

Christopher C. French, *Construction Defects: Are They “Occurrences”?*, 47 *Gonz. L. Rev.* 1, 43-44 (2011).

In sum, the case for a need to infer the insured's intent in claims involving defective construction in the same manner as those involving inherently harmful or illegal acts seems remarkably thin. Courts need only apply the policy language to the facts of the case.

---

<sup>11</sup> Interpreting the word “accident” to include unexpected and unintended property damage caused by allegedly faulty workmanship does not convert a CGL policy into a performance bond. See *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 887-88 (Fla. 2007). The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor. *Village of Fox Lake v. Aetna Cas. & Sur. Co.*, 178 Ill. App. 3d 887, 911 (2d Dist. 1989). Thus, unlike an insurance policy, a performance bond benefits the owner of a project rather than the contractor. *Id.* at 911-12. Further, a surety, unlike a liability insurer, is entitled to indemnification from the contractor. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 888 (Fla. 2007); see also Marilyn Klinger, George J. Bachrach, and Tracey L. Haley, *The Surety's Indemnity Agreement: Law and Practice*, 2nd Ed. 4 (2008). Moreover, a finding that faulty workmanship constitutes an accident and therefore an “occurrence” is merely the first step in a process that necessarily must include analyzing whether there has been “property damage” and whether any of the CGL policy's exclusions apply to the loss.

**E. Applying a Tort-Based Foreseeability Standard to Determine Whether Negligence Claims Constitute an “Occurrence” Renders a Liability Policy Essentially Meaningless.**

One major problem with applying a tort-based foreseeability standard like the “natural and ordinary consequences” test to liability insurance policies is that “the negligent acts of the insured will almost never be “accidents” because, by definition, negligence requires that damages be foreseeable.” *Travelers Indem. Co. of Am. v. Moore & Assoc., Inc.*, 216 S.W.3d 302, 308 (Tenn. 2007). Accordingly, “[c]onstruing ‘accident’ in a manner that does not cover the insured’s negligence would render a CGL policy almost meaningless.” *Id.*

Indeed, virtually any liability policy would be rendered meaningless under the “natural and ordinary consequences” test. If defective construction is the natural and ordinary consequence of faulty workmanship and therefore not an “accident,” could it not be said that automobile collisions are merely the natural and ordinary consequence of faulty driving? Or that a slip and fall in a grocery store resulting in bodily injury is the natural and ordinary consequence of faulty mopping? Alternatively, if the natural and ordinary consequences of an act do not constitute an accident, exactly what consequences must be present in order for there to be an accident?

The “natural and ordinary consequences” test is virtually indistinguishable from the test Illinois courts utilize to determine the existence of proximate cause in a negligence action. Under Illinois law, proximate cause exists “if the injury is the natural and probable result of the negligent act or omission and is of such a character that an ordinarily prudent person would have foreseen it as a result of such negligence.” *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 65 (quoting *Niffenegger v. Lakeland Construction Co.*, 95 Ill. App. 3d 420, 425 (2d Dist. 1981)).

The below discussion from the Florida Supreme Court is instructive on this issue:

By utilizing the concept of “natural and probable consequences,” the Court incorporated tort law principles into its interpretation of the term “accident.” However, as this Court stated forty years later

in *Prudential Property & Casualty Insurance Co. v. Swindal*, 622 So.2d 467, 470 (Fla.1993), “Florida law has long followed the general rule that tort law principles do not control judicial construction of insurance contracts.” In *Swindal* we considered the term “natural and probable consequence” interchangeably with the term “reasonably foreseeable,” see *id.* at 472, and quoted with approval Justice Drew, who in writing for a majority<sup>1</sup> of this Court in *Gulf Life Insurance Co. v. Nash*, 97 So.2d 4, 9 (Fla.1957), stated that the “ ‘doctrine of foreseeability is a doctrine totally unsuited and unadaptable in construing accident policies.’ ” *Swindal*, 622 So.2d at 470 (quoting *Nash* ).

*State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1074 (Fla. 1998). Ironically, in light of its defective construction jurisprudence, the First District Appellate Court similarly has severely criticized as “problematic” on . . . [a] fundamental level” what it termed “the assimilation of principles from tort law into the analysis of an insurance contract.” *Oakley Transp., Inc. v. Zurich Ins. Co.*, 271 Ill. App. 3d 716, 725 (1st Dist. 1995).

Liability insurance policies provide coverage for the foreseeable risks of an insured’s business, many or most of which are addressed in the insurance policy. For example, one foreseeable risk – or “natural and ordinary consequence” – of operating a long haul commercial trucking fleet is collisions with automobiles and pedestrians. No insurer would ever take the position that the foreseeable nature of that risk requires a court to infer the insured’s intent to cause those collisions whenever they occur and thereby deprive the insured of defense or indemnity coverage. Insurance company underwriters decide whether to write a policy, and, if so, on what price and terms depending on what they perceive to be the likelihood that foreseeable risks will occur or claims will be made during the policy period. Clearly, any losses must be *fortuitous*, *i.e.*, “happening by chance or accident, or occurring unexpectedly or without known cause.” *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass’n*, 387 Ill. App. 3d 85, 108-09 (1st Dist. 2008). Mere *foreseeability*, however, is not a bar to an “accident” under a liability policy. In *Viking Construction Management, supra.*, the court appears to have confused *fortuity* with *foreseeability* and improperly conflated the two related, yet distinct concepts.

**F. The Appellate Courts' Formulation of "Occurrence" Violates Basic Principles of Policy Interpretation.**

Illinois appellate courts' use of the "natural and ordinary consequences" test to determine whether there has been an accident violates basic tenets of policy construction under Illinois law.

**1. Construing the Term "Accident" to Be Something Other Than the Natural and Ordinary Consequences of an Act and to Be Dependent on the Nature of the Property Damaged is at Odds with the Undefined Term's "Plain, Ordinary and Popular Meaning."**

A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479, 687 N.E.2d 72, 75 (1997). To ascertain the intent of the parties and the meaning of the words used in the insurance policy, a court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Id.*

Because a CGL policy does not define the term "accident," a court must interpret the term "by affording it its *plain, ordinary, and popular* meaning." *Outboard Marine Corp.*, 154 Ill. 2d 90, 115 (1992) (emphasis in original). In ascertaining the plain and ordinary meaning of words, courts often consult dictionaries. *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill. 2d 1 (1991). In its plain and ordinary usage, "accident" refers to "an unexpected happening without intention or design," *Black's Law Dictionary* 15 (6th ed.1990), an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result," *Webster's Third New Int'l Dictionary* 11 (1969), or "[s]omething that occurs unexpectedly or unintentionally." *American Heritage Dictionary* 71 (2d College Ed. 1991).

There is nothing in the above definitions remotely suggesting that the natural and ordinary consequences of an act do not constitute an accident. To the contrary, it seems clear that, in its plain, ordinary, and popular meaning, "accident" conveys information about the extent

to which a happening was intended or expected, which is entirely consistent with the Illinois Supreme Court's holding in *Wilken* and the Appellate Court's rulings in the non-construction defect cases of *Shelborne* and *Lyons, supra.* at page 7. Moreover, "[s]tanding alone, the word ["accident"] is not used usually and commonly to convey information about the nature or extent of injuries worked by such a happening, much less the identity of the person whose interests are injured." *Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co.*, 293 Ga. 456, 460, 746 N.E.2d 587, 591 (2013). As the Florida Supreme Court stated:

[W]e fail to see how defective work that results in a claim against the contractor because of injury to a third party or damage to a third party's property is "unforeseeable," while the same defective work that results in a claim against the contractor because of damage to the completed project is "foreseeable." This distinction would make the definition of "occurrence" dependent on which property was damaged. For example, applying U.S. Fire's interpretation in this case would make the subcontractor's improper soil compaction and testing an "occurrence" when it damages the homeowners' personal property, such as the wallpaper, but not an "occurrence" when it damages the homeowners' foundations and drywall.

*U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 883 (Fla. 2007).

Unfortunately, in their dogged application of the "natural and ordinary consequences" test, the appellate courts have failed to apply the "usual and ordinary meaning" of the term "accident."

## **2. Interpreting "Accident" to Preclude Coverage for Faulty Workmanship Renders the "Your Work" Exclusion Meaningless.**

Another tenet of policy construction is that a court must strive to give each term in the policy meaning unless to do so would render the clause or policy inconsistent or inherently contradictory. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 123 (1992). Effect should be given to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 362-63 (2006).



Exclusion I. of the CGL Policy (the “your work” exclusion) provides that the policy does not apply to:

"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.*

CGL Form CG 00 01 07 98, Insurance Services Office, Inc. (1997) (emphasis added). The reason for the subcontractor exception to the “your work” exclusion has been explained as follows:

[T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

Jeffery W. Stempel, *Stempel on Insurance Contracts* § 14.13d at 14–224.8 (3d ed. supp. 2007).

Thirty years ago, the Insurance Services Office provided guidance regarding the subcontractor’s exception by making clear that the policy “cover[ed] damage caused by faulty workmanship to other parts of work in progress; *and damage to, or caused by, a subcontractor’s work after the insured’s operations are completed.*” *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 879 (Fla. 2007) (alteration in original) (emphasis added) (quoting ISO Circular, Commercial General Liability Program Instructions Pamphlet, No. GL–86–204 (July 15, 1986)). This evidence of insurance industry intent to treat faulty workmanship as an “occurrence” is particularly damning and would have to be considered – regardless of the existence of an ambiguity<sup>12</sup> – as part of any inquiry into the “overall purpose of the contract.” *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997).

---

<sup>12</sup> In *Country Mut. Ins. Co. v. Carr*, 372 Ill. App. 3d 335, 340-41 (4th Dist. 2007), a construct defect case involving a CGL policy that generally is considered to be an outlier, the Fourth District Appellate Court

The Second District Appellate Court examined the subcontractor exception to the “your work” exclusion in *Stoneridge* and determined that “an exception to an exclusion does not create coverage or provide an additional basis for coverage.” *Stoneridge*, 382 Ill. App. 3d at 756. The court further concluded that the subcontractor exception “cannot negate the lack of an ‘occurrence’ . . . as the damage arose from the natural and ordinary consequence of defective workmanship rather than an ‘accident.’” *Id.* Neither of the court’s rationalizations for its holding interprets the CGL policy as a whole.<sup>13</sup> As the Wisconsin Supreme Court has stated:

If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it. Why would the insurance industry exclude damage to the insured’s own work or product if the damage could never be considered to have arisen from a covered “occurrence” in the first place?

*American Family Mut. Ins. Co. v. American Girl, Inc.*, 268 Wis. 2d 16, 43, 673 N.W.2d 65, 78 (2004); accord, *Sheehan Constr. v. Continental Cas. Co.*, 935 N.E.2d 160, 171, modified on other grounds, 938 N.E.2d 685 (Ind. 2010) (“[i]f the insuring provisions do not confer an initial grant of coverage, then there would be no reasons for a ‘your work’ exclusion”). The Appellate Court’s interpretation of “accident” in *Stoneridge* clearly renders the “your work” exclusion mere surplusage in violation of basic principles of policy interpretation.

**G. Inferring Intent By Way of the “Natural and Ordinary Consequences” Test Violates Long-Standing Duty to Defend Principles and Deprives the Insured of the Benefit of the Litigation Insurance it Purchased.**

Under Illinois law, a court must compare the allegations in the underlying complaint to the policy language in order to determine whether the insurer's duty to defend has arisen. *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154-55 (2005). If the

---

noted that the term “accident” had been interpreted inconsistently by Illinois courts, held that the term was ambiguous, and interpreted it to require an inquiry into whether the person performing the act intended or expected the result.

<sup>13</sup> If anything, the *Stoneridge* court’s rather tortured explanation for why its interpretation “does not necessarily render the subcontractor exception mere surplusage” (382 Ill. App. 3d at 757 n.6) only further undermines its application of the “natural and ordinary consequences” test to the “occurrence” issue.

underlying complaint alleges facts within or potentially within policy coverage, an insurer is obligated to defend its insured even if the allegations are groundless, false or fraudulent. *Id.* at 155.

Under this standard, the question of whether a plaintiff has alleged an “occurrence” is determined from the facts and circumstances contained in the complaint. Generally speaking, when a complaint alleges defective construction as the result of the insured’s negligence, it has alleged an “occurrence” under a CGL policy. See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007). As long as the complaint also alleges “property damage” (*i.e.*, “physical injury to tangible property”)<sup>14</sup> during the policy period caused by an “occurrence,” the insured has met its burden of proving that the claim falls within the insuring agreement of the insurance policy. *Erie Ins. Exch. v. Compeve Corp.*, 2015 IL App (1st) 142508, ¶ 18 (2015) (quoting *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009)). Once the insured has demonstrated coverage under the insuring agreement, the burden then shifts to the insurer to prove that a limitation or exclusion applies. *Id.* When an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured. *Erie Ins. Exch. v. Compeve Corp.*, 2015 IL App (1st) 142508, ¶ 17.

Illinois courts’ application of the “natural and ordinary consequences” test in defective construction cases subverts the above paradigm to the insured’s substantial detriment. By ignoring the allegations of the complaint and holding that faulty workmanship can never constitute an “occurrence” unless it damages property other than the project – even when the work was performed by a subcontractor – Illinois courts greatly *increase* the likelihood that there will be no potential for coverage and therefore no duty on the part of the insurer to provide a defense. Insureds lose the benefit of the litigation insurance they purchased and often find

---

<sup>14</sup> Tangible property is considered physically injured “when the property is altered in appearance, shape, color or in other material dimension.” *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001).

themselves simultaneously fighting a two-front war with the plaintiff and their insurance company.

## H. Conclusion

The “natural and ordinary consequences” test – a tort-based method of inferring intent that is otherwise applied by Illinois courts almost exclusively to inherently harmful and criminal acts – should have no role whatsoever in the interpretation of a CGL policy. To the contrary, the question of whether defective construction has been caused by an “occurrence” should not hinge on whether damage has been alleged to property other than the construction project, but rather on whether the facts pleaded in the underlying complaint allege that the insured expected or intended the injury. Illinois appellate courts’ longstanding practice of inferring the insured’s intent or expectation whenever the two words “faulty workmanship” appear in an underlying complaint is inconsistent with the purpose of the CGL policy and at odds with both well-established tenets of policy interpretation and the rulings of the overwhelming majority of state supreme courts that have examined the issue. It has been said that “[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>15</sup> It is time for the Illinois Supreme Court to apply that adage to the question of whether faulty workmanship resulting in defective construction constitutes an “occurrence” under a CGL policy and bring Illinois within the mainstream of jurisprudence throughout the United States.<sup>16</sup>

---

<sup>15</sup> *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 482-83 (2013) (adopting the position that faulty workmanship constitutes an “occurrence” under a CGL policy and quoting *Henslee v. Union Planters Nat’l Bank & Trust Co.*, 335 U.S. 595, 600 (1949)).

<sup>16</sup> For further reading, the author recommends Seth D. Lamden, Michael L. Young, and Mollie E. Nolan Werwas, *The IDC Monograph: “Exclusion of the Occurrence? Examining Illinois Courts’ Interpretation of ‘Coverage’ in Construction Defect Cases,”* IDC Quarterly (Fourth Quarter 2013), as well as the Gonzaga law review article by Christopher C. French, *supra.* at page 12.